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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

IN RE: SULZER HIP PROSTHESIS AND KNEE PROSTHESIS PRODUCTS LIABILITY LITIGATION	Case No.: 01-CV-9000 (MDL Docket No. 1401) JUDGE KATHLEEN M. O'MALLEY RESPONSE TO THE COURT'S JUNE 12, 2003 ORDER RE: COMMON BENEFIT FEES BY THOMAS A. SCHULTZ ON BEHALF OF LOPEZ, HODES, RESTAINO, MILMAN & SKIKOS

I, Thomas A. Schultz, an attorney at law admitted to practice law in the State of California affirms the following under penalty of perjury:

1. I am a partner with the law firm of Lopez, Hodes, Restaino, Milman & Skikos. I have been the attorney primarily responsible for the handling of the Sulzer litigation for the firm since January 2001 to the present. This firm was appointed by the Honorable Ronald Sabraw as Co-Lead counsel in the California Coordinated proceedings and was also appointed by this Court as a member of the Special State Court Committee in these MDL proceedings. I have been an active participant in the Sulzer State and Federal proceedings and am familiar with and have knowledge of the facts contained in this declaration.

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2. That on June 12, 2003, this Court issued an order approving a common benefit fee application filed by your declarant and your declarant's firm in connection with common benefit services performed by your declarant and your declarant's firm. In its June 12, 2003 order, this Court concluded that your declarant's firm had the 4th highest "reasonable lodestar" out of the 57 firms who submitted common benefit fee applications. This order follows this Court's March 24, 2003 order in which it approved common benefit expenses incurred by your declarant's firm in an amount that was the 2nd highest of the 58 applicant firms who submitted common benefit cost reimbursement applications.

3. In it's June 12, 2003 order, this Court withheld an actual order of fees for your declarant's firm and 10 other identified firms and requested a response as to whether any such firms were pursuing non-class cases that were in potential and/or actual conflict with the potential interests of the class members (hereinafter referred to as the "Non-affected cases"). Further, in it's June 12, 2003 order, this Court also stated that for any firm pursuing any such Non-affected cases, an explanation was required as to whether the theories of liability asserted in the pending non-affected cases were different from the defect claims identified in the global settlement.

4. First, by this declaration, your declarant affirms that neither your declarant nor your declarant's firm are actively involved in the present prosecution of any Non-affected cases. Your declarant's firm rejected an unfiled case (Powers) months ago and is in the process of moving the court to withdraw from another case (Deane[1]) and will be substituting out of our firm's three other pending non-affected product cases (Linnell, Stewart and Jackson) given the Court's order of June 12, 2003 declaring a potential conflict. Further, although your declarant does not believe that an actual or potential conflict exists with respect to our firm's handling of these cases, out of deference to this Court, your declarant and your declarant's firm have advised all of our clients both in writing and in

[1] The motion to withdraw in Deane and the rejection of the Powers case, however, was not occasioned by this Court's June 12, 2003 order but was the culmination of dialogue that has occurred over the last year with the clients following the realization that there was a lack of evidence over the implants' failure.

subsequent telephone conversations that we can no longer assist these individuals in their claims and all such clients have agreed to substitute in new counsel as a result of the potential conflict outlined in the Court's June 12, 2003 order.

5. Your declarant further attests that neither your declarant nor your declarant's firm has any intent[2] to have any role in the future handling of the above-referenced non-affected product cases, if they are pursued, and that neither your declarant nor your declarant's firm have any agreement or intent to share in any fees with respect to these cases.

6. Your declarant further declares that the non-affected product cases and the class implant cases were not and cannot be pursued on the same defect theory. The class implants at issue with the global settlement all underwent post-porous coating machining and/or were not passivated and/or were entirely machined at Sulzer's Texas manufacturing plant. Indeed, at the Fairness Hearing in this matter, in response to an objection filed by a non-affected product recipient, this Court elicited from Sulzer's defense counsel that the non-affected product cases are clearly different from the class cases, since the non-affected implants were manufactured in a totally different manner than the class implants. Indeed, due to these differences in manufacturing between the class implants and the non-affected products and the lack of any increased statistical incidence of failure of the non-affected implants, the Sulzer defendants and class counsel made a conscious choice not to include these known cases in the instant global settlement. (See pg. 276, line 1 through pg. 280, line 10 of the Fairness Hearing Transcript for 5/7/02, specifically testimony of Joseph Piorkowski in response to the Court's questioning why non-affected products were not included in the global settlement).

7. Further, with respect to the non-affected product cases that our firm and other firms were or have been prosecuting, your declarant states that the evidence that has been presented by the

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[2] Although your declarant truly has no intent to have any involvement whatsoever in those cases, this Court should be advised that this decision is a purely personal one based on this Court's perceived potential conflict and is in no way based upon any condition set by the defendants or this Court, which could be construed as a violation of Disciplinary Rule 2-108 which states: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law."

defendants both before and after the Fairness Hearing confirms the above-referenced testimony from Sulzer's defense counsel namely, that the non-affected product cases do not implicate the same manufacturing defect as occurred with the class implants and, as such, were not and should not have been included in the class settlement since: (1) the evidence is clear that the non-class implants all underwent the important process of passivation, did not undergo post-porous coating machining and were not all exclusively machined at Sulzer's Texas manufacturing plant; (2) the statistical incidence of implant failure with the class and non-affected implants are vastly different; and (3) given the available insurance and assets for the instant global settlement, it would not have been possible to include the non-affected product claims in the global settlement and achieve the same benefits to the class members which were required to ensure the low opt-out rate and which in turn made the instant global settlement a reality.

8. Additionally, your declarant states that at no time during your declarant's and your declarant's firm's active handling of our firm's non-affected product cases did we violate any of our obligations to this Court or to the settlement trust as a common benefit attorney. Rather, at all times, we properly balanced our duties to our clients and our obligations to the trust and to the class. Your declarant's reasons for this conclusion are as follows:

(a) Several months prior to the Fairness Hearing in this matter, your declarant specifically raised the potential problem of these non-affected product cases with Sulzer defense counsel and class counsel. This potential problem was raised by both your declarant and Mr. Glen Zuckerman, an attorney at Weitz & Luxemburg, who also has a pending common benefit application with an amount that has likewise been withheld in this Court's June 12, 2003 order. In this regard, in a discussion with class counsel and Sulzer defense counsel in early 2002, both your declarant and Mr. Zuckerman raised the issue which this Court also raised at the Fairness Hearing, namely, whether the global settlement should be expanded to include the non-affected product cases. In response to our inquiries, your declarant and Mr. Zuckerman were advised, as this Court was advised at the Fairness Hearing, that the manufacturing process and statistical incidence of complications involved in the class

and non-class cases were vastly different and, as such, that the class would not and should not be widened to accommodate these non-affected product claims;

(b) Additionally, at no time has your declarant nor your declarant's firm attempted to actively solicit for any additional non-affected product cases or anyother case that might threaten the obligations of the trust to the current defined class. All of the cases identified above are cases that your declarant's firm was retained on in early to mid 2001, well prior to the enactment of the first or second global settlement in this matter and prior to any definition of what a class or non-class implant would be;

(c) Further, although your declarant has been approached by multiple attorneys and clients to handle their non-affected product cases given our firm's unique knowledge of these case, neither your declarant nor your declarant's firm have agreed to prosecute any additional cases other than the ones identified above, which, again, are no longer being prosecuted by the instant firm;

(d) At all times your declarant attempted to resolve our firm's non-affected cases short of protracted litigation and never sought compensation for these clients above class terms, which would potentially threaten the trust's obligations to the defined settlement class;

(e) In your declarant's firm's capacity as co-lead counsel in the California Coordinated Sulzer proceedings, together with the Lieff, Cabraser firm, your declarant and your declarant's firm at all times tried to facilitate the orderly resolution of California's non-affected product claims so that these cases would not jeopardize or threaten the settlement trust's obligations to the class. Your declarant's conduct in this regard was as follows:

(1) Your declarant ensured the orderly administration of class claims and the viability of the trust to pay class claims by agreeing to what now amounts to a 21 month stay on the non-affected product cases in California, which stay has been in effect from September of 2001 to June 12, 2003. On June 12, 2003 the California coordination judge, Ronald Sabraw, issued an order remanding the California non-affected product cases out of the California coordinated proceedings and

back to their respective home courts. This June 12, 2003 order was issued at Sulzer's request following a motion to remand filed by Sulzer's defense counsel;

(2) Your declarant made great efforts to arrange for a settlement conference process to occur under the auspices of the California coordination court, which occurred on March 14, 2003, in an attempt to resolve all of the California non-affected product cases (approximately 20 such cases) without the need for protracted litigation and in order to minimize the potential impact posed by these cases. Rather than engage in reasonable settlement discussions, Sulzer instead chose to refuse to offer any money on any of the California non-affected product cases and, as a result, it was Sulzer that forced the potential litigation of the non-affected cases in California by their no offer approach and the above-referenced motion for remand;

(3) In the event litigation of the non-affected cases was required, your declarant also proposed to conduct uniform national discovery in order to assist in lessening the expense associated with these cases, which might theoretically affect the available assets to the trust and ultimately to class members; and

(4) All of the above-referenced concessions were made despite the fact that on March 20, 2003 defendants announced the proposed sale of Centerpulse to Smith & Nephew for $2.3 billion dollars. With this transaction any potential or theoretical adverse impact by these non-affected product cases on the defendants' obligations to fund the trust has been completely eliminated in your declarant's respectful opinion.

(f) Lastly, at no time prior to this Court's June 12, 2003 order did anyone ever suggest that it was an actual or potential conflict for our firm to handle the above-referenced non-affected product cases; neither defense counsel, class counsel or our California coordination judge ever raised this as a possibility. As such, your declarant respectfully submits that without prior good cause to withdraw from these cases, in your declarant's opinion it may have been ethically problematic to have withdrawn from certain of these cases, prior to this Court's order of June 12, 2003, identifying a potential conflict of interest.

9. As the above demonstrates, at no time did your declarant act in a manner inconsistent with your declarant and your declarant's firm's obligations to the trust.

10. Further, as soon as a potential conflict was identified by this Court in its order of June 12, 2003, remedial steps were taken by your declarant to remove such a potential and/or actual conflict by taking steps to immediately withdraw from our three remaining non-affected product cases (Linnell, Stewart and Jackson).

11. Based upon the foregoing it is respectfully requested that this Court issue an order withdrawing its previous order withholding the common benefit fees earned by this firm for the nearly 2200 hours of approved common benefit work performed by your declarant's firm over the last 2 years.

I declare under the penalty of perjury that the foregoing is correct and true.

Executed this 18th day of June, 2003 at Newport Beach, California.

THOMAS A. SCHULTZ
Declarant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE:

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 450 Newport Center Drive, Second Floor, Newport Beach, CA 92660.

On **June 18, 2003** I served the foregoing document described as **RESPONSE TO THE COURT'S JUNE 12, 2003 ORDER RE: COMMON BENEFIT FEES BY THOMAS A. SCHULTZ ON BEHALF OF LOPEZ, HODES, RESTAINO, MILMAN & SKIKOS** in this action by placing ___ the original _X_ true copies thereof enclosed in sealed envelopes addressed as follows:

U.S. District Court - Ohio
Judge Kathleen McDonald O'Malley
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X__ **BY FEDERAL EXPRESS/UPS OVERNIGHT DELIVERY SERVICE**: Said documents were delivered to an authorized courier or driver authorized by the express service carrier to receive documents with delivery fees paid or provided for.

Executed on **June 18, 2003** at Newport Beach, California.

___ STATE: I declare under penalty of perjury that the foregoing is true and correct.

X__ FEDERAL: I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

MARIA MONTERROSO