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CLERK OF COURT
CLEVELAND, OHIO

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

IN RE: : MDL DOCKET NO. 1401
: :
SULZER HIP PROSTHESIS AND : Case No. A:01 CV 9000
KNEE PROSTHESIS PRODUCT :
LIABILITY LITIGATION : Judge Kathleen M. O'Malley

**MOTION FOR APPROVAL OF ATTORNEY FEE
AND/OR REQUEST FOR DISCOVERY ON ISSUE OF ATTORNEY FEES**

NOW COMES attorney David B. Timmis and the law firm of Vandever Garzia, P.C., for the purposes of moving this Honorable Court for the approval of an appropriate attorney fee, who hereby state as follows:

1. Attorney David B. Timmis and the law firm of Vandever Garzia were retained by Affected Product Recipient Thomas Megna and his wife, Kathleen Megna, to pursue a claim against Defendant, **SULZER ORTHOPEDICS, INC.** and **INTERMEDICS VREEDE, INC.**, the local distributor in the greater Metropolitan Detroit area for the Affected Products.

2. Said retention of David B. Timmis and Vandever Garzia occurred on February 1, 2001.

3. Immediately upon their retention, David Timmis and Vandever Garzia commenced an investigation into the nature and source of the "brown residue" that was found around the Sulzer Inter-Op Acetabular Shell, which was designed, manufactured and distributed by the aforementioned Defendants.

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4. It was quickly learned that on December 8, 2002, **SULZER ORTHOPEDICS, INC.**, had initiated and announced a voluntary recall of certain lots of the Inter-Op Acetabular Shell, which did not include the Shell that had been implanted into Mr. Megna.

5. More specifically, the Hemispherical Shell Lot #1295156 was implanted into Mr. Megna, while the recall included lot numbers 1307848 through 1465372.

6. Despite the fact that the Hemispherical Shell that had been implanted into Mr. Megna was not included in the voluntary recall, it was known that said Shell had been subjected to manufacturing processes that resulted in a "brown residue" being found on the explanted Affected Product, which the explanting surgeon, Dr. Andrew Urquhart, of the University of Michigan, certainly found was the result of an adulterated product or improper manufacturing processes.

7. On February 26, 2001, David B. Timmis and the law firm of Vandever Garzia, P.C., filed the Complaint that is attached as **Exhibit A**, which was captioned as follows:

STATE OF MICHIGAN
 IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
 THOMAS MEGNA and
 KATHLEEN MEGNA,
 Plaintiffs,

v

Case No. 01-106628-NO
 Hon. Daphne Means Curtis

SULZER ORTHOPEDICS,
 INC. a foreign corporation, and
 INTERMEDICS VREEDE, INC.

8. Despite the fact that the lot number of the product implanted into Mr. Megna was not part of the voluntary recall, attorneys for Mr. Megna pressed on with their written discovery efforts, which were certainly more extensive than those efforts by Class Counsel, as evidenced by the discovery requests that were submitted on behalf of the Megnas:

PLAINTIFF'S INTERROGATORIES, REQUEST TO PRODUCE AND REQUEST TO ADMIT TO DEFENDANT, SULZER ORTHOPEDICS, INC., DATED MAY 30, 2001 (see **Exhibit B**); and

PLAINTIFF'S INTERROGATORIES TO DEFENDANT, SULZER ORTHOPEDICS, INC., DATED DECEMBER 6, 2002 (see **Exhibit C**).

9. As can specifically be seen by the nature and extent of the aforementioned discovery requests, David B. Timmis and the law firm of Vandever Garzia, P.C., were instrumental in prompting **SULZER ORTHOPEDICS, INC.** to provide crucial information that was generally valuable to the Class, **which was also of vital importance with regard to Inter-Op Acetabular Shells that were not a part of the original recall effort, despite the similar problems that had been sustained by other recipients of Inter-Op Acetabular Shells that were not recognized as Affected Products.**

10. The import of the aforementioned discovery requests was recognized by the Defendants and was evidenced by their continued dilatory, obstructionist and evasive responses, which were finally overcome through the efforts of attorney David B. Timmis and the law firm of Vandever Garzia, P.C.

11. Additionally, efforts were undertaken and demand was made by David B. Timmis and the law firm of Vandever Garzia to lift the stay on litigation for those cases which involved Inter-Op Acetabular Shells that were not considered Affected Products under **SULZER ORTHOPEDICS, INC.**'s voluntary recall program. (See **Exhibit D**).

12. As the result of said efforts, the **FINAL NOTICE OF SETTLEMENT OF NATIONWIDE HIP PROSTHESIS AND KNEE PROSTHESIS PRODUCT LIABILITY**

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CLASS ACTION LITIGATION was entered by this Honorable Court, **which included significantly more Affected Products than were included in the original voluntary recall.**

13. It is therefore the position of David B. Timmis and the law firm of Vandever Garzia, P.C., that their efforts were directly responsible for the inclusion of those of Affected Products in the FINAL NOTICE OF SETTLEMENT that were not included in the original voluntary recall, and further that the efforts of attorney David B. Timmis and the law firm of Vandever Garzia, P.C. were not only responsible for the eventual increase in the proposed settlement proceeds, but also were responsible for **SULZER ORTHOPEDICS, INC.'s** acceptance of the FINAL NOTICE OF SETTLEMENT (i.e. its failure to opt out).

14. The Common Benefits Fund, as set forth on page 15 of the FINAL NOTICE OF SETTLEMENT OF NATIONWIDE HIP PROSTHESIS AND KNEE PROSTHESIS PRODUCT LIABILITY CLASS ACTION LITIGATION is set at \$50,000,000.00 of which David B. Timmis and the law firm of Vandever Garzia, P.C. are entitled to \$2,500,000.00 (one twentieth of the overall attorney fee) for their efforts, as set forth above.

15. It should further be noted that Class Counsel and/or their designated representatives failed to keep individuals Plaintiffs' counsel advised of significant hearings, developments and/or related information, that was necessary for involvement and full participation in the MDL.

16. In the event that this Honorable Court is of the opinion that additional information is necessary in order for a determination to be made on the request of attorney David B. Timmis and the law firm of Vandever Garzia for a reasonable attorney fee, request is hereby made of this Honorable Court to refrain from the distribution of the Common Benefits Fund until appropriate discovery can be made of the Class Counsel and **SULZER ORTHOPEDICS, INC.**

to determine the full nature and extent of the activities of attorney David B. Timmis and the law firm of Vandever Garzia, P.C., as well as the value of those activities on the final resolution of the MDL.

17. In further support of the request for a reasonable attorney fee by attorney David B. Timmis and the law firm of Vandever Garzia, P.C., it is respectfully submitted that the underlying action that was filed in behalf of their clients. Mr. Thomas and Kathleen Megna, was one of the more significant actions insofar as Mr. Megna, as a 48 year old man at the time of the implant of the Affected Product, which was his second hip implant surgery (obviously increasing the difficulty of the surgery and complicating future surgeries, as only a limited number of hip implant surgeries can be undertaken on an individual), was certainly younger than most, if not all, recipients of Affected Products and therefore damaged in a much more profound fashion.

18. Conservatively, the claim on behalf of the Megnas in Wayne County Circuit Court would have certainly resulted in one of the more significant verdicts on behalf of any recipient of an Affected Product.

WHEREFORE, attorney David B. Timmis and the law firm of Vandever Garzia, P.C., respectfully request that this Honorable Court award an attorney fee of \$2,500,000.00 and/or refrain from the distribution of the Common Benefits Fund pending sufficient discovery from Class Counsel and **SULZER ORTHOPEDICS, INC.**, with regard to issues relating to the efforts of attorney David B. Timmis and the law firm of Vandever Garzia on behalf of the Class and/or that benefited the Class.

VANDEVEER GARZIA, P.C.

By

DAVID B. TIMMIS (P40539)

Attorney for Plaintiff

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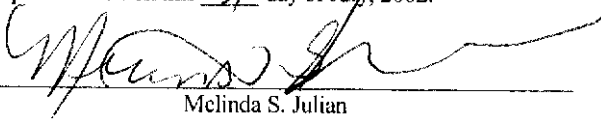
Troy, MI 48098

(248) 312-2800

DATED: July 30, 2002

PROOF OF SERVICE

Melinda S. Julian certifies that a copy of the foregoing instrument was mailed upon the attorney(s) of record of all parties to the above cause by mailing the same to them at their respective business addresses as disclosed by the pleadings of record herein, with postage fully prepaid thereon on this 31 day of July, 2002.



Melinda S. Julian

VANDEVEER GARZIA, P.C.