UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re	§	MDL Docket No. 01-CV-9000
	§	
INTER-OP HIP PROSTHESIS	§	
PRODUCT LIABILITY	§	
LITIGATION	§	(JUDGE KATHLEEN O'MALLEY)
	§	
	§	**ORAL ARGUMENT REQUESTED**

STATE-COURT-PLAINTIFF OBJECTORS' BRIEF AND EVIDENCE IN OPPOSITION TO CONDITIONAL CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF CLASS SETTLEMENT

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TO THE HONORABLE COURT:

State-court plaintiff objectors[1] file this their objection to the Proposed Class Action Settlement Agreement and oppose both Plaintiffs' and Sulzer's motion for preliminary approval of that settlement as follows:

I. Introduction

Sulzer seeks preliminary approval of a **worldwide**[2] class action settlement. Legally, Fed.R.Civ.P. 23 does not authorize preliminary approval of the settlement proposed. Practically, even if permitted in law, this deal is as bad as it gets.

The deal provides that each claimant receives cash and Sulzer stock worth 1/10 of the Sulzer-estimated value his or her case (i.e. approximately $50,000 on a $500,000 revision case). In exchange for the settlement proceeds, plaintiffs must provide a release to Sulzer Medica, Ltd., all of its subsidiaries and affiliated companies, Sulzer AG, all implanting/revising surgeons, materials suppliers, sales agents, product distributors, organized medical specialty organizations, and "any other person or entity involved in the design, manufacture, distribution, implant or

[1] This brief is limited to the preliminary approval inquiry. Objectors specifically reserve their righs to make substantive challenges to the fairness of the settlement in the context of final approval.

[2] Although the complaint proposes a general class of "residents of the United States" (*See* Amended Complaint, p. 3), the settlement defines "settlement class" as "all persons or entities wherever located . . . .")*(See* Settlement, p. 7.)

explant" of any of the affected products. *(See* Settlement Agreement, p. 4, definition of "Released Parties.")

Sulzer and plaintiffs counsel say the sums are reasonable --not because they are reasonable, but because that is all the money Sulzer has to give (and still stay in business). The objectors say the settlement is *unreasonable* because the only party compromising is plaintiffs. On its face, the settlement wipes out tort claims against the released parties as though these plaintiffs were bankruptcy creditors *to all potentially responsible parties*. Plaintiffs, however, receive none of the bankruptcy law assurances that *all available assets of all potentially responsible parties*, managed by a neutral trustee, have been used to appropriately prioritize claims. So, the settlement is, *per se* unreasonable. *See In re Fibreboard*, 134 F.3d 668 (5th Cir. 1998 (Smith, J., dissenting) *reversed sub nom Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) (noting that a similar proposed settlement in the context of the asbestos litigation crisis is a "constructive bankruptcy . . . reached without the protections of the Bankruptcy Code: procedural protections--such as the creditors' vote on settlements--and substantive protections--such as tort creditors' preferred status. It is, moreover, a colossal bailout for Fibreboard's shareholders that would not occur in bankruptcy")

Moreover, the settlement is actually offensive when viewed in the context of

the fact that:

1. SOI, the manufacturing subsidiary, had sales in the United States in 2000, in the amount of more $57,000,000 **solely on its porous coated products** which represented 30% of its total sales. *(See* Declaration of SOI employee David Bartkowiak, August 9, 2001, paragraph attached as Exhibit "4")

2. Sulzer employees and executives have received bonuses and golden parachutes for their participation in the Inter-Op debacle. For example, the president of SOI was terminated as punishment for the problems associated with Inter-Op recall and he received a severance package of $1.9 million dollars. (*See* July 6, 2001, press release regarding Sabins accountability, attached at Exhibit "6"; *see also* Excerpt from Sabins deposition, p. 41-46, attached as Exhibit "1") Heads have rolled at Sulzer, but those heads received pricey retention agreements to ensure "cooperation." In June, 2001, David Bartkowiak, Vice President of Operations U.S. tendered his resignation as a gesture to assist the company through the recall difficulty--he received a severance package equal to almost one year's pay and benefits valued at approximately $140,000. (*See* Excerpt of

the deposition of D. Bartkowiak, p. 152 - 157, attached as Exhibit "3"). The Vice President of Scientific Affairs, Chris Peterson, has also been forced out of the company but retained on the payroll until January, 2002 in order to effect a 36-week severance package. (*See* Excerpt from the Deposition of Chris Peterson, attached as Exhibit 2)

3. SOI independent sales distributors have been paid commissions on **no sales** during the recall in order to "make them whole" during the crisis. (*See* December 28, 2000, Memorandum from Gary Sabins; Exhibit 5)

4. SOI surgeon customers have been made whole through reimbursement of expenses for surgery and time expended handling recall matters in order to "make them whole" and preserve those valuable relationships. In fact, Sulzer paid one physician money to hire staff to work in his office as a result of the recall. (*See* Excerpt from Deposition of Chris Peterson, p. 636, attached as Exhibit "2"; Excerpt from Deposition of Gary Sabins, p. 56, attached as Exhibit "1")

5. Sulzer AG, parent to Sulzer Ltd., spun from its offspring in an effort to distance itself from the bad news and insulate its shareholders. *(See* July 6, 2001 Press release, attached as Exhibit 6)

This Court should reject the settlement.

II. SUMMARY OF THE ARGUMENT

State-court plaintiffs assert the following objections to preliminary approval of the settlement:

1. *The Settlement is not within the range of reasonable* The class parties argue that this settlement is within the range of reasonable solely because of the financial condition of "Sulzer." Class parties does not cite a single case authorizing approval of a class settlement under 23(b)(2) or 23(b)(3) based upon a finding of "reasonable in light of limited resources." Only 23(b)(1) "limited fund" certification permits such "fire sale" compromise of a putative plaintiff's claims and only upon a specific factual showing. *See In re Telectronics Pacing Sys.*, 221 F.3d 870 (6th Cir. 2000).

2. *The settlement cannot on its face satisfy the 23(a) and (b) criteria.* This settlement suffers precisely the same types of class-action flaws as the rejected class in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997):

   a. The settlement seeks certification of products that are wholly unrelated to the recalled Inter-Op hip replacement devices (*See* definition of "Affected Products," p.2) including (i) non-recalled hips; (ii) knees; and (iii) reprocessed shells (*commonality; predominance*);[please see factual statement for a description of these products]

   b. The settlement seeks certification of classes that are not representative of the divergent nature of claims. For example, evidence developed in state court shows Sulzer had notice of the defect at least as early as July, 2000. (*See* Excerpts from the Deposition of Gary Sabins, p. 175-76, attached as Exhibit "1"; *see also* February 6, 2001 E-mail from Maurer enclosing telephone log entry regarding Dorr problems with Inter-Op in July, 2000, attached as Exhibit "10") All class

representatives were implanted prior to that date and there is no subclass based upon date of implant. (*adequacy of representation)*

c. The settlement seeks certification under the direction of a class representative who has disavowed the settlement (*See* Videotape, attached as Exhibit 15) (*adequacy of representation)*;

d. The settlement seeks certification of claims for which there is no class representative (*adequacy of representation*);

e. The settlement seeks certification of claims that arise from different courses of conduct--or no course of conduct at all (*typicality*)

f. The settlement seeks certification of claims in which even **Sulzer agrees** the individualized questions predominate over any common questions of law and fact (*predominance*).

g. The settlement seeks certification of an attorneys fee that will likely create a conflict of interest

h. The settlement seeks certification of a cash/stock payment as reasonable without consideration of the tax implications that will be generated by the payment in kind.

3. *Jurisdiction.* The Court is without subject matter (amount in controversy; standing) or personal (for injunctive relief) jurisdiction to order grant the relief requested by this Class Action Settlement Agreement.

4. *Rule 23(b)(2)* The Court is without authority to order preliminary approval of the medical monitoring **fund** portion of the Class Action Settlement Agreement proposed in this case because 23(b)(2) certification is prohibited in actions that seek primarily monetary relief.

III. FACTUAL STATEMENT

On or about December 5, 2000, Sulzer Orthopedics, Inc. ("SOI") recalled its Inter-Op acetabular shells that are a part of hip implants because of a phenomenon dubbed by SOI as "early loosening." SOI disclosed in press releases that it had determined that the early loosening was caused by an oily[3] residue that remained on the cup of the device after manufacture. Though SOI claimed to have only just learned of the problem, subsequent state-court depositions have revealed that surgeons began notifying SOI of a problem with the product as early as July, 2000. (*See* Exhibits "1" and "10")

Nevertheless, SOI publicly accepted full responsibility for the problem and guaranteed fair treatment of all concerned. SOI notified its surgeon customers that they would be compensated for their time spent explaining the problem to patients, making revisions, etc. (*See* Exhibit "1"OI strongly urged surgeons not to make prophylactic revisions on the theory that not all implants will fail. SOI also assured its independent sales representatives that the recall and loss of commission therefrom would be borne by SOI because the individuals would be paid

[3] The oil, made by Mobil Oil, has been publicly characterized by Sulzer as mineral-based oil, though Sulzer has admitted in depositions that the oil is, in fact, machine oil. (*See* Excerpt from Depition of Gary Sabins, attached as Exhibit "1") According to the August 22, 2001, testimony of Sulzer pathology consultant Pat Campbell, Sulzer has not yet determined whether their will be systemic effects from the oil escaping into the human body.

commission based upon prior sales. (*See* Exhibit "5")

SOI also immediately demanded return of all recalled, but not implanted, devices from its independent distributors. (*See* December 19, 2001 letter to Orthopedic Specialities from Beeman attached as Exhibit 18) And, SOI launched a campaign to reprocess those devices through a new cleaning process and put them back on the shelf. (*See* Exhibit 5) Approximately 13,000 reprocessed products were returned to the market on January 11, 2001. (*See* Excerpts from the deposition of David Bartkowiak, p. 532, attached as Exhibit "3"; *see also* Exhibit 8)

Meanwhile, SOI was still investigating the cause of the oily residue. SOI believed that it had narrowed the problem to two possibilities: (1) something went wrong when it brought manufacturing in house; or (2) something went wrong when SOI eliminated a step (passivation) from its manufacturing process. *(See* Excerpt from SOI Answers to Interrogatory No. 4, attached as Exhibit "13 ") As late as July, 2001, SOI continued to investigate but had begun to rule out some theories such as sabotage. (*See* Exhibit 9) SOI continued, however, to disclaim the involvement of any product other than those recalled. (*See* Exhibit 18; stating that "[t]he purpose [of the Dear Doctor and Dear Hospital letter] is to assure our customers that none of our other products were affected") SOI also steadfastly argues that its secret porous coating process, CSTi, is not involved in the recall and

should not, therefore, be revealed in the discovery process.[4] (*See* Excerpts from the deposition of David Bartkowiak, p. 61, attached as Exhibit "3")

Texas state-court litigation has moved in accordance with the guidelines of the Texas Rules of Judicial Administration and the Texas Rules of Civil Procedure. State court litigation is not only well under way, at least one cause is currently in the trial on the merits. The litigation is sufficiently advanced in state court, that Sulzer proposed consolidation of all of the Texas claims under Texas Rule of Judicial Administration 11. (*See* Exhibit "11") Rule 11 treats Texas litigation in the same way that federal multi district litigation treats federal court claims in that it fosters uniformity of pretrial rulings and judicial/party economy. *(See* Tex.R.Jud. Admin. 11, attached as Exhibit "12") Similarly, through the authority of District Judge Suzanne Covington, state-court plaintiffs counsel from Texas, California, and Florida (who have the vast majority of the state-court cases) have cooperatively conducted the depositions of approximately 15 Sulzer representatives and non-party witnesses. The Court ordered and the Plaintiffs coordinated these cooperative depositions in specific response to Sulzer's cost and resource concerns. More than 15 more such depositions are scheduled for the next two months,

[4]Note, however, that Sulzer has defined affected products in this proposed settlement to include "certain other InterOp Shells machined after porous coating." *(See* Class Action Settlement Agreement, p. 2)

including the depositions of current and former executives of Sulzer Medica, Ltd. and Sulzer, Ltd.

Those same parties have entered into protective orders governing the production of documents. The parties have exchanged multiple levels of discovery on not only liability, but also piercing the corporate veil and personal jurisdiction. Judge Covington is presently conducting an *in camera* review of documents pertaining to Sulzer's claim of privilege, which documents specifically include correspondence with the parent companies. These same state-court litigants have already scheduled the agreed depositions of those individuals believed to possess the most information about the involvement of the parent corporations in the daily activities of Sulzer Orthopedics, Inc. as well as the jurisdictional contacts of the parent companies.

On the corporate side, Sulzer responded to litigation by terminating SOI president Gary Sabins, but only after providing him a recall-year bonus at the Sulzer maximum of 200%. Though Sulzer press statements hold Sabins accountable for the recall, Sulzer has paid Sabins a severance package of 1.9 million and a $300/hour litigation consulting contract. (*See* Sabins deposition, p.41-46, attached as Exhibit "1.")

All other SOI employees deposed received their recall-year bonuses, as well.

And, several employees no longer with the company received substantial severance pay. David Bartkowiak, Vice President of Operations U.S. tendered his resignation and received a severance package equal to almost one year's pay and benefits valued at approximately $140,000. (*See* Excerpt of the deposition of David Bartkowiak, p. 152 - 157, attached as Exhibit "3"). The Vice President of Scientific Affairs, Chris Peterson, will beon the SOI payroll until January, 2002, in order to effect a 36-week severance package; but, he is no longer with the company. (*See* Excerpt from the Deposition of Chris Peterson, attached as Exhibit 2). Maurer's severance arrangement is unknown as she was terminated immediately following her deposition in state-court litigation.

While SOI was terminating its employment relationship with recall-related employees, Sulzer AG was severing its relationship with Sulzer Medica Ltd. By July 6, 2001, the corporate overhaul was complete. (*See* July 6, 2001 Press release, attached hereto as Exhibit 6)

Days earlier, on June 19, 2001, the Judicial Panel on Multidistrict Litigation transferred certain actions arising from "allegedly . . . defective hip implants (Inter-Op shells) to this Court for coordinated or consolidated pretrial proceedings. *In re Inter-Op Hip Prosthesis Prods. Liability Litig.*, 2001 U.S. Dist. Lexis 8856 (June, 2001). There is no published order consolidating any broader scope of claims

against Sulzer.

Now, two months later, the class parties seek settlement-class certification pursuant to Rule 23(b)(2) and Rule 23(b)(3). *See* Memorandum in Support of Plaintiffs' Motion for Order Conditionally Certifying a Rule 23(b)(2) and (b)(3) Class Action, Preliminarily Approving Settlement, and Enjoining all Inter-Op Hip Prosthesis Litigation, p. 1. Plaintiffs' Amended and Consolidated Complaint raises: 1) strict liability; 2) negligence; 3) breach of implied warranty; 4) breach of express warranty; 5) fear of future product failure; 6) misrepresentation; 7) medical monitoring and 8) punitive damages. The complaint alleges one general class: US residents who received an affected Inter-Op acetabular shell and two subclasses: those who have had surgical revision and those who may later need surgical revision.[5] (*See* Plaintiffs' Amended and Consolidated Complaint, p. 5) The Proposed Class Action Settlement adopts a broader scope of affected products. Under the settlement, the affected products that are the subject of release are: (1) Acetabular shells identified in SOUS's Safety Alert dated December 5, 2000, and certain other InterOp Shells machined after porous coating, (2) Natural Knee Tibial Baseplates identified in SOUS's Special Notification dated May 17, 2001 and (3)

[5]This entire subclass is without standing under Article III; the complaint defines the subclass as without present injury and, therefore, the claims are nonjusticiable.

Reprocessed Shells sold prior to the date of the settlement. (*See* Class Action Settlement Agreement, p. 2)

The class representatives are Harlan Herman (implanted March 8, 2000; no revision) and his wife; Linda Wells (implanted February, 2000; no revision); and George Yasenchack (implanted March 14, 2000, revision) and his wife. (*See* Plaintiffs' Amended and Consolidated Complaint, p. 3) The named defendants are Sulzer Orthopedics, Inc.; Sulzer Medica Ltd.; and Sulzer Orthopedics Ltd. (*See* Plaintiffs' Amended and Consolidated Complaint, p. 3-4). State-court-plaintiff objectors are more than approximately 700 recipients of Sulzer recalled Inter-Op acetabular shells who are pursuing litigation in Texas state courts. The individuals object to the proposed settlement agreement and to any injunctive relief on the grounds outlined below. Further, these plaintiffs have continued their cooperation with other state plaintiff objectors and have endeavored not to submit duplicative briefs. Rather, these objectors incorporate by reference the materials filed by Mr. Massey and Mr. Pereira of Fleming & Associates, LLP.

IV. ARGUMENT

As the Court can see from the above factual presentation, a premature, preliminary approval of a class-settlement whose terms are still evolving is unnecessary. The class parties argue they need preliminary approval in order to

begin the task of evaluating Sulzer AG liability. State-court litigation is already accomplishing precisely that information-gathering function. Sulzer lawyers are going to be compensated from the same insurance funds with or without preliminary approval. Those lawyers are going to present the same witnesses for deposition and produce the same documents for jurisdiction and piercing arguments in state or federal court. And, the plaintiffs' efforts are going to be coordinated, whether in state or federal court. The difference is DELAY. While the class lawyers are finalizing settlement terms, establishing settlement trusts, and preparing for a fairness hearing, state court litigants will be finished with the Sulzer AG discovery. *There is no reason to stop the parties class negotiations with insurance companies and parent companies; neither is there a reason to stop the state-court litigants' discovery of facts essential to both litigation and settlement.*

With regard to the currently proposed settlement, it cannot pass muster under Federal law, and in particular, under *Amchem, Ortiz,* and *Telectronics*. Sulzer has devised a scheme that will save its business and buy its peace with respect not only to the Inter-Op hip recalled in December, 2000, but also with regard to all other non-recalled hips manufactured with the same porous coating, knee replacements, and all recalled hips that the company pulled from the shelf, cleaned with a different process, and put back in the operating room before the end of January,

2001. However, it is neither Rule 23's purpose to save a tortfeasor's business nor to consolidate a tortfeasor's liability into one group. These are bankruptcy purposes.

Rather, it is Rule 23's purpose to provide a vehicle to bring together common claims against a common defendant or defendants to facilitate a common, judicially economic solution. Here, the only thing common about the putative plaintffs' is that they all have a personal injury or a potential personal injury case against Sulzer and its related affiliates. Sulzer uses this quasi-limited fund to sweep years of fixed and potential, related and unrelated liability into one pot for 10 cents on the dollar --and returns to business as usual in 8 years. Class counsel ask this Court to rush to preliminary approval of their "innovative" settlement when the questions it raises on its face mandate a more reasoned approach. ***Even if everything class counsel have said about this settlement is true, neither Rule 23 nor the United States Constitution permit so much as preliminary approval.***

Standard for the Court's Review

The Court's approval of any class action settlement is a two-stage process, according to the Manual for Complex Litigation. First, "the court reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing." Manual for Complex Litigation, § 23.14 (3d ed. 1995). Second,

the Court makes a final decision after a fairness hearing. *Id.* The trial court may not rewrite a settlement agreement; if it is unacceptable, the court must disapprove it.

The Manual for Complex Litigation suggests that during preliminary evaluation of the proposed settlement, the Court is looking for facial "grounds to doubt its fairness" or "obvious deficiencies." Manual for Complex Litigation, § 30.41 (3d ed. 1995). If the settlement appears to fall within the range of possible approval, the Court should direct that Rule 23 notice be given to the class members of a formal fairness hearing. Manual for Complex Litigation, § 30.41 (3d ed. 1995)

The scrutiny applied to a proposed settlement is lower than that used for final approval. At either stage of settlement review, however, the court must apply a higher level of scrutiny to any settlement achieved prior to certification.[6] *See Mars*

[6]In connection with the Court's evaluation of the settlement, the class parties have submitted evidence. The State-court objectors also make the following objections to the evidence filed by the class parties:
The affidavit of **Harvey S. Rosen** is legally deficient because it fails to demonstrate the witness' methodology or basis for his proferred opinions. Rosen's entire opinion turns upon the tension between what the total potential liability is versus the total available assets and yet he fails to reveal the factual information that formed the basis of his opinion about either.
The affidavit of **Adam R. Salvas** affidavit is defective to the extent that the witness provides expert testimony regarding the value of an Inter-Op acetabular shell claim based upon unrelated verdicts and settlements. The methodology is unsound. The affidavit similarly fails it its attempt to extrapolate the average claimant's medical expenses based upon a sampling of 27 patients; the analysis is statistically unsound. Data from other records reviewed is hearsay and would contribute nothing to the methodology.
The affidavit of **Richard May** is also legally deficient because it fails to reveal the factual

Steel v. Continental Ill. Nat'l Bank & Trust, 834 F.2d 677, 682 (7th Cir. 1987)(holding that settlement review prior to class certification requires 'especially careful and penetrating' review") ; *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied, *Lewy v. Weinberger*, 464 U.S. 818, 78 L. Ed. 2d 89, 104 S. Ct. 77 (1983).

1. *The Settlement is not within the range of reasonable*

The class parties[7] argue that this settlement is within the range of reasonable solely because of the financial condition of "Sulzer." Neither Fed.R.Civ.P. 23 nor a single case authorizes approval of a class settlement under 23(b)(2) or 23(b)(3) based upon a finding of "reasonable in light of limited resources." Even if Sulzer sought certification on the basis of a 23(b)(1) limited fund, "the threat of bankruptcy alone would not be sufficient cause to certify the class. *See In re Telectronics Pacing Sys.*, 221 F.3d at 880. The settlement becomes all the more unreasonable in light of the inclusion of parent company Sulzer AG in the release

information that forms the basis of his opinion that the liquidation value of "Sulzer" is less than $700 million. He fails to identify the assets that could be sold. In short, the witness fails to identify all of the liquid assets of "Sulzer" to support the conclusion.

[7] By their pleadings the parties support the settlement. However, George Yasanchak, the only class representative for the surgical revision subclass, has himself publicly disavowed the settlement. Yasanchak stated that the deal did not sound very good to him. (*See* Exhibit "15"; videotape of interview with George Yasanchak).

of claims. (*See* "Released Parties"; Settlement Agreement, p. 5) This case has all the ingredients for *Telectronics II.* Here, as in *Telectronics*, the class parties have agreed among themselves that Defendants have limited resources with which to pay tort claims. Here, as in *Telectronics*, the class parties demand that the putative class members release Defendant's parent company. In *Telectronics*, however, the class plaintiffs had survived a motion to dismiss the parent company for lack of personal jurisdiction. *See In re Telectronics Pacing Systems, Inc.*, 953 F. Supp. 909 (S.D. Ohio 1997). Here, plaintiffs have not sued the parent Sulzer AG. In *Telectronics*, the Sixth Circuit was disturbed that the district court would deny a motion to dismiss for lack of personal jurisdiction and less than a year later certify a limited fund class because, *inter alia*, "it believed the district court was unlikely to obtain jurisdiction over the Australian companies." *See In re Telectronics Pacing Sys.*, 221 F.3d at 875-6. Here, this Court should be disturbed that plaintiffs have taken no steps to bring Sulzer AG before this Court prior to seeking certification of a class that releases Sulzer AG without financial contribution. Perhaps the class parties are attempting to cure the *Telectronics* problem by securing preliminary approval (and the associated presumption of fairness) approximately two months after MDL assignment and prior to developing any evidence that might call fairness into question. Sulzer will lose nothing if the

preliminary approval order is later vacated because of evidence that Sulzer AG is a proper party[8]; the settlement funds are still available to Sulzer to pay its lawyers. *(See* Settlement Agreement, Article 5, p. 20) Plaintiffs will, however, lose valuable time in their pursuant of a company that is determined to give away the money it does have.

It is impossible for this Court to make a preliminary determination about whether Sulzer AG's assets should be considered. And, it is inconceivable that the cart (approval of a settlement based upon limited resources) should precede the horse (AG's resources will or will not be considered).

The Settlement is also unfair on its face because it discriminates among class members in the following ways. Derivative claimants are discriminated against because they have no independent right to opt out of the class; if the "affected product recipient" fails to exercise an Opt-Out Right, it is binding on the derivative claimant. (*See* Settlement Agreement, Article 3.6(b), p. 19) Also, class members who hired contingency-fee counsel prior to August 2, 2001, will have their

[8]Even the discovery completed to date shows an inextricable intertwining of Sulzer Orthopedics, Inc., Sulzer Medica Ltd. and Sulzer Ltd.. As an additional source of jurisdiction, Sulzer Ltd. has a significant presence in the United States and Texas, in particular. Sulzer Ltd. has relationships with at least four companies in Texas, alone. Exhibit A, pp. 101-02, 105-06. Its personnel made trips to Texas to audit Sulzer Orthopedics. (*See* Excerpt from Sulzer AG response to jurisdictional discovery, Interrogatory No. 3, attached hereto as Exhibit "14")

attorney-fees contract paid separately by the settlement. However, those who hired counsel after August 2, 2001, will be required to pay counsel out of their settlement proceeds.

The settlement is unfair because it creates a conflict-of-interest for attorneys representing more than one class member. Specifically, if paid in stock as to one class member who remains in the settlement, the attorney may representing another client who opts out of the settlement. Now, the attorney is both a shareholder in Sulzer and an attorney suing Sulzer.

The settlement is unfair in that it allocates money for medical monitoring over a period of eight years even though Sulzer has determined that "[patients who are affected generally experience symptoms in the first six months." (*See* December 19, 2000, Dear Dr. letter from Gary Sabins, attached hereto as Exhibit "1")

The settlement is unfair in that it seeks certification of a cash/stock payment as reasonable without consideration of the tax implications that will be generated by the payment in kind.

The Settlement is unfair in that it purports to bind plaintiffs even if Defendant file for bankruptcy protection. (*See* Settlement Agreement, Article

14.13, p. 29)

Both Article 11.1(Sulzer AG asked not to settle) and 14.16 (Sulzer will not settle) are unfair and void as against public policy. Nonjudicial resolution of claims is part of the strongest public policy of all of the United States. An agreement not to settle legitimate claims violates that policy.

2. *The settlement cannot, on its face, satisfy the 23(a) and (b) criteria.*

A settlement is not within the range of possible approval if it does not, on its face, satisfy the requisites of Fed.R.Civ.P. 23. *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997). Although in the context of a settlement class there are some Rule 23 issues that may be relaxed (i.e. management), those Rule 23 requirements that are designed to protect the due process rights of absentee class members are to be applied with stricter scrutiny in the context of a settlement class. *Id.* The factors enunciated in Rule 23 are well-known to the Court but set forth for each of reference:

Subsection (a) of Rule 23 contains four prerequisites which must *all* be met before a class can be certified:

1. the class is so numerous that joinder of all member is impracticable;

2. there are questions of law or fact common to the class;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
4. the representative parties will fairly and adequately protect the interest of the class.

Once those conditions are satisfied, the party seeking certification must also demonstrate that the class falls within at least *one* of the subcategories of Rule 23(b). Here, the parties seek certification under both 23(b)(2) and (b)(3).

Rule 23(b)(2) permits certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Rule 23(b)(3) permits certification if "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Rule 23(b)(3) also suggests pertinent factors for the Court to consider:

a. interest of members of the class in individually controlling the prosecution or defense of separate actions.
b. the extent and nature of any litigation concerning the controversy already commenced by or against members of the class
c. desirability or undesirability of concentrating the litigation of the claims in the particular forum

d. the difficulties likely to be encountered in the management of a class action.

In this case, a cursory review of the settlement reveals that it cannot satisfy any of the applicable criteria. On the issue of joinder, neither Sulzer nor the plaintiffs have alleged why joinder is not feasible. In Texas, joinder is working and Sulzer itself is utilizing joinder for pretrial purposes under Tex.R.Jud. Admin. 11.

Rule 23(a)

As to common questions of law/fact, there is no doubt that claims arising from personal injuries as a result of recalled Inter-Op acetabular shells share common questions. Plaintiffs list some of those questions in Plaintiffs' Amended and Consolidated Class Action Complaint, p. 6. However, neither Plaintiffs nor Sulzer allege common questions of law or fact shared by claims arising out of recalled hips, non-recalled hips, knees, and reprocessed products.

In that same connection, Plaintiffs cannot show that the claims of the class representatives are typical. This is the most serious 23(a) deficiency suffered by the proposed class. The settlement seeks certification of products that are wholly unrelated to the recalled Inter-Op hip replacement devices (*See* definition of "Affected Products", p.2) including (i) non-recalled hips; (ii) knees; and (iii) reprocessed shells. Yet, the class representatives received only recalled Inter-Op

hip replacement devices. There is no allegation–nor could there be-- that claims arising from all of these products are the result of the same course of conduct. *See e.g. In re American Medical Sys.*, 75 F.3d 1069 (holding that claims from flow from a common course of conduct). In fact, the current complaint on file doesn't mention these products at all.

The class representatives claims are not typical of the many of the claims in that the implantation date for each representative is March, 2000 or earlier. Sulzer knowledge of the defect is established with certainty from July, 2000, forward. To date, admissible evidence does not reflect March, 2000, notice. The claims of these class representatives are not of the same nature as those of individuals implanted after July, 2000.

The class parties cannot achieve adequacy of representation as the class representatives are currently pleaded. To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them. See Hansberry v. Lee, 311 U.S. 32, 42-43, 85 L. Ed. 22, 61 S. Ct. 115 (1940). The adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class

members. As previously outlined, the class representatives implanted prior to March, 2000, will have little incentive to press claims, but post-July claims, for which notice is established, do have such incentive.

Likewise, as there is no class representative for three of the four categories of products, there can be no adequate representation.

Rule 23(b)

So, even if the class parties had met the criteria of 23(a), they would nonetheless be required to establish the requirements of one of the subsections of 23(b). As indicated above, the parties rely upon 23(b)(2) and 23(b)(3). Rule 23(b) provides the most common avenue for certification, but this class cannot survive the test.

Sulzer judicially admits that it cannot meet the "predominance" requirement. This Court cannot find that questions of law or fact common to the members of the class predominate over any questions affecting only individual members when Sulzer has plead the opposite. In Sulzer's motion for Rule 11(of the Texas Rules of Judicial Administration), Sulzer states that "common issues will not predominate" over the "common issue of law or fact among these cases." *See* Sulzer Motion for Rule 11 Consolidation, p. 5, second sentence of paragraph A.,

attached as Exhibit " ." Had Sulzer not admitted that this factor cannot be met, it would fail nonetheless for the predominance of state and, possibly, international law complications that outweigh any commonality.[9]

The other 23(b)(3) factors also weigh heavily against approval. The claims in this case are not traditional class action claims. The justiciable claims have a significant value for which individual handling is not only economically feasible, it is preferable. It is for that reason that the state-court litigation has developed to the point that trials on the merits are possible. As outlined in the factual statement, the state-court litigation has progressed to near completion of pre-trial matters. Therefore, the Court should not certify a settlement class whose express purpose it is to interfere with state-court litigation.

3. *The Court lacks subject matter jurisdiction.*[10]

The alleged basis for this Court's subject matter jurisdiction is diversity of citizenship as found in 28 U.S.C. § 1332(a). In order for there to be jurisdiction,

[9]Class counsel have argued that divergent state laws will not be a problem for a settlement as the settlement agreement will pay even those claimants whose states do not recognize a cause of action. Ignoring state laws will not cure the problem. For example, any question about whether the "security agreement" (Settlement Agreement, Article 2.8) is enforceable against non-parties will likely be assessed under state law.

[10]To the extent that Sulzer attempts to reassert its request for injunction relief, the objections also contest personal jurisdiction.

there must be diversity of citizenship and the amount in controversy must be at least $75,000.00. *Id.* Since there is an attempt to certify this as a class action, in order for this Court to have jurisdiction each member of the class must claim the jurisdictional amount. *Zahn v. International Paper Co.*, 414 U.S.291, 301, 94 S.Ct. 505, 512 (1973). *See also Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 637 – 41 (10th Cir. 1998). The test for whether this case satisfies the amount in controversy requirement is whether the complaint makes a good-faith claim that each member of the class has suffered at least $75,000.00 in damages. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 292, 58 S.Ct. 586, 591-92 (1938).

In the instant case, the members of subclass 2 have received recalled hip implants but have not, at this time, undergone revision surgery. *(See* Plaintiffs' Amended and Consolidated Class Action Complaint, p. 5) There are a myriad of reasons why these persons have not yet undergone revision surgery. For example, these persons may be asymptomatic; they may be symptomatic but do not wish to undergo more pain, suffering, and risk by submitting to additional surgery; or they my be symptomatic but are no longer candidates for surgery because of their age or physical condition. Irrespective of the foregoing, each person will, if the settlement is approved, receive $750.00 in cash and 392 ADRs in Sulzer Medica Ltd which are

ostensibly valued at $5.10 per ADR. *(See* Class Action Settlement Agreement, Article 3, section 3.4(a)(i)). In other words, each member of the class will receive less than 4% of the good faith value of their claim, or $75,000.00.

This is not a case of contested liability; the Sulzer defendants have admitted they are liable. (*See, generally* Exhibit 17). Assuming, for the sake of argument, the validity of the economic numbers advanced by the proponents of this class action, Sulzer is able to fund around fifty percent (50%) of its projected liability. (*See* Affidavits of Brian Devine, Richard May, and Harvey Rosen offered in support of the Settlement Agreement). Additionally, Sulzer's own evidence establishes that the vast bulk of class members are those in subclass 2. (*See, generally* Exhibit 17). This presents the proponents of this class action and proposed settlement with a dilemma. Either, the amount in controversy for the subclass 2 class members is less than $75,000, in which case this Court does not have jurisdiction over the claims of those class members, or the subclass 2 class members are being treated unfairly at the expense of the lesser number of class members who have undergone revision surgery. In either event, this Court is prevented from preliminarily approving class certification and the proposed settlement.

As indicated in footnote 5 above, the objectors also challenge the standing of

the subclass 2 class members.

4. *Rule 23(b)(2)*

The Court is without authority to order preliminary approval of the medical monitoring **fund** portion of the Class Action Settlement Agreement proposed in this case because 23(b)(2) certification is prohibited in actions that seek primarily monetary relief. Certification of a 23(b)(2) class turns on whether the injunctive and/or declaratory relief sought on behalf of the class "predominate[s]" relative to any incidental monetary damages requested. See, e.g., *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 410 (5th Cir. 1998).

Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive. *Nelsen v. King County*, 895 F.2d 1248, 1254-55 (9th Cir. 1990); *O'Connor v. Boeing N. Am., Inc.*,, 180 F.R.D. 359, 377 (C.D. Cal. 1997. A class seeking monetary damages may be certified pursuant to Rule 23(b)(2) where such relief is "merely incidental to [the] primary claim for injunctive relief." *Probe v. State Teachers' Retirement Sys.* 780 F.2d 776, 780 (9th Cir. 1986).

In this case, Plaintiffs' Amended and Consolidated Class Action Complaint alleges generally that "Defendants' course of dealing with members of the Class

adversely affects all members of the Class, thereby making appropriate final and injunctive relief corresponding to declaratory relief with respect to the Class as a whole, whereby the Defendants would be compelled to cease such course of dealing. (*See* Amended Complaint, p. 8) However, Plaintiffs do not identify the "course of dealing" complained of and they do not request declaratory relief with respect to such conduct.

It is unclear that this settlement agreement requests any injunctive relief other than a collateral injunction against state-court actions. Courts have split on whether medical monitoring relief is primarily compensatory or injunction. However, where, as here, the relief is a fund rather than the establishment of medical monitoring itself, courts frequently deny certification. *See, e.g. Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 483-85; *see also Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995).

Under any set of circumstances, the primary relief sought and obtained by this settlement is monetary. Certification under 23(b)(2) is inappropriate.

V. REQUEST FOR STAY

If this Court determines that conditional certification of the class and preliminary approval of the settlement are appropriate, Objectors ask this Court to stay its decision pending Objectors' request for leave to appeal pursuant to Fed.R.Civ.P. 23(f).

VI. CONCLUSION

Asbestos lawsuits have created a litigation crisis in a proportion never seen by this country and likely not to be seen again. While many state and federal rules have stretched their limits to accommodate the mass of claims, bankrupt defendants, trials, etc., Fed.R.Civ.P. 23 has remained steadfast to its limitations. If a proposed class does fit the criteria, it should not be certified. If asbestos did not warrant an exception, neither do Inter-Op hips. The proposed class cannot meet the test.

The settlement is nothing more than a constructive bankruptcy. Until and unless the parties are able to meet the evidentiary requirements of Fed.R.Civ.P. 23(b)(1), the strength of plaintiffs' claims and the severity of their injuries does not deserve to take a back seat to Sulzer's survival.

The State-Court-Plaintiff Objectors respectfully request that the Court deny conditional certification and deny preliminary approval.

Respectfully submitted,

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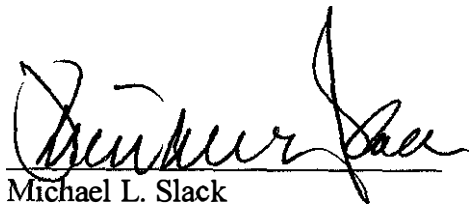

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