

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

)	Civil Action No.: 01-CV-9000
)	(MDL NO. 1401)
IN RE: SULZER HIP PROSTHESIS)	
AND KNEE PROSTHESIS PRODUCT)	JUDGE O'MALLEY
LIABILITY LITIGATION)	
)	THIS DOCUMENT PERTAINS
)	TO ALL CASES
)	

MOTION FOR APPROVAL OF SETTLEMENT WIND UP PROCEDURES

James J. McMonagle, Claims Administrator (“Claims Administrator”) for the Sulzer Settlement Trust (“Trust”), pursuant to Settlement Agreement § 1.1(p), as amended, in *In re Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation*, MDL No. 1401 (“Settlement Agreement”) files this Motion for Approval of Settlement Wind Up Procedures (“Wind Up Procedures”) for the reasons advanced in this Motion and in the accompanying Memorandum in Support of this Motion. Capitalized terms not otherwise defined in this Motion have the meaning given them in the Settlement Agreement.

1. On February 21, 2002, the Court preliminarily approved the Settlement Agreement. *See* Docket Entry 217. After conducting a Fairness Hearing, the Court granted Trial

Court Approval to the Settlement Agreement on May 8, 2002. *See* Docket Entry 340. In the absence of any appeals from that Order, the Settlement Agreement achieved Final Judicial Approval on June 7, 2002. Settlement Agreement § 1.1(jj).

2. Settlement Agreement § 1.1(p) appointed James J. McMonagle Claims Administrator for the Settlement effective on the date of the Court's preliminary approval.

3. Pursuant to Settlement Agreement § 4.6(a) and an Order of this Court, Docket Entry 249, the Claims Administrator adopted Claims Administrator Procedures to aid in implementing the Settlement Agreement.

4. Now, four years after the Settlement was approved, the related Trust has been fully funded, most Claim deadlines have passed, and more than \$1 billion in Settlement benefits have been paid to, or on behalf of, the Settlement Class.

5. Attached as Exhibit A to this Motion is the Claims Administrator's Status Report regarding administration of the Settlement. This report also seeks to identify what Claims may yet be submitted and, based on Claim history to date, attempts to quantify the likely value of those Claims. This Motion also surveys the rights and obligations created by the Settlement Agreement and identifies the extent to which they have been fulfilled.

6. In light of the fact that nearly all present Claims have been resolved, this Motion seeks the Court's approval for procedures for disbursing the balance of the Sulzer Settlement Trust, for creating appropriate reserves for potential future Claims, and for procedures relating to winding up Claims Administration obligations.

Funding of the Sulzer Settlement Trust --Settlement Agreement § 2.5

7. The Released Parties have satisfied all their initial funding obligations, including tendering the Financing Amount (\$425 million less pre-Funding Date administration fees and

costs), the Initial Insurance Proceeds (\$178.5 million), \$50 million in cash from Sulzer AG, the Settlement Shares (\$60.4 million), and the Second Year Insurance Proceeds to the Sulzer Settlement Trust (\$40.2 million).

8. Pursuant to Article 16 (Block Trade Agreement) of the Settlement Agreement, the Settlement Shares were liquidated and their cash value deposited into the Sulzer Settlement Trust.

9. Sulzer elected, pursuant to Annex III of the Settlement Agreement, to pay \$300 million to the Trust in lieu of tendering the Convertible Call Instrument and that deposit was complete on November 4, 2002.

10. Pursuant to Settlement Agreement § 2.2, and by November 8, 2002, the Funds and Sub-Funds of the Trust were funded with at least their minimum, initial amounts:

- a. Medical Research and Monitoring Fund: \$1.0 million.
- b. Unrevised Affected Product Recipient Fund: \$28.0 million.
- c. Affected Product Revision Surgery Fund: \$622.5 million.
- d. Extraordinary Injury Fund: \$100 million.
- e. Professional Services Fund (Subrogation and Uninsured Expenses Sub-Fund): \$60 million.
- f. Professional Services Fund (Plaintiffs' Counsel Sub-Fund): \$184.0 million.

11. Since the Funding Date, the Claims Administrator has demanded, pursuant to applicable Court orders, Settlement Agreement § 2.5 and CAP's 22 and 31, payment by Sulzer of additional funds of \$74,005,605.03. All those payment requests have been honored.

12. New reimbursement requests, pursuant to Settlement Agreement § 2.5, associated with the small number of pending EIF Claims and certain Uninsured APR medical expenses, are likely in the coming months.

Medical Research and Monitoring Fund – Settlement Agreement § 3.1

13. Settlement Agreement § 3.1 provides that the Medical Research and Monitoring Fund “shall be used to finance medical research relating to reconstructive orthopedic implants, specifically hip and knee implants, for the benefit of Class Members as set forth on the proposal” described in Annex III to the Settlement Agreement.

14. Settlement Agreement § 3.1 also provides for the creation of a “registry” of Class Members for “the purpose of collection of information and data in order to monitor the medical condition of such Class Members.”

15. The Court has approved research grants, Docket Entries 2948 and 3185, consistent with Settlement Agreement § 3.1 and Annex III for a total of \$1,000,419.00 with \$550,000.00 remaining to be paid from the Trust.

16. Each research grant requires the grant recipients to make regular reports of their work to the Claims Administrator and the Court.

17. Therefore, the purposes of the Medical Research and Monitoring Fund having been fulfilled, the Claims Administrator recommends creating a reserve of \$550,000 to pay the remaining obligations of the Trust with respect to the Court approved research grants.

Unrevised APR Claims – Settlement Agreement § 3.3

18. The deadline for a timely Unrevised APR Claim (Blue Form) was September 5, 2002. All of those Claims have now been finalized and none are pending.

19. The Claims Administrator has directed a total of approximately \$2.9 million in Unrevised APR Fund payments.

20. Given that there are no pending Unrevised APR Claims, the Claims Administrator does not recommend creating a reserve for present Unrevised APR Claims.

21. Given the relatively small value of Unrevised APR awards and the time that has passed since the deadline for making Unrevised APR Claims, the Claims Administrator does not recommend creating a reserve for future Unrevised APR Claims.

APRS Claims -- Settlement Agreement § 3.4

22. The deadline for a timely APRS Claim (Orange Form) was different depending on when the APRS occurred and what Affected Product type was revised. Nevertheless, the last possible deadline prescribed in the Settlement Agreement for making a compensable APRS Claim, regardless of product type or APRS date, has passed.

23. The last possible APRS Claims were due to be filed December 2, 2003, May 15, 2004, and March 7, 2005 for Inter-Op Shells, Tibial Baseplates, and Reprocessed Shells, respectively.

24. The Claims Administrator has directed payment of a total of approximately \$695.9 million in APRS Fund payments.

25. There are presently three APRS Claims pending that have not been finalized. The Claims Administrator anticipates that these will be finalized, pursuant to the administration procedures required by Settlement Agreement § 4.6, by the end of 2006.

26. Pursuant to Settlement Agreement § 2.5(d), Sulzer is responsible for reimbursing to the Trust 50% of the value of APRS Claims related to Inter-Op Shells or Tibial Baseplates after the first 4,000 such Claims have been paid. Because there have been more than 4,000 such

Claims, 50% of any new APRS Claims related to Inter-Op Shells or Tibial Baseplates that were determined to be timely and valid would ultimately be paid by Sulzer.

27. Pursuant to Settlement Agreement § 2.5(e), Sulzer is responsible for reimbursing to the Trust 100% of the value of APRS Claims related to Reprocessed Shells after the first 64 such Claims have been paid. Because there have been more than 64 such Claims, 100% of any new APRS Claims related to Inter-Op Shells or Tibial Baseplates that were determined to be timely and valid would ultimately be paid by Sulzer.

28. The Claims Administrator recommends creating a reserve of \$600,000 for payment of the three pending APRS Claims in the event those Claims are compensable.

29. Since a late Claim may, pursuant to applicable rules of Civil Procedure and CAP 29, be cognizable, the Claims Administrator recommends reserving \$1.0 million for possible future APRS Claims and associated attorney fee subsidies pursuant to Settlement Agreement § 3.4. Given the reimbursement requirements of Settlement Agreement § 2.5, that reserve would be sufficient to pay ten APRS Claims.

Extraordinary Injury Fund Claims – Settlement Agreement § 3.7

30. The deadlines for making EIF Claims (Green Form) have nearly all passed.

31. May 30, 2006 was the last possible date for Class Members to submit a compensable EIF Claim related to an Inter-Op Shell.

32. The last possible date for a Tibial Baseplate-related EIF Claim will be on November 13, 2006.

33. The last possible date for a Reprocessed Shell-related EIF Claim will be on September 4, 2007.

34. CAP 13, permitting Class Members to relate certain newly advanced Claims back to their Green Form's submission date, had the consequence of extending some Claim deadlines. However, as Claims are finalized, the deadline extending effects of CAP 13 cease. Of the 6,637 EIF Claims submitted, less than 100 from less than 30 different Claimants, remain to be finalized.

35. The Claims Administrator has directed payment of approximately \$106.1 million in EIF payments.

36. While it is technically true that Class Members may submit Tibial Baseplate-related Claims as late as November 13, 2006 or Reprocessed Shell-related Claims as late as September 4, 2007, neither eventuality is likely. For either of those deadlines to be applicable to a given Class Member, a Claimant would have to (i) undergo an APRS on the last possible date permitted by the Settlement Agreement, (ii) subsequently undergo NAPRS and ANAPRS on the last possible dates permitted by the Settlement Agreement, and (iii) wait until the last possible date to submit their Claims.

37. The Claims Administrator's records do not reflect that any Tibial Baseplate or Reprocessed Shell Class Members underwent a NAPRS on the last possible day permitted by the Settlement Agreement.

38. The Claims Administrator's experience in the Settlement has been that eligible Claimants typically submit Claims for benefits within approximately 90 days of the accrual of their right to make a Claim.

39. Over the past month, the Claims Administrator has received no new Green Forms advancing timely EIF Claims. Over the past three months, the Claims Administrator has

received only one new Green Form advancing a new EIF Claim. Over the past six months, the Claims Administrator has received a total of only two such Green Forms.

40. Having reviewed the pending EIF Claims, the Claims Administrator recommends creating a reserve of \$3 million to pay currently pending EIF Claims and any associated attorney fee subsidies.

41. Because (i) the Claim deadlines for EIF Claims have, in some instances, relatively recently passed, *see* Exhibit A (Status Report), Tab 4 (Landmark Settlement Dates) and (ii) the values of EIF Claims are relatively variable given the range of compensable injuries payable from the EIF, the Claims Administrator recommends creating a reserve of \$2 million to pay potential future EIF Claims and any associated attorney fee subsidies.

Uninsured APRS Claims – Settlement Agreement § 3.9(a)

42. The deadlines for making Uninsured APRS Claims (Red Form), pursuant to Settlement Agreement § 3.9(a), with a timely submitted Red Form, Settlement Agreement § 4.5, were the same as those for their associated APRS Claims. As discussed above, those deadlines have now passed.

43. On August 29, 2006, pursuant to Settlement Agreement § 3.9(a), the Claims Administrator demanded reimbursement of \$582,520.06 from Sulzer for Uninsured APRS medical expenses that exceeded \$15,000 per APRS. Payment of that amount is pending.

44. The Claims Administrator has completed review of all the submitted Red Form Uninsured APR Claims. Fewer than thirty of these Claims await final payment from the Trust pending confirmation from Sulzer of its payment of its § 3.9(a) reimbursement.

45. Because all submitted Uninsured APRS Claims have been finalized, the deadlines for making Uninsured APRS Claims have long passed, and no new Uninsured APRS Claims

have been submitted in more than a year, the Claims Administrator does not recommend creating a reserve for Uninsured APRS Claims.

Indemnification of Medical Expense Subrogation Claims – Settlement Agreement § 3.9(c)

46. The Trust also indemnifies, pursuant to Settlement Agreement § 3.9(c), Class Members and Plaintiffs' Counsel from "claims by a subrogee directly against such Class Member[s] or Plaintiffs' Counsel for reimbursement of medical expenses of an Affected Product Recipient necessitated by an Affected Product."

47. To date, the Claims Administrator's office has received 4,465 claims for indemnification from the Subrogation and Uninsured APR Sub-Fund for medical expense liens or claims of reimbursement. Of those claims, fewer than 300 remain to be negotiated or resolved by final denial.¹

48. Although the Settlement Agreement contains no deadline for submission of these claims, the Claims Administrator has, pursuant to Settlement Agreement § 4.6(a)(permitting the Claims Administrator to set and notify Class Members of deadlines and to disallow claims received after applicable deadlines), reviewed indemnification claims as Class Members have submitted them and, in the course of paying some and disallowing others, advised claimants of the final disallowance of certain claims.

49. To ensure the Trust's liability for indemnification claims is as clearly described as is practicable, the Claims Administrator recommends that:

- a. No indemnification claim already resolved by the Claims Administrator and not timely contested pursuant to the Claims Administrator's determination notice may be paid by the Trust.

¹ The large majority of these pending claims are potential claims for reimbursement by the United States for Tibial Baseplate-related APRS's. The Claims Administrator's negotiations with the United States in this regard are proceeding apace and the Claims Administrator anticipates they will be concluded by the end of 2006.

- b. Class Members must submit any indemnification claim not already presented to the Claims Administrator within 180 days of receiving notice of the claim and, in any event, no later than June 7, 2012.

50. The Claims Administrator estimates that pending indemnification claims already submitted have an outside liability of approximately \$3.7 million and therefore recommends creating a reserve in that amount.

51. Because (i) new indemnification claims must, to be compensable, be subrogation claims (i.e., causally linked to allegedly tortious conduct resolved by the Settlement Agreement), and because with the passage of time, (ii) Class Members' new medical expenses are increasingly less likely to be related to their Affected Products, (iii) relatively few new Class Members reported medical complications occurring many years after they were implanted with Affected Products, and (iv) Sulzer and the Claims Administrator have already negotiated and paid past and future Third Party Payor indemnification claims from a large number of major insurance companies, the Claims Administrator recommends creating a reserve of \$1 million for future indemnification claims.

52. The Claims Administrator has been advised that some Third Party Payors may seek additional payments, ordered by the Court, from the Subrogation and Uninsured APR Sub-Fund. The Claims Administrator requests that:

- a. The Court enter an order directing that this request for additional payments be submitted to the Court for consideration no later than October 31, 2006.
- b. That a reserve of \$2 million be created for payment of any such additional payments.

Errors and Omissions Insurance – Settlement Agreement § 4.6(g)

53. Settlement Agreement § 4.6(g) permits the Claims Administrator to obtain appropriate insurance. The Claims Administrator has had errors and omissions insurance in force continuously since August of 2002 with annual premiums of approximately \$45,000.

54. That insurance, the proceeds of which, if ever called upon, would operate to protect the interests of both the Claims Administrator and the Settlement Class.

55. The Claims Administrator recommends that a reserve of \$400,000 be created to pay for errors and omissions insurance for the next five years plus a tail, extended reporting policy of up to three years.

Escheat and Uncollected Claims – Settlement Agreement, Article 4

56. The Claims Administrator has worked over the past year to identify any uncashed Settlement benefit checks and to contact the payees for those checks.

57. There remain approximately \$250,000 in Settlement benefit checks that have not been cashed.

58. The Claims Administrator recommends creating a reserve in the amount of \$250,000 to pay, as appropriate, uncollected Claims.

Final Report to Court – Trust Agreement § 5.03

59. The Trust Agreement provides that “The Trust shall terminate as soon as practicable after the Trustee’s obligation to disburse funds pursuant to this Trust Agreement and the Settlement Agreement has been satisfied. The Trustee shall cooperate with the Claims Administrator in the termination of the Trust and winding up its affairs and the distribution of any remaining assets of the Trust as provided in the Settlement Agreement or at the direction of the Court.” Trust Agreement, § 5.03.

60. Accompanying this Motion is a report summarizing the status of the Trust's payments and processing functions. The Claims Administrator recommends that an updated version of this report be submitted to the Court on or about the first day of November each year beginning in 2007 until 2012, or until such time as the Court enters an order that the Trust may be terminated.

Common Benefit Fees and Expenses Fund -- Settlement Agreement § 5.4

61. Of the \$50 million and \$7.5 million the Settlement Agreement initially allocated as permissible, but not required, Common Benefit Attorney fees and expenses, respectively. There remains unawarded \$6,505,056.25 in potential Common Benefit attorney fees and \$3,572,468.87 in potential Common Benefit expenses.

62. The Claims Administrator is advised that there may be several law firms that wish to submit an application to the Court for an award of Common Benefit fees or expenses for work performed or expenses incurred since the Court's award of Common Benefit fees and expenses in 2003. *See* Docket Numbers 674, 738, 753, 868.

63. So that the amount of any 2006 distribution of Trust assets to Class Members might be maximized, the Claims Administrator recommends that the Court order any such applications be submitted for review by the Court by November 15, 2006 and that, pending ruling on those applications, a Common Benefit fee reserve of \$6,505,056.25 and a Common Benefit expense reserve of \$3,572,468.87 be maintained.

Document Storage and Retention Order -- Settlement Agreement § 15.1

64. The Claims Administrator's office has compiled many thousands of documents related to Class Members' Claims as well as a database containing Class Member Claim information.

65. BrownGreer PLC and Cullen D. Seltzer, Attorney at Law PLC have also compiled a large number of documents that include legal advice provided to the Claims Administrator.

66. Both types of documents have been electronically scanned and are presently stored at either law firm's offices or, in some instances, both.

67. The Claims Administrator recommends that:

- a. Both BrownGreer PLC and Cullen D. Seltzer, Attorney at Law PLC be ordered to retain electronic versions of all Settlement related documents and databases, in either removable media (DVD or its equivalent with a back-up for retention and storage in Cleveland) or on appropriately backed-up servers until December 31, 2019 in a manner that preserves Class Member confidentiality as required by Settlement Agreement § 15.1.
- b. Paper records maintained by the Claims Administrator or his agents or designees be destroyed in a manner that preserves Class Member confidentiality as required by Settlement Agreement § 15.1 and that a reserve of \$7,500 be created for that purpose.
- c. Upon a written request by Sulzer certifying that such documents are necessary, in connection with some threatened or actual litigation with a Class Member, to enforce the terms of the Settlement Agreement, the Claims Administrator be authorized to provide to Sulzer copies of the Class Member's Claim Forms and the Class Member's payment history from the Trust, provided that the Claims Administrator shall not release any Class Member's medical records or other Claim processing documents except by order of the Court.

Opt-Outs – Settlement Agreement § 3.8

68. The deadline for opting out of the Settlement was no later than May 15, 2002 (five days after Trial Court Approval). Having already reported all Opt-Outs to the Parties as required by the Settlement Agreement § 3.8, the Claims Administrator has no further obligation with respect to Opt-Outs.

Attorney Fee Subsidies – Settlement Agreement § 5.1

69. The Attorney Fee subsidies that accrue to Class Members, other than Common Benefit attorney fees or expenses as discussed above, have been disbursed as required along with their associated APRS and EIF benefits. Therefore, the only remaining Claims for Attorney Fee benefits to be processed are those associated with the pending APRS and EIF Claims described above.

70. In addition to those Claims, one Class Member's attorney continues to make regular installment payments of an outstanding reimbursement due to the Trust.

Guaranteed Payment Option – Settlement Agreement, Article 8

71. Class Members who submitted valid Orange Forms seeking APRS benefits within 120 days of Trial Court Approval, in 2002, were entitled to a quick Guaranteed Payment Option payment of \$40,000 pending the Funding Date. The Claims Administrator directed the first \$40,000 GPO payments in August of 2002.

72. The Funding Date, which was November 4, 2002, required Sulzer's payment of the substantial remainder of the Trust's initial endowment, also triggered the Trust's payment to Class Members of nearly all their APRS benefits.

73. Beginning in December of 2002, the Trust began making \$130,000 payments to Class Members with respect to their APRS Claims and ceased making preliminary \$40,000 GPO

payments for those same Claims. The GPO program was, therefore, complete by the beginning of 2003, when the last GPO-electing Orange Forms were ripe for GPO payment. The Trust's GPO payment obligations are complete.

**Sulzer's and the Class Representatives' Rights to Terminate the Settlement Agreement—
Settlement Agreement, Article 10**

74. The Settlement Agreement, and subsequent order of the Court, vested in Sulzer and Class Representatives the right to unilaterally terminate the Settlement Agreement under circumstances which, in any event, expired on or before May 31, 2002. No Parties elected to terminate the Settlement Agreement and the parties' rights to terminate the Settlement Agreement have been extinguished.

Settlement Implementation – Settlement Agreement, Article 13

75. All the provisions of Article 13 of the Settlement Agreement requiring the Court to make certain findings and enter certain orders staying and dismissing certain pending lawsuits and approving the Settlement Agreement have been fulfilled.

76. The Court retains jurisdiction to enforce the Settlement Agreement as it relates to pending litigation involving Sulzer or Class Members or to such future litigation as well as to enforce the Settlement Agreement. Settlement Agreement § 9.1.

Confidentiality of Class Member Information --Settlement Agreement § 15.1

77. In the event the Court determines it is appropriate for the Trust to engage an escrow agent or insurance plan to aid in certain wind up activity, the Claims Administrator recommends that any such entity be ordered to adhere to the confidentiality provisions of the Settlement Agreement.

Reserve for Future Administration Expenses – Settlement Agreement § 15.6

78. The last possible deadline for making an Inter-Op Shell-based Claim for Settlement benefits has passed.

79. The last possible deadline for making a Tibial Baseplate-based Claim for Settlement benefits will pass on November 13, 2006.

80. The last possible deadline for making a Reprocessed Shell-based Claim for Settlement benefits will pass on September 4, 2007.

81. Some late Claims may be cognizable pursuant to applicable rules of procedure and principles of law.

82. Certain Claims for benefits from the Subrogation and Uninsured APR Sub-Fund of the Professional Services Fund may be made, pursuant to the recommendation in this motion, as late as June 7, 2012.

83. Settlement Agreement § 15.6 provides that before any distribution of the remaining assets of the Trust shall be made, “the Claims Administrator shall first use any amounts remaining in any particular Fund after satisfaction of all obligations to Class Members to either pay for or create a reserve for payment of all administrative expenses that have been or will be incurred in connection with the winding-up of the administration of the Sulzer Settlement Trust.”

84. The Claims Administrator recommends that:

- a. A reserve in the amount of \$1.5 million be created for the payment of administrative expenses until December 31, 2012.
- b. The Claims Administrator be directed to contract with appropriate administration and/or insurance providers, for administration and wind up services for those

services until December 31, 2012, \$360,000 of which fees shall be allocated to the Claims Administrator for his availability and services for that period.

- c. The Trust make payments from this reserve in calendar year 2006 to avail itself to the maximum extent permissible of tax savings for the Trust in 2006.

Trust's Tax Liabilities

85. The Trust has a still unpaid, but likely, 2006 federal tax liability of \$450,000.

86. Although there is no pending assertion by any taxing authority that the Trust has an outstanding past tax liability, in the event the Trust has a future assessment for taxes on income earned before 2007, the Claims Administrator recommends creating a reserve of \$300,000 for potential past tax assessments.

87. The Claims Administrator recommends creating a reserve of \$750,000 for current and future tax liabilities.

Liens on Class Member Settlement Benefits

88. There remains \$165,769 in non-medical expense liens asserted against Class Member Settlement benefits. The Claims Administrator continues to work with the lien filers and Class Members in these Claims to resolve an appropriate method for disbursing these Settlement benefits.

89. The Claims Administrator recommends creating a reserve of \$165,769 for disbursement of non-medical liens.

Distribution of Remaining Trust Assets – Settlement Agreement §§ 5.2 and 15.6

90. Presently the Sulzer Settlement Trust retains approximately \$59.42 million in assets.

91. Taking into consideration the present and likely future obligations of the Trust described in this Motion, the Claims Administrator estimates that approximately \$33.9 million may be distributed to Class Members pursuant to an Order of the Court.

92. Two provisions of the Settlement Agreement describe what should happen with any residue of the Settlement Trust.

93. Settlement Agreement § 5.2 provides that “[i]n the event there are any amounts in the Plaintiffs’ Counsel Sub-Fund after all applicable amounts have been paid to Plaintiffs’ Counsel, such remaining amount shall be distributed *pro rata* among all Class Members who received [APRS or EIF] benefits.”

94. The initial funding for the Plaintiffs’ Counsel Sub-Fund was exhausted during Claim Processing, owing to greater than expected Claim submissions, but was supplemented with transfers from the Unrevised APR Fund as necessary to pay well-founded Claims.

95. In addition, Settlement Agreement § 15.6 provides that Class Counsel, together with the Special State Counsel Committee shall make a determination, subject to the approval of the Court, with respect to the disposition of any amounts remaining in any particular Fund upon satisfaction in full of all obligations to pay Class Members and Plaintiffs’ Counsel pursuant to the Settlement Agreement.

96. Class Counsel and the Special State Counsel Committee join in the Claims Administrator’s recommendation for *pro rata* distribution described in this Motion.

97. Among the permissible determinations, the § 15.6 specifically permits, but does not require, a *pro rata* distribution or a donation to a medical research institute or university or to charity “if the amount is negligible.”

98. The Claims Administrator recommends that the Court order that:

- a. No later than December 31, 2006, the Claims Administrator create the reserves prescribed in this Motion (“Reserves”), provided, in the event that circumstances between the time of this Motion and December 31, 2006, permit a reasonable conclusion that the Reserves may be reduced, then the Claims Administrator may so reduce them, further provided that the Reserves shall, in total, be at least \$10 million unless further reduced by Order of the Court;
- b. No later than December 31, 2006, the Claims Administrator send a *pro rata* distribution of the balance of the Sulzer Settlement Trust, less the Reserves, (“Total *Pro Rata* Distribution Amount”) to Class Members as described below:
 - i. Class Members eligible for the *pro rata* distribution (“Eligible Participants”) shall include APR’s or Representative Claimants who were awarded APRS or EIF benefits on or before November 30, 2006.
 - ii. Each Eligible Participant’s share of the *pro rata* distribution shall be a function of two calculations.
 1. The first calculation is to determine the Eligible Participant’s proportional share (“Proportional Share”) of the *pro rata* distribution which shall be equivalent to the sum of the Eligible Participant’s APRS and EIF benefits (excluding any attorney fee subsidy paid pursuant to Article V of the Settlement Agreement) divided by the total amount of APRS and EIF benefits awarded to APRs and Representative Claimants on or before November 30, 2006.

2. The second calculation is to determine the Eligible Participant's *pro rata* distribution amount ("Individual Distribution Amount") which shall be equal to the Eligible Participant's Proportional Share multiplied by the Total *Pro Rata* Distribution Amount.
- iii. To the extent practicable, there shall be only one *pro rata* distribution before the termination of the Trust.
- iv. Checks for Individual *Pro Rata* Distributions shall be made payable, if a Class Member is represented by Plaintiff's Counsel, to Class Members and Plaintiffs' Counsel, jointly as provided in CAP 3.
- v. The Claims Administrator shall enclose with each Individual *Pro Rata* Distribution a notice bearing the following text:

NOTICE: The Sulzer Settlement Trust is pleased to send you the enclosed check. This check is your share of the excess funds in the Sulzer Settlement Trust which amount is in addition to the Settlement benefits you were previously awarded and paid. It is your *Individual Pro Rata* distribution from the residue of the Sulzer Settlement Trust. Some Settlement benefits included a subsidy of a Class Member's attorney fee owed to his or her Plaintiff's Counsel. This Individual *Pro Rata* Distribution of the residual funds does not include such a subsidy. While Plaintiff's Counsel may collect a fee on this payment pursuant to their pre-existing contingency fee contracts, Counsel are encouraged to consider foregoing or reducing their fee. The Court directs Plaintiff's Counsel to include a copy of this Notice with the settlement distribution to Class Members along with a clear explanation as to the amount, if any, of attorney's fees paid from this Individual *Pro Rata* Distribution.

- vi. Individual *Pro Rata* Distributions shall be paid, for ease of administration purposes, from the Extraordinary Injury Fund without regard to whether any Eligible Participant received Extraordinary Injury Fund benefits.

- vii. The Claims Administrator is authorized to direct the Trustee to transfer funds from other funds of the Trust to ensure the EIF has sufficient funds to pay the Total *Pro Rata* Distribution Amount.
- viii. Settlement Agreement § 2.5, providing for certain reimbursements by Sulzer, shall not be construed to require Sulzer to reimburse the Trust for any portion of any Individual *Pro Rata* Distributions.
- ix. The Claims Administrator shall preserve a record of the proportional increase in benefits that Eligible Participants receive as a result of this *pro rata* distribution.
 - 1. Any APR or Representative Claimant who, after November 30, 2006, is awarded an APRS or EIF Settlement benefit which award would have counted toward his or her Proportional Share if awarded on or before November 30, 2006, shall be awarded Settlement benefits in accordance with applicable provisions of the Settlement Agreement and CAP's and, in addition, the proportional increase described in this section of this Motion.
 - 2. To the extent any new Settlement award includes a proportional increase, as described herein, Sulzer's reimbursement obligations pursuant to Settlement Agreement § 2.5 shall not include any such proportional increase.
- c. On or about the first day of November of each year, beginning in 2007 and until 2012, the Claims Administrator shall report to the Court the status of Claims against the Trust and the cumulative amount of assets in the Trust with the

expectation that each year some portion of the Reserves might be ordered by the Court to be contributed to an eleemosynary institution upon the recommendation of the Claims Administrator, Class Counsel, and the Special State Counsel Committee.

- d. The Claims Administrator shall direct the Trustee to transfer funds from one fund of the Trust to another fund as necessary to pay present and future obligations of the Trust without further requirement that an Order from the Court be obtained, provided that the Claims Administrator shall provide notice of such transfers to the Court and Class Counsel.

Therefore, and for the reasons advanced in the accompanying Memorandum in Support of this Motion, the Claims Administrator respectfully moves for approval of the Wind Up Procedures described herein and an Order of the Court directing the Parties and the Claims Administrator to implement these procedures.

Respectfully submitted,

JAMES J. McMONAGLE, CLAIMS ADMINISTRATOR

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CERTIFICATE OF SERVICE

I certify that on this 28th day of September 2006, I did cause to be filed a copy of this motion and accompanying memorandum in support, electronically through the Court's electronic filing system which will notify all other parties of this filing.

/s Cullen D. Seltzer

Cullen D. Seltzer

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