UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: SULZER HIP PROSTHESIS AND KNEE PROSTHESIS PRODUCTS LIABILITY LITIGATION	Case No. 1:01-CV-9000 (MDL Docket No. 1401) JUDGE KATHLEEN O'MALLEY **RESPONSE TO COURT'S ORDER, DATED JUNE 12, 2003 (Common Benefit Fees for Weitz & Luxenberg, P.C.)**

Glenn Zuckerman, Esq., an attorney at law admitted to practice in the State of New York, affirms the following under the penalties of perjury:

1. I am associated with the law firm of Weitz & Luxenberg, P.C., and as such, I have been managing the Sulzer Implant cases for this firm on a daily basis since the recall was announced in December, 2000. In addition to our caseload, Weitz & Luxenberg has played an integral role in the creation, negotiation and promotion of the current Sulzer Class-Action Settlement. This firm has been appointed by Honorable Helen Freedman as Liaison Counsel for all cases filed in New York State. Additionally, this firm has been appointed as a member of the Special State Court Committee to the Sulzer MDL. On behalf of this firm, I have actively participated in almost every aspect of this litigation and was asked to testify at the Fairness Hearing before Your Honor in May, 2002. I am fully familiar with the facts and representations contained in this response and verify that they are true and accurate to the best of my knowledge.

2. On or about September 12, 2002, I submitted a Notice of Fee Request on behalf of Weitz & Luxenberg, P.C. in which I itemized 1,430.15 hours which this firm contributed to the common benefit in this litigation. In its June 12, 2003 Order, this Court determined that

1,072.61 of these hours were "reasonable" and assigned a reasonable recalculated loadstar to arrive at a figure of $389,253.75. This Court determined that 11 firms, including Weitz & Luxenberg, P.C., were pursuing non-recall cases and in doing so may be engaging in conduct to the detriment of the class. The Court has decided to withhold any common benefit award to these 11 firms and ordered these firms to provide a formal explanation addressing the Court's concerns regarding a possible conflict.

3. Beginning in January, 2001, Weitz & Luxenberg P.C. engaged in an extensive and expensive advertising campaign to alert the public as to the details of the Sulzer recall. As the Court is well aware, back in late 2000 to early 2001 Sulzer regularly adjusted the parameters of the recall to the point where even the surgeons themselves were confused as to precisely which implants were actually recalled, which were suspicious and which were safe. Many hip implant recipients did not even know if they received a Sulzer implant and many Sulzer recipients did not know if their implant was defective or recalled. As a result of our advertising campaign, we investigated over 1500 claims involving recipients of hip implants after 1997. Following our investigation we rejected all non-Sulzer cases and we were left with approximately 354 clients who received a Sulzer implant during the recall period. Of this group, 337 clients received a recalled product and 17 received a Sulzer implant in 1999 or 2000 but these shells were not on the recall list. Of this group of 17, we subsequently rejected 9 and filed suit (prior to the September 2001 stay) on the other 8 cases.

Of these 8 cases, three in particular appeared to be particularly strong. Each of these cases involved late implantations, each had a revision within 18 months due to acetabular loosening with little to no bone growth on the acetabular shell. In fact, two of these plaintiffs received recall letters from their surgeons and we were the ones to tell them and their surgeons

that their implants were not on the recall list.

4. As stated previously, I was actively involved in the negotiation and creation of the terms of the class settlement and, as the single representative of the largest number of class members of any one firm, I made every effort to make the terms of this settlement as favorable as they could be. In the course of my involvement, I contacted class counsel and Sulzer national counsel in an effort to widen the parameters of the lot numbers included in this class. In fact, the parameters were slightly widened just prior to the submission of the settlement agreement to Your Honor for approval in March 2002. In particular, on February 13, 2002, I contacted David Landever, Esq. from Class Counsel via E-Mail with additional details of some of my clients whose lot numbers were not on the current recall list yet experienced the same symptoms - i.e. early loosening and revision within 18 months. (See Exhibit "A", annexed hereto). Shortly thereafter, I had conversations with Eric Kennedy, Esq. and Richard Scruggs, Esq. about this issue and was told that Sulzer will not agree to widen the recall lot numbers any further, that these implants were manufactured completely differently (and supposedly without defect) and that Sulzer has determined that these cases are "defense-able". Nevertheless, in April, 2002, I contacted Richard Scruggs' associate, Sidney Beckstrom, Esq. about the particular details of my few non-recall cases in a last ditch effort to get these cases in under the class settlement. (See, Exhibit "B" annexed hereto). Mr Beckstrom made it quite clear that the lot number(s) "was not and should not have been recalled."

5. Following the responses of class counsel and national defense counsel, it became clear that we could not advance these non-recall cases on the same defect theories used in the class. Having reviewed thousands of discovery documents personally in one of my trips to Cleveland, it is evident that the recalled implants were manufactured at Sulzer's manufacturing

plant in Texas using post-porous coating machining without the passivation process. The documents that I reviewed, the conversations that I had with class counsel and national counsel as well as the testimony at the fairness hearing led me to the conclusion that our non-recall cases were completely different than the recall cases[1]. As a result, I was (and still am) completely comfortable in testifying that the terms of the class are fair reasonable and adequate. Clearly, Sulzer made a last minute business decision to add the re-processed shells into the class and leave the non-recall cases out of the class knowing that they would have to defend those cases after the global settlement was resolved.

6. **It must be stressed that at all times I, on behalf of Weitz & Luxenberg, acted in the best interests of the class and the global settlement and we went to great lengths to balance our duties to our clients individually and to the class as a whole**. In this regard:

- we agreed to refrain from soliciting new non-recalled cases[2];
- we agreed to hold back on the non-recalled cases for an extended period of time to allow the class to succeed and for the defendant to avoid bankruptcy[3];
- we always attempted to resolve the non-recalled cases at class terms or lower.

Clearly, on behalf of Weitz & Luxenberg, I made every effort to maximize the terms and

[1] The recall in some respects was over inclusive in that many implants on the recall list were likely not "defective" and have not failed. However, the implants on the recall list were all manufactured similarly whereas the non-recall implants were manufactured at a different location using different techniques.

[2] We have been contacted by dozens of non-recall recipients and/or their attorneys and have not agreed to work on a single additional case.

[3] In doing so we attempted to facilitate Sulzer's ability to make the required payments under the Global Settlement.

parameters of the class and certainly never knowingly made any misrepresentations to the Court at any time.

7. As a member of the Special State Court Committee, and in working side by side with Class Counsel, Weitz & Luxenberg enhanced the terms of the Global Settlement to the benefit of all class members. We provided data from our case load which was used to create the Extraordinary Fund categories. We achieved service of process on Sulzer AG in Switzerland and reviewed thousands of discovery documents to help build a cases against the Swiss entity which resulted in a significant contribution to the settlement. We negotiated the breakdown of the billion plus dollars and convinced attorneys to waive their fees and costs on the unrevised cases. In representing 337 class members and their spouses,[4] this firm remarkably achieved a 99.4% opt in rate at the opt in/opt out deadline. We worked hard to quickly resolve our two opt-out cases to enable them to opt back in to the settlement to assist Sulzer in reducing their opt-outs to avoid bankruptcy. We strongly promoted the settlement to more than 50 law firms from around the East Coast (including running several conference calls to answer any and all questions) and to the best of my knowledge there was not a single opt-out from any of those firms. We assisted class counsel in contacting attorneys representing opt-out cases to explain the terms of the settlement and why it was the best possible settlement under the circumstances. Throughout this process we have worked tirelessly for the common **benefit** of the entire class.

[4] Other than perhaps the Wiseman firm, Weitz & Luxenberg advanced the most money of any firm on this litigation. While our total contingency fees appear to be high, after referral fees and un-reimbursable expenses (such as advertising, overhead, etc.) are deducted the financial risk in advancing such a large sum, was not justified by the minimal (bottom-line) profits we earned in this litigation.

8. Up until this point we have never been told that there is a potential conflict in representing non-recalled claimants despite the fact that it was well known to national counsel (and class counsel) that we had a few such cases. Had this issue been raised a year ago, it is safe to conclude that some of these clients would have found other counsel and (to the detriment of the class) their cases may have reached trial by now. While we respectfully do not believe that there is a conflict at issue, in order to eliminate any possibility of a perceived conflict we hereby agree to withdraw as counsel on all of our remaining non-recall cases. In this regard, we have contacted our non-recall clients as well as national defense counsel and advised them that due to the Court's Order, dated June 12, 2003, and in order to avoid even the appearance of impropriety, Weitz & Luxenberg cannot proceed on these cases due to a potential conflict of interest.[5] With regards to our three cases filed in New York we are waiting for written responses from our clients authorizes us to stipulate to withdraw their cases without prejudice. We will certainly notify the Court when these responses are received and the Stipulations are filed. Lastly, as the Court may already be aware, J. Graham Hill has already filed a motion to non-suit one of our joint cases (White), filed in Texas.

9. Following the Order, dated June 12, 2003, this firm has not made any efforts to refer these cases to another law firm. We have taken efforts to ensure that the clients rights have been protected to allow them time to find new counsel if they so chose.

[5] I recently contacted David Brooks, Esq. from Shook Hardy & Bacon who surprisingly advised that to his knowledge Weitz & Luxenberg did not have any non-recall cases pending and he did not know why our common-benefit fees were withheld. I informed Mr Brooks that we had several cases (as described above) and we would withdraw as counsel on each. Mr. Brooks seemed completely satisfied with our position and indicated that he would notify the Court.

10. Based on the forgoing, it is hereby respectfully requested that the Court issue an Order awarding Weitz & Luxenberg P.C. a fair common benefit award for its invaluable contributions to the creation, negotiation, division, promotion and success of this class action settlement.

Dated: New York, New York
June 24, 2003

Glenn Zuckerman