

**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
)	

MEMORANDUM IN SUPPORT OF
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 Memorandum in Support of the accompanying Motion for Approval of Settlement Wind Up Procedures.

Since the Court approved the Settlement Agreement in 2002, the Claims Administrator has received and reviewed more than 19,000 Claims from more than 11,000 Claimants. As a

result of those reviews, the Claims Administrator has disbursed more than \$1.02 billion in Class Member benefits. Approximately \$6.6 million dollars remain in the Sulzer Settlement Trust.

All of the deadlines applicable to Class Members to submit a Claim for Settlement benefits have passed and nearly all the pending Claims for Settlement benefits have been finalized and resolved.

Settlement Agreement § 9.1 vests the Court with exclusive and continuing jurisdiction over the Settlement Agreement and its implementation. Settlement Agreement §§ 5.2 and 15.6 prescribe means by which the residue of the Sulzer Settlement Trust may be disbursed. Upon satisfaction of the rights and responsibilities prescribed by the Settlement Agreement, the Court may order termination of the Sulzer Settlement Trust. Trust Agreement § 5.03.

On October 20, 2006, the Court entered an order regarding certain wind up functions of the Sulzer Settlement Trust. That Order approved, among other things, a *pro rata* distribution to qualifying Class Members of approximately \$46.7 million dollars. The following year, on December 3, 2007, the Court approved a second *pro rata* distribution to qualifying Class Members of an additional \$6 million dollars.

The Claims Administrator estimates that of the remaining \$6.6 million dollars in the Trust, approximately \$2.4 million may be disbursed as there is no present or anticipated need for that sum to satisfy Claims against the Trust. A broad based *pro rata* distribution of that sum to Class Members would likely be cost prohibitive for a variety of reasons. First, many Class Members and Plaintiffs' Counsel have moved away, and some Class Members have passed away. Distributing benefits to missing, incompetent, or deceased Claimants, or their estates, is difficult, a difficulty exacerbated when the median distribution is very small. If the Claims Administrator were to distribute \$2.4 million to 4,205 APRS and EIF Claimants, the median

distribution would be \$480.25. That amount would be further reduced by Plaintiffs' Counsel attorney fees (permitted up to 25% in previous *pro rata* distributions).

Consequently, for the reasons described in the Motion to Permit Supplemental Distribution for the Sulzer Settlement Trust, the Claims Administrator proposes to more narrowly focus the distribution of the remaining corpus of the Trust that is not reserved for payment of present and anticipated claims. Such narrowing, by making awards to Claimants who, in the Claims Administrator's discretion, appear to have particularly compelling circumstances would result in more significant awards to the most injured Class Members. In addition, administering these awards to a smaller Class Member group would have the tendency to mitigate the cost of the supplemental distribution. By distributing some of the amount eligible for distribution *pro rata* to qualifying Class Members, and my targeting individual awards to others, the process is intended to simultaneously treat broadly similarly situated Class Members similarly and permit some individualized consideration of other Class Members. The process is weighted to assure that any distribution will be weighted 2/3 to 1/3 in favor of a *pro rata* distribution to qualifying Claimants.

The remaining \$6 million in the Trust, and the \$2.4 million now amenable to distribution, represent approximately 0.2%-0.6% of the original *corpus* of the Trust. Distribution of this relatively small proportion in accordance with the Claims Administrator's discretion is consistent with the structure of the Settlement Agreement which provided, from its inception, that certain EIF awards would be made pursuant to the Claims Administrator's discretion. *See* Settlement Agreement, Annex IV (Hip and Knee Matrix Levels IX)(permitting the Claims Administrator to make discretionary awards).

Finally, permitting the Claims Administrator to make discretionary awards as described in the Motion to Permit Supplemental Awards, would set in place a mechanism for disposing of the the last small residual sums in the Trust.

For these reasons, and for the reasons described in the accompanying Motion, the Claims Administrator respectfully requests that the Court enter an Order permitting a supplemental distribution as described in the Motion..

Respectfully submitted,

JAMES J. McMONAGLE, CLAIMS ADMINISTRATOR

By counsel

Cullen D. Seltzer
Counsel for the Claims Administrator
SeltzerGreene, PLC
Eighth & Main Building
707 E. Main Street, Suite 1025
Richmond, Virginia 23219
(804) 864-1100 – voice
(804) 672-4540 – facsimile
cseltzer@seltzergreene.com
Virginia State Bar No. 35923

CERTIFICATE OF SERVICE

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

/s Cullen D. Seltzer
Cullen D. Seltzer
Counsel for the Claims Administrator
SeltzerGreene, PLC
Eighth & Main Building
707 E. Main Street, Suite 1025
Richmond, Virginia 23219
(804) 864-1100 – voice
(804) 672-4540 – facsimile
cseltzer@seltzergreene.com
Virginia State Bar No. 35923