IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: INTER-OP HIP PROSTHESIS LIABILITY LITIGATION	:	MDL Docket NO. 01-CV-9000
	:	(ALL CASES)
	:	MDL No. 1401
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	:	
	:	JUDGE KATHLEEN O'MALLEY
	:	
	:	

OBJECTIONS TO PROPOSED CLASS AND CLASS ACTION SETTLEMENT

Putative class members, now Objectors, Johnie Whisman, Edna Peet, and Dorothy Bodek, by counsel, and in accordance with this Court's August 17, 2001 Order, hereby file their objections to the proposed class and proposed settlement agreement set forth in Defendant Sulzer Orthopedics Inc.'s Motion for Preliminary Approval of Class Settlement and related documents which is scheduled for a hearing before this Court on Tuesday, August 28, 2001 at 10:00 a.m.[1] Attached hereto are the Declarations of Objectors Johnie Whisman,[2] Edna Peet,[3] and Dorothy

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[1] For purposes of these objections the Objectors will adopt the convention of using "Sulzer" to describe the entities set forth in the proposed settlement, including Sulzer Orthopedics, Inc. ("SOI"), and Sulzer Medica Limited ("SML"), unless otherwise indicated.

[2] Johnie Whisman's suit against Sulzer is filed in the District Court of Jefferson County Texas, 60th Judicial District. It appears he would be entitled to the benefits described in "Group I."

[3] Edna Peet's suit against Sulzer is filed in the Supreme Court of the State of New York, County of New York. It appears she would be entitled to the benefits described in "Group II."

Bodek,[4] in support of these Objections. These Objections shall also serve as the Objectors' notice of their intent to participate in any fairness hearing which may be scheduled in this matter.

INTRODUCTION

It is axiomatic that settlement classes must be given "heightened" scrutiny, despite the parties' agreement, in order to protect absentee class members. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997). Settlement classes therefore are subject to a higher standard for approval where the approval takes place prior to formal class certification. Settlement classes must meet all the prerequisites of Rule 23(a), as well as those which govern the class to be maintained, in this case Rules 23(b)(2) and (b)(3). *Id*. The proposed settlement of this matter has been described as "novel" and "unusual" and is widely objected to.[5] Preliminary approval should be denied because it does not withstand application of the *Amchem* standard of "heightened scrutiny," and does not meet the standards for preliminary approval. Further, the terms of the settlement are unfair, and the proposed settlement class cannot meet the requirements of Rules 23(a), (b)(2), or (b)(3), or the applicable case law.

ARGUMENT

I. The Standards For Preliminary Approval Are Not Met.

Review of Defendant Sulzer Orthopedics Inc.'s Motion for Preliminary Approval of Class Settlement and the proposed terms of the settlement discloses "grounds to doubt its fairness" and

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[4] Dorothy Bodek's suit against Sulzer is filed in the District Court of Jefferson County Texas, 60th Judicial District. It appears she would be entitled to the benefits described in "Group III."

[5] *See*, Jess Bravin, *Sulzer Medica Reaches Novel Class-Action Pact*, The Wall Street Journal, at A3 (August 16, 2001).

reveals it does not "fall within the range of possible approval." *Manual for Complex Litigation (Third)*, § 30.41 (3d ed. 1997). As the Court stated in *Romstadt v. Apple Computer, Inc.*, 948 F.Supp. 701, 705 (N.D. Ohio 1996):

> Prior to approving a preliminary settlement, a court must 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.' (citation omitted). The court 'acts as a fiduciary who must serve as guardian of the rights of absent class members . . .[t]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate.' (citations omitted). Finally, the proponents of the settlement bear the burden in showing that the agreement is fair, reasonable, and adequate. (citation omitted).

See also, Grice v. PNC Mortgage Corporation of America, 1998 WL 350581, *6 (D.Md. 1998);[6] *In re NASDAQ Market-Makers Antitrust Litigation*, 176 F.R.D. 99 (S.D.N.Y. 1997); *In re Skinner Group*, 206 B.R. 252 (N.D. Ga. Bankr. 1997); *In re Amino Acid Lysine Antitrust Litigation*, 1996 WL 197671 (N.D. Ill. 1996); *Manual for Complex Litigation (Third)*, § 30.41 (3d ed. 1997).

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[6] In *Grice v. PNC Mortgage Corporation of America*, 1998 WL 350581, *6 (D.Md. 1998), the court held that it must analyze the fairness and adequacy of the settlement before granting preliminary approval of a settlement class. In addressing fairness, a range of factors can be considered:

> (1) The presence or absence of collusion among the parties; (2) the posture of the case at the time settlement is proposed; (3) the extent of discovery that has been conducted; and (4) the circumstances surrounding the negotiations and the experience of counsel.

Id. In addressing adequacy, the court can review additional factors:

> (1) The relative strength of the plaintiffs' case on the merits and probability for success at trial; (2) the anticipated duration and expense of additional litigation; (3) the solvency of the defendants and the likelihood of recovery on a litigated judgment; and (4) the degree of opposition to the settlement.

A. Preliminary Approval Should Be Denied Because There Are Substantial Grounds To Doubt The Fairness Of The Proposed Settlement.

The terms of the proposed settlement are unfair and inadequate. Further, discovery is not completed on issues necessary to conduct the required "heightened scrutiny" of the fairness of the proposed settlement.[7] Prominent examples of a number of the proposal's inequities include the following:

1. Cash payments:[8] The cash payments proposed for class members in Groups I through V are inadequate. First, the payments provided for each Group treat all members the same, regardless of variations in their injuries, damages, and expenses. Class members thus are not fairly compensated. Second, the payments are based on assumptions regarding Sulzer's assets which have not been the subject of adequate discovery or vigorous litigation.[9] Third, the settlement releases solvent and potentially liable companies (for example, it would release Sulzer Ltd., the parent of Sulzer Medica

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[7] As Defendant Sulzer Orthopedic Inc.'s Motion for Preliminary Approval of Class Settlement concedes, discovery is ongoing. Recent deposition notices reveal that the depositions of a number of SOI's corporate officers are not scheduled until September, 2001. Discovery is therefore incomplete with respect to the crucial issue of whether the Defendants' parent company is liable or whether its assets can be made available or pledged to fund the settlement. Discovery is therefore also incomplete with respect to the opinions of Harvey Rosen, Ph.D., the sole expert relied upon by the proponents regarding the financial condition of SOI and its interrelationship with its affiliates and its parent company. Putting aside for the moment that the Court should have the benefit of the independent views of other experts regarding the financial condition of SOI and its affiliates and parent, Dr. Rosen's opinion is inadequate. First, since discovery is incomplete, his opinion lacks an adequate basis and likely will have to be amended or supplemented. Second, his opinion fails to analyze whether the parent corporation's assets can be reached and, if so, the nature and extent of those assets. Until such discovery is complete, the motion for preliminary approval should be denied.

[8] *See*, Class Settlement Agreement, Art. 3, Sec. 3.4.

[9] Depositions of a number of the corporate affiants and witnesses with knowledge of Sulzer's financial condition are not scheduled until *after* the hearing on preliminary approval.

Ltd., as well as other entities) in violation of *In Re: Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000). As a result, assets which otherwise would be available to fund settlements are not included in the calculation of the cash payments which could be made available to class members. Finally, defendants make the unsupported claim that the level of payments must be limited because SOI's liabilities will exceed its resources and it "may or may not be able to go on."[10] This threat of bankruptcy, besides lacking credibility,[11] is inappropriate for consideration of preliminary approval. *See, In Re: Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000). The defendants have not sought to certify a limited fund under Rule 23(b)(1)(B). The only logical inference is that they are able to continue as a profitable business long after this settlement is terminated. As a result, the assets are unfairly limited in amount and by an arbitrary time frame.

2. **ADRs**:[12] First, it has not been adequately demonstrated that funding a substantial portion of the settlements with the company's stock is necessary. Second, the total value of each class member's settlement is substantially contingent on the value, at the point in time when the class member submits a claim, of the trading price of the ADRs on the New York Stock Exchange on the day a claim is consummated. The price at which ADRs are trading at a particular point in time will fluctuate significantly. Thus, class members who are entitled to ADRs as part of their settlement (Groups I, II, and III) are subject to widely disparate treatment. Further, there is no guaranteed floor,

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[10] *See*, Defendant Sulzer Orthopedics Inc.'s Motion for Preliminary Approval of Class Settlement, p. 2.

[11] For example, Sulzer-Medica is reported to have $382.8 million in cash, sales of $814.6 million, and profits in year 2000 of $116.2 million.

[12] *See*, Class Settlement Agreement, Art. 6.

or minimum, for the value of an ADRs for purposes of calculating total settlement amount. Thus, if the stock becomes worthless, the class members will receive substantially less. This is a bargain which unfairly benefits Sulzer, in derogation of the class members.

3. December 31, 2008:[13] This date is an important term of the settlement which has been arbitrarily chosen as a guesstimate to serve various functions, including as a limiting date for the defendants' financial obligations. It also serves an important limiting function with respect to Groups I through V. As a result, in conjunction with the impact of the fluctuating value of the ADRs, class members with similar injuries will get different amounts depending upon whether their revision occurs before or after December 31, 2008. This date appears to be purely a product of the negotiation process and is unsupported by any financial, medical, scientific, or epidemiologic data, and there is no expert testimony to justify whether it is reasonable or not. As a result, until more is understood about the basis of the selection of this date and its obvious impact on the terms of the settlement, it is inappropriate to grant preliminary approval of the proposed settlement.

4. Medical Expenses:[14]

a. Lack of criteria: The proposed settlement is unfair because it does not set forth specific criteria for determining which medical expenses related to a revision will be reimbursed. This guarantees that there will disputes, and therefore disparate treatment, among class members entitled to reimbursement of medical expenses (Groups I and II), regarding the extent to which their medical expenses will be paid. The proposed settlement is unfair without such specific and published

[13] *See*, Class Settlement Agreement, Art. 3, Sec. 3.3.

[14] *See*, Class Settlement Agreement, Art. 3, Sec. 3.4.

criteria, and without an appropriate review or dispute resolution process, by which disputes can be resolved.

b. Nature and extent of injuries: The proposed settlement ignores the reality of the medical problems faced by the class members. As a result, class members receive inequitable and disparate treatment under the vague and arbitrary terms of Group I through V. For example:

i.) It is clear that Sulzer revisions can cause blood clots. These blood clots can cause death. As a result, there is a high likelihood that an individual with a Sulzer implant or revision will die as a result of a Sulzer revision, either during the original surgery or after, or during or after the revision. The proposed settlement nowhere reflects this reality, either in the subclasses, the settlement values, or in the medical criteria. As a result, wrongful death claims have effectively been excluded from the proposed settlement.

ii.) It is clear that there are people with Sulzer implants who will not be able to have a revision because the original implant has caused blood clots or bone loss making further surgery medically inadvisable. The proposed settlement nowhere reflects this reality, either in Groups I through V, in the settlement values, or in the medical criteria. Thus, for example, those who have not had a replacement surgery, but need surgery and cannot have it performed, receive only $750.00 in cash and $2,000.00 in stock, even though their circumstances, as a consequence of the defendants various delicts, are more

dire than many others who qualify for the same amount.

iii.) It is clear that there is a limit (usually 3) to the number of revisions which can occur. There is also a limit to the effective life span of a Sulzer implant (approximately 20 years). As a consequence, there are people with Sulzer implants who, for a variety of medical reasons, including bone loss in the hip socket as a result of the surgery, will be unable to have a successive revision and thus will be faced with the pain and suffering of a revision they cannot have replaced for the rest of their lives. This could lead eventually to amputation or serious disability. Further, there are younger people (e.g., 30 years of age) with Sulzer implants who have had as many as 3 revisions and, due to the defective Sulzer implant, due to the limit on the number of revision surgeries, and due to the limit on the life of the implant, will reach the age of 50 with no ability to have a 4th revision. The proposed settlement nowhere reflects this reality, either in the subclasses, the settlement values, or in the medical criteria.

5. Inequities and Disparate Treatment Under The "Extraordinary Fund":[15]

The maximum benefit is deemed to be those benefits available for persons who qualify for Group III.[16] However, class members may be eligible to receive additional benefits under the "Extraordinary Fund" provision.[17] However, the terms of this provision are vague and no criteria have been set forth by which entitlement can be determined. In fact, qualifying appears to be left solely to the discretion of the Special Master who would be appointed to determine "Matrix Compensation Benefits." However, the terms of this provision are glaringly inadequate, since the recovery for the most severely injured persons is unspecified. Thus, for example, a class member who has had sepsis complications from the replacement surgery, or has suffered embolisms from the replacement surgery (or from multiple dislocations of the defective implant), or has substantial lost income, or can not have the surgery due to other health concerns and thus suffers daily with pain, are given no notice whatsoever as to whether they may be entitled to additional benefits from the "Extraordinary Fund." Rather, they receive the small base amounts and are then placed in the ill-defined "extraordinary" fund. Arguably, almost every Sulzer claimant will have a colorable claim against this fund.

6. Treatment of Opt-Outs:[18] The Opt-Outs receive disparate and unfair treatment under the terms of the proposed settlement. As Mr. Richard Scruggs, attorney for SOI and one of the architects of the deal, was quoted in the Wall Street Journal:

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[15] *See*, Class Settlement Agreement, Art. 3, Sec. 3.5.

[16] *See*, Class Settlement Agreement, Art. 3, Sec. 3.4(e).

[17] *See*, Class Settlement Agreement, Art. 3, Sec. 3.5.

[18] *See*, Class Settlement Agreement, Art. 3, Sec. 3.6.

> [I]f anybody opts out, they still have to try their cases, win their appeal, and then there would be no assets to satisfy their judgment, because they are pledged to the class."[19]

This means that the proposed settlement is designed to strip SOI of all its assets and insulate it and its parents against any judgment which could be executed by an opt-out, in order to force opt-outs into the settlement class. In reality, the terms of the settlement are designed to be punitive toward those who choose to exercise their opt-out rights, and thus the rights of the opt-outs are meaningless.[20] The effect of these provisions is to create a *de facto* mandatory class without having to satisfy the requirements applicable to Rule 23(b)(1)(B) limited fund settlement classes. As such, the proposed settlement would be in violation of the requirements applicable to limited fund settlement classes. *See, Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999); *In Re: Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000). As a result, the preliminary approval should be denied.

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[19] *See*, Jess Bravin, *Sulzer Medica Reaches Novel Class-Action Pact*, The Wall Street Journal, at A3 (August 16, 2001).

[20] *See*, *e.g.*, Class Settlement Agreement, Art. 2, Sec. 2.8(a)(security interest granted by SOI and SML to Settlement Trust has priority over any liens resulting from claims by opt-outs); Art. 3, Sec. 3.7(amount of benefits which would have been paid to an opt-out to be added to payments for class members who did not opt-out); Art. 11 (most favored nation clause for Sulzer AG prohibits opt-outs from receiving any settlement more valuable than that of an opt-in); Art. 14, Sec. 14.4 (restricting right of opt-outs from using terms of settlement in any judicial proceeding).

7. **Security/Lien**:[21] Security in the form of a lien, pledge, or security interest in its various assets is defined as being granted by "Sulzer." However, Sulzer is defined in the proposed settlement as consisting of only Sulzer Orthopedics, Inc. (SOI), and Sulzer Medica (SML).[22] Therefore, neither the direct parent of SML, Sulzer AG, which until recently owned 74% of the stock of SML, nor Sulzer Ltd., which is the parent of Sulzer AG, are providing any security interest to fund the settlement. Moreover, the security interest granted by SML will be in effect only until June 30, 2009.[23] Given that there have been no long term medical or scientific studies of the time period over which, or the rate at which, these implants will fail, and given the uncertainty regarding the fluctuating value of the ADRs over time in the stock market, the proposed settlement unfairly and inequitably subjects class members to significant uncertainty, and unavoidably disparate treatment, during the time the security interest is effective, and even greater uncertainty after the security expires on June 30, 2009. Thus, present and future class members will inevitably receive unfair and disparate treatment.

8. **Release of Swiss Parents**:[24] Even though the proponents claim that liability claims against the parents are "slim," and establishing jurisdiction over them in U.S. courts is "virtually impossible,"[25] the settlement provides an unconditional, total, and complete release of SOI's and

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[21] *See*, Class Settlement Agreement, Art. 2, Sec. 2.8.

[22] *See*, Class Settlement Agreement, Art. 1 (ooo).

[23] *See*, Defendant Sulzer Orthopedics Inc.'s Motion for Preliminary Approval of Class Settlement, p. 9.

[24] *See*, Class Settlement Agreement, Art. 7.

[25] *See*, Defendant Sulzer Orthopedics Inc.'s Motion for Preliminary Approval of Class Settlement, p. 4, n. 2.

SML's Swiss parents (Sulzer AG, and Sulzer Ltd.), including all holding companies, and affiliates, as well as all "past, present, and future parent companies."[26] SOI fails to assert, and does not show, that it is clear, or that it has been demonstrated through discovery, that such parents, entities, or affiliates have no liability. This is a particularly egregious characteristic of the settlement which should result in a denial of SOI's motion for preliminary approval. Such a broad release is a clear violation of the ruling in *In Re: Telectronics Pacing Systems, Inc.*, 221 F.3d 870 (6th Cir. 2000), which held that the release of the parent corporation undermined the appropriateness of the settlement class.[27]

9. **Funding:**[28] The settlement provides Sulzer will use "commercially reasonable efforts to cause Winterthur Insurance Company" to fund the aggregate cash proceeds. Thus, it appears there is no guarantee the insurance funds will be available, and there is no evidence of an enforceable agreement between SOI or SML and its insurer.

II. Preliminary Approval Should Be Denied Because The Proposed Class Cannot Meet The Requirements For Certification Under Rule 23(b)(2) and (b)(3).

This proposed settlement is a limited fund settlement under Rule 23(b)(1)(B) by any other name. However, in order to skirt the strictures of a Rule 23(b)(1)(B) limited fund settlement class, *see*, *e.g.*, *Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999), *In*

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[26] *See*, Class Settlement Agreement, Art. 1 (vv).

[27] Indeed, the affidavit of Richard J. May, at paragraph 3, an exhibit to Defendant Sulzer Orthopedics Inc.'s Motion for Preliminary Approval of Class Settlement, indicates that as recently as July 10, 2001, Sulzer AG distributed substantially all of its interest in SML to its shareholders via a dividend. This transaction effectively isolated substantial assets from this "limited fund" settlement and should be subjected to close scrutiny.

[28] *See*, Class Settlement Agreement, Art. 2, Sec. 2.9(b).

Re: Telectronics Pacing Systems, Inc., 221 F.3d 870 (6th Cir. 2000), the proponents seek instead to certify this action under Rule 23(b)(2), for equitable relief in the form of medical monitoring, and under Rule 23(b)(3) for compensatory damages. While the merits of class certification may be explored in future arguments before the Court, it is nonetheless apparent from the proposed structure of this settlement class that it cannot be certified under either Rule 23(a), (b)(2), and (b)(3). Preliminary approval therefore should be denied.

A. The Proposed Settlement Class Cannot Be Certified Under Rule 23(b)(2).

Among its other deficiencies, the plaintiffs' proposed settlement class glosses over the overabundance of individual issues present in this action. While predominance of common questions over individual ones is not explicitly required under Rule 23(b)(2), as it is under 23(b)(3), a surfeit of individual issues can still defeat a motion for certification of a 23(b)(2) class by destroying "cohesiveness." See, *Barnes v. The American Tobacco Company*, 161 F.3d 127, 142 (3d Cir. 1998)(issues of addiction, causation, affirmative defenses all presented individual issues which destroyed cohesiveness and thus not properly decided in a 23(b)(2) class action). *See also*, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997)(cohesion necessary element). The amended complaint, and the motion for preliminary approval and attached exhibits, demonstrate that are too many individual issues to establish "cohesiveness" for purposes of certifying a class under Rule 23(b)(2). Indeed, SOI's own pleading concedes there are

> . . . many individualized factors which influence whether a patient requires revision surgery (including, but not limited to, each patient's medical history and lifestyle as well as the amount of

contaminant, if any, found on a particular implant).[29]

It is apparent from the face of the pleadings that there are many individual issues pertaining to individual causation, reliance on misrepresentations, statutes of limitations, damages, and others, as there are in many mass torts. These individual issues will overwhelm any common issues. Further, as a nationwide class, there are 50 different state laws regarding the causes of action pleaded.[30] As a result, there will be significant variation among the state laws as well as the application of the various affirmative defenses to such causes of action.

B. The Proposed Settlement Class Cannot Be Certified Under Rule 23(b)(3).

1. There are too many individual issues to satisfy the predominance, superiority, and cohesion requirements.

One of the central requirements under Rule 23(b)(3) is that common issues of law and fact must predominate over individual issues. As demonstrated herein above, there are numerous individual issues unique to each class member. As a result, neither the predominance requirement of Rule 23(b)(3) nor the cohesiveness requirements can be met. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997). As a further consequence, the superiority requirement of Rule 23(b)(3) cannot be met. Notably, the motion for preliminary approval avoids anything other than conclusory assertions that the requirements of Rule 23 are met.

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[29] *See*, Defendant Sulzer Orthopedics Inc.'s Motion for Preliminary Approval of Class Settlement, Exhibit 7, Declaration of Larry Beeman, para. 9, p. 4.

[30] The Plaintiffs' Amended and Consolidated Class Action Complaint asserts the following causes of action – strict liability, negligence, breach of express and implied warranty, fear of future product failure, misrepresentation – and seeks equitable relief in the form of a medical monitoring program, and punitive damages.

2. The Proposed Subclassing Structure Is Inadequate To Provide Appropriate Protection To Absent Class Members.

The proposed subclass structure is inadequate to provide fundamental fairness and to protect the rights of the absentee class members injured by Sulzer implants. The amended complaint proposes only two subclasses. Subclass 1 consists of class members with revisions prior to the date of final judicial approval. Subclass 2 consists of those who need revisions after the date of final judicial approval. Such oversimplified subclassing fails to meet the requirements set forth in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619, 117 S.Ct. 2231, 2248, 138 L.Ed.2d 689 (1997). This inadequacy is demonstrated, first, by the settlement's proposal to divide the general class into five "Groups" for purposes of defining the available benefits. Thus, even at this first level, the potential for conflicts among Groups, as well as within Groups, is obvious. For example, as shown, the settlement value of post-June 30, 2009 revisions will be exposed to the heightened risks created when Sulzer's security interest expires. Within Groups, such as Group III, there will be conflicts of interest between class members with widely varying degrees of injury and medical expenses. For example, wrongful death cases, or those with multiple revisions, or those who cannot medically have further revisions, will all have inherent conflicts. There will also be disparate treatment and result conflict of interest between class members entitled to both Group III benefits as well as additional benefits from the Extraordinary Fund, and those who are not. These conflicts are the inevitable consequence of the proposal's failure to account for the demonstrably more complex medical reality of the nature and extent of the injuries and complications experienced by class members. Further, there will be significant variation in the monetary value of the settlements within Groups depending upon the date on which the settlement is

consummated and the price of the ADRs on that date. It is clear that additional subclasses would be needed to address this problem, among others. Finally, there is no provision for separate subclasses for the knee implant claims and the reprocessed shell claims which have been folded into the same settlement with the hip implant claims. These fundamental structural problems do not alleviate the multiple conflicts and thus prevent preliminary approval.

CONCLUSION

Close scrutiny of this proposed settlement class reveals there are substantial grounds to doubt its fairness. Further, due to the array of individual issues present in this stereotypical mass product liability tort, and its lack of structural protections to protect absent class members, neither a (b)(2) nor a (b)(3) class can be certified under the applicable case law. As a consequence, it does not fall within the range of possible approval. Defendant Sulzer Orthopedics Inc.'s Motion for Preliminary Approval of Class Settlement therefore should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2001, a true and correct copy of the foregoing Objections To Proposed Class And Class Action Settlement was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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