

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**IN RE: SULZER HIP PROSTHESIS
AND KNEE PROSTHESIS PRODUCT
LIABILITY LITIGATION**

) **Civil Action No.: 01-CV-9000**
) **(MDL NO. 1401)**
)
) **JUDGE O'MALLEY**
)
) **THIS DOCUMENT PERTAINS**
) **TO ALL CASES**
)

MOTION TO PERMIT SUPPLEMENTAL DISTRIBUTION
FROM THE SULZER SETTLEMENT TRUST

The Claims Administrator hereby moves for an Order of the Court permitting a supplemental distribution from the Sulzer Settlement Trust.¹ In support of this Motion, the Claims Administrator states:

1. Pursuant to this Court's Orders of October 20, 2006, ("Wind Up Order"), December 3, 2007 ("Second Pro Rata Order"), and Settlement Agreement §§ 5.2 and 15.6, the Claims Administrator previously awarded certain Class Members

¹ Capitalized terms not otherwise defined in this Motion have the meaning given them in the Settlement Agreement in *In re Sulzer Hip Prosthesis and Knee Prosthesis Product Liability Litigation*, MDL No. 1401.

additional *pro rata* benefits from the portion (“Disbursable Amount”) of the Sulzer Settlement Trust that was not required to satisfy claims for Settlement benefits or claims for Settlement benefits that the Claims Administrator reasonably anticipated might be necessary in the future.

2. The Claims Administrator has reasonably estimated that of the approximately \$6.6 million dollars remaining in the Sulzer Settlement Trust, approximately \$4.2 million dollars are required to satisfy current and anticipated obligations of the Trust.
3. Accordingly, approximately \$2.4 million dollars of the Sulzer Settlement Trust exists as a Disbursable Amount. The Claims Administrator anticipates that in the coming months and years, before the Sulzer Settlement Trust is slated to close on December 31, 2012, additional Disbursable Amounts may be identified as the need for reserves against certain contingencies ends.
4. Much of the Settlement Class is elderly. More than six years has passed since the Court approved the Settlement Agreement and the first payments from the Settlement were disbursed. Many Class Members have passed away. Many others, and many Plaintiffs’ Counsel, have moved without a forwarding address to the Claims Administrator.
5. The Claims Administrator has determined it advisable to disburse the relatively small remainder of the Trust (compared to its initial *corpus* of approximately \$1.040 billion dollars) as soon as practicable, to the Class Members who can be readily identified.

6. Distribution of the currently available Disbursable Amount to all Class Members who were awarded Settlement benefits, would result in considerable expense in transactional costs to the Trust and in the large majority of instances, *de minimis* payments to most Class Members. For example, a *pro rata* distribution of \$2.4 million to approximately 4,205 APRS and EIF Claimants would result in a median distribution of \$480.25. The Court's previous orders for *pro rata* distributions permitted attorney fees of up to 25% which would reduce the median award to \$336.18. Claimants who are deceased or incompetent may have to open, or in some cases, re-open, estates or guardianships, fees for which could quickly reduce the distribution amount to nothing.
7. Targeting, however, the most injured Class Members, as reflected in their already submitted Claim submissions, would permit more significant awards to the most injured Class Members. The transactional costs of a fair review of potential Claims in a more targeted process would be substantially offset by the reduced transactional costs of a very broad *pro rata* distribution. A broad *pro rata* distribution would require substantial mailing, printing, call center, follow up, and estate coordination expenses, by and among the Claims Administrator, Class Members, and Plaintiffs' Counsel.
8. Targeted, discretionary awards of a portion of the Trust's residue are consistent with the Settlement Agreement's original plans for distributing a portion of the Sulzer Settlement Trust. *See* Settlement Agreement, Annex IV, Hip Matrix and Knee Matrix Level IX (Discretionary)("The Claims Administrator, at his/her

discretion, may award EIF benefits to a Class Member under this Matrix Level IX.”).

9. The Claims Administrator requests that the Court order that the Claims Administrator disburse any Disbursable Amounts in the Trust pursuant to the following protocol:
 - a. From time to time, as the Claims Administrator determines circumstances permit, the Claims Administrator shall identify a Disbursable Amount.
 - b. The Claims Administrator shall disburse any Disbursable Amount to Class Members who, in the Claims Administrator's discretion, were those most significantly injured. In making that determination, the Claims Administrator shall identify EIF recipients who, as reflected in their previous Claim submissions, were among the most seriously injured (“Supplemental Distribution Participants”). To these Supplemental Distribution Participants, the Claims Administrator shall disburse the Disbursable Amount, less any reserve for Targeted Awards described in Section (c) of this Paragraph, *pro rata* in proportion to the Supplemental Distribution Participants’ previous Settlement awards.
 - c. From each disbursal of available residue, the Claims Administrator may reserve up to a third of the Disbursable Amount, or \$1 million, whichever is smaller, for targeted awards (“Targeted Awards”) to Class Members who, in the Claims Administrator's discretion, present circumstances and injuries of a compelling need. Such Targeted Awards from the Disbursable Amount shall be in addition to any *pro rata* award to Supplemental Distribution

Participants. In making a Targeted Award, the Claims Administrator shall confine his evaluation to the record already submitted by Claimants in connection with their prior Claims for Settlement benefits. Class Members may make no new Claim submission in connection with a *pro rata* distribution or Targeted Award.

- d. No Class Member shall be entitled, pursuant to the Settlement Agreement or this protocol, to any award or benefit except such awards made by the Claims Administrator in his sole discretion. *Pro rata* and Targeted Awards may not be contested or appealed. Only Class Members who have been awarded, and who have cashed checks related to, previous *pro rata* awards may be eligible for payments pursuant to this protocol. Any check issued pursuant to this protocol must be cashed within 180 days of issuance or the sum shall revert to the Sulzer Settlement Trust.
- e. No Plaintiff's Counsel may collect more than 25% of any distribution made pursuant to this protocol.
- f. The Claims Administrator may distribute Disbursable Amounts from the residue of the Sulzer Settlement Trust pursuant to this protocol as he determines to be appropriate and advisable without further order of the Court.
- g. If the Claims Administrator mails a check to a Class Member or a Class Member's Plaintiff's Counsel, and the check is returned to the Claims Administrator as undeliverable, the Claims Administrator shall not reissue or re-mail that check unless notified within 180 days of the check's issuance of a valid address to which to send a reissued check.

- h. The Claims Administrator shall not undertake efforts to find Class Members or their attorneys whose mail is returned as undeliverable by the U.S. Postal Service except to confirm that the check was sent to the last known address contained in the Claims Administrator's records.
- i. The Claims Administrator shall endeavor to limit costs and fees expended in implementation of this protocol and shall not incur fees and expenses in excess of \$200,000 without further order of the Court.

10. Class Counsel has no objection to this proposal.

For these reasons and for the reasons set forth in the attached Memorandum in Support of Motion to Permit Supplemental Distribution from the Sulzer Settlement Trust, the Claims Administrator respectfully requests that the Court enter an order as described herein.

Respectfully submitted

JAMES J. McMONAGLE,
CLAIMS ADMINISTRATOR

By counsel

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I certify that on December 17, 2008, I did cause to be filed a copy of this Motion for Order electronically through the Court's electronic filing system which will notify all other parties of this filing.

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