

S:\mbp\MDL\01cv9000U-ord.wpd

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

	:	Case No. 1:01-CV-9000
	:	
IN RE: SULZER HIP PROSTHESIS	:	(MDL Docket No. 1401)
AND KNEE PROSTHESIS	:	
LIABILITY LITIGATION	:	JUDGE O'MALLEY
	:	
	:	<u>MEMORANDUM AND ORDER</u>
	:	

Counsel for the plaintiff class in this class action have filed a (revised) motion to amend the class definition, as well as a motion to file a fifth amended complaint to reflect the changed class definition and new class representatives. The defendants do not oppose these motions, and have essentially joined the plaintiffs in seeking expansion of the class definition.

The thrust of these motions is to expand the class definition to include persons implanted with “reprocessed” Inter-Op acetabular hip implants. Put simply, subclass I, currently composed of persons who received a recalled Inter-op shell and underwent revision surgery, would be expanded to include persons who received a reprocessed shell and underwent revision surgery. This change would expand subclass I by about 64 persons. In addition, there would be a new subclass V, essentially composed of all persons who received a reprocessed shell and who have not undergone revision surgery. This new subclass would include about 5-6,000 persons. Subclass V would have its own subclass counsel, Richard Heimann, and would be represented by designated plaintiffs Patricia and John Van Dillen.

The Court concludes that both the revised motion to amend the class definition (docket no. 230)

and the motion to amend the complaint (docket no. 229) should be **GRANTED**.¹

With regard to the requirements of Fed. R. Civ. P. 23(a), it remains true that “the proposed class is so large that joinder of all members is impracticable.” Order at 11 (August 31, 2001) (“Class Order”). It also remains true that the named representative plaintiffs “will fairly and adequately represent the interests of the class,” Fed. R. Civ. P. 23(a)(4), and that the “plaintiffs have continued to maintain ‘structural assurance of fair and adequate representation for the diverse groups and individuals affected,’ by dividing the now-larger proposed class into homogeneous subclasses and providing each subclass with its own counsel.” Class Order at 13 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997)). The key questions are whether inclusion of the new sub-class destroys commonality and typicality.

The Court concludes that, in fact, commonality and typicality remain high. The Court incorporates by reference its analyses of this question contained in the Class Order and also the Order in which it expanded the class to include persons who received knee implants. Order at 10-13 (Oct. 19, 2001) (“Revised Class Order”). When it concluded that “knee claimants” were appropriately included in the class, which until then included only “hip claimants,” the Court noted that “the questions of fact and law that are common to the members of the newly proposed ‘hip and knee implant class’ are substantial, and are not outweighed by questions of fact and law idiosyncratic to each plaintiff.” Revised Class Order at 11. The same is true of members of the larger, newly proposed class. These questions of fact and law in common include whether the implants had a defect, whether the defendants adequately tested the safety

¹ The following motions are therefore **DENIED AS MOOT**: (1) motion to file third amended complaint (docket no. 206); (2) motion to file fourth amended complaint (docket no. 210); and (3) first motion to amend the class definition (docket no. 228).

of their products, when the defendants learned of the defect, whether they timely took action upon learning the defect might exist, the relationships between the various “Sulzer-related” corporate entities, what insurance policies apply, and to what extent persons who received these implants may recover under each policy. Id. at 10-11. Indeed, factual discovery that has occurred after the date of the Court’s original Class Order has given the parties reason to stipulate that the facts and law surrounding claims of persons implanted with reprocessed shells are substantially the same, if not identical, to the facts and law surrounding claims of persons implanted with hip shells that were not reprocessed or with knee implants. Put simply, the defect (a residue of lubricant on the implant), injury (aseptic loosening of the implant), and causal link between the two is virtually the same in all cases.

As for typicality, the Court concludes that the proposed amended complaint, especially viewed in light of the entire history of this case, shows that the representative plaintiffs’ interests are aligned with those of the proposed class and subclasses, and in pursuing their own claims, the named plaintiffs will also advance the interests of the class members and the members of each subclass. As such, the plaintiffs have carried their burden of showing that the proposed class meets the commonality requirement of Rule 23(a)(3). Finally, the Court’s earlier analyses of the propriety of certifying the class under Rule 23(b)(3) remain completely valid. Class Order at 23-30; Revised Class Order at 14-15.

Having concluded that it is appropriate to amend the class definition to include reprocessed hip shell claimants, the Court conditionally certifies the class and subclasses as defined in the Fifth Amended Complaint.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE