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

	:	Case No. 1:01-CV-9000
	:	
IN RE: SULZER HIP PROSTHESIS	:	(MDL Docket No. 1401)
AND KNEE PROSTHESIS	:	
LIABILITY LITIGATION	:	JUDGE O'MALLEY
	:	
	:	<u>MEMORANDUM AND ORDER</u>
	:	

On July 3, 2002, the Court issued proposed guidelines outlining how it would receive and review applications for common benefit attorney fees and expenses. The Court also solicited comments on the proposed guidelines. Having reviewed these comments and, where appropriate, incorporated certain suggestions, the Court now issues its FINAL Guidelines.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

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

_____]	Case No. 01-CV-9000
]	MDL Docket No.: 1401
In re:]	
SULZER ORTHOPEDICS INC.]	
HIP PROSTHESIS AND KNEE PROSTHESIS]	JUDGE KATHLEEN O'MALLEY
PRODUCTS LIABILITY LITIGATION]	
_____]	THIS DOCUMENT RELATES TO ALL CASES

**GUIDELINES FOR SULZER ORTHOPEDIC, INC.
HIP AND KNEE PROSTHESIS MDL 1401 PLAINTIFFS' COUNSEL
COMMON BENEFIT TIME AND EXPENSE REQUESTS**

A. INTRODUCTION.

Common Benefit expenses and billable hours reported pursuant to this litigation must be reasonable and necessary. Time and expense that is part of a *bona fide* effort in state or federal litigation which actually advanced the interests of the entire class of plaintiffs will be recognized. The guidelines for reporting Common Benefit expenses and billable hours have been developed with these principles in mind. Therefore, the Court

hereby adopts the following guidelines:

B. REPORTING GUIDELINES.

1. Receipts:

Each expense claimed must be properly documented by a receipt or some other form of proof of payment. Receipts must be attached to an Expense Summary. (The ***Expense Summary Report*** which must be used is attached hereto as ***Exhibit "1"***). Original receipts must be available for production upon request. Cash advances will not be considered for reimbursement without evidence of payments made with the cash.

2. Hotels:

Charges for movies, toiletries or alcoholic beverages will not be reimbursed.

3. Meals:

A copy of a receipt or other original proof of payment must be submitted. Charges for alcoholic beverages will not be reimbursed.

4. Mileage:

Reimbursement for automobile expenses will be on the basis of mileage traveled. Mileage claims must be documented by stating origination point, destination, total actual miles for each trip, and the rate per mile paid by the individual's firm. The maximum allowable rate is \$.30 per mile (which is the current allowable rate set by the I.R.S.).

5. Air Travel:

Air travel shall be reimbursed based upon what is reasonable and necessary.

6. Long Distance:

Long distance telephone expenses must be documented. Copies of telephone bills

must be submitted with notation as to which charges are related to MDL No. 1401. Only actual charges are reimbursable.

7. Federal Express, Local Courier Service, or Other Courier:

All claimed expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package.

8. Postage Charges:

A contemporaneous postage log or other supporting documentation must be maintained and submitted. Postage charges are to be reported at actual cost.

9. Facsimile Charges:

Contemporaneous records should be maintained and submitted showing faxes sent and received. The per-fax charge should be no more than \$1.00 per page.

10. In-house Photocopy:

A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$.25 per page.

11. Secretarial and Clerical Overtime:

An itemized description of the task and time spent must be submitted for secretarial and clerical overtime.

12. LEXIS/WESTLAW:

Claims for expenses relating to computerized legal research, i.e. LEXIS or WESTLAW, should be in the exact amount charged to your firm for these research services.

13. Deposition Costs, Expert Witness Fees, and Exhibit Costs:

Only fees and costs associated with MDL or state discovery that were authorized by Class Counsel, the leadership of the California Consolidated Proceedings, or the leadership of the Texas Consolidated Proceedings will be considered. No party will be reimbursed for obtaining his or her own personal copy of a deposition transcript.

14. Equipment Purchases:

Purchases of equipment are not to be claimed, absent special circumstances approved by Class Counsel, the leadership of the California Consolidated Proceedings, or the leadership of the Texas Consolidated Proceedings. Laptop computers purchased for and utilized by the individual attorneys and their staff, even if used primarily for this case, are not reimbursable.

15. Monetary Sanctions:

No monetary sanction levied by the Court on any attorney shall be reported as an expense.

16. Common Benefit Time Sheets:

If contemporaneous time records were kept by the Applicant, then a Monthly Common Benefit Time Summary Sheet must be submitted in order for Common Benefit time to be considered by the Court. (The **Monthly Common Benefit Time Summary Sheet** form which must be used is attached hereto as **Exhibit "3"**). **Daily Common Benefit Time Summary Sheets** must also be attached to each **Monthly Common Benefit Time Summary Sheet**. (The **Daily Common Benefit Time Summary Sheet**

form which must be used is attached hereto as **Exhibit “2”**). These daily records may be computer generated or typed copies of daily records. Such records must be organized by timekeeper. Only time exclusively related to Common Benefit work should be reported. If contemporaneous time records were not kept by the Applicant, then the Applicant shall explain why time devoted to claimed Common Benefit work was not contemporaneously recorded and must make a good faith effort to summarize or categorize the time spent and the work done.

C. TIME OR EXPENSE THAT WILL BE DISALLOWED OR DISCOUNTED.

1. Any submission or report of professional time and expense in which the hours of service and expenses were not properly coded per the **Common Benefit Time Summary Sheet** and **Expense Summary Report**;

2. Any item of expense for which proper receipts or other proof of payment have not been submitted;

3. Any item of time or expense which was incurred in connection with the trial of individual cases or groups of cases or the case-specific preparation of those cases for trial.¹ This does not mean that coordinated discovery in the MDL or state proceedings will

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When the Court approved the Settlement Agreement in this case, which included payment of a substantial portion of those contingency fees owed by represented claimants to their individual counsel, the Court took into consideration the fact that counsel's efforts on behalf of these individual claimants also conferred a measurable benefit upon the class as a whole. Having taken the unusual step of authorizing the payment of contingency fees out of settlement proceeds – thereby spreading the cost of those contingency fees across

be disallowed.

4. Any submission or report of professional time which does not provide hourly rates and/or descriptions of the professional status (i.e., partner, associate, paralegal, law clerk) of each person whose professional time is the subject of the submission or report;

5. Any submission or report of professional time which does not provide cumulative totals for the reimbursable expenses claimed;

6. Any item of expense which does not meet the requirements of this Order;

7. Any item of time or expense which is not described in sufficient detail to determine the nature and purpose of the service or expense involved (entries such as “research,” “telephone call to Class Counsel,” “conference with JB,” without further description, are to be disallowed);

8. Any submission of professional time in which the amount of “review” time is excessive as a whole when judged in reference to the role which the Attorney, or other timekeeper, had in the litigation;

9. Any submission of time and expense which is grossly excessive on its face, when considered as a whole in light of the role which the Attorney, or other timekeeper, had in the litigation.

the **entire class**, including unrepresented claimants – the Court concludes it is inappropriate to also award out of common benefit funds any item of time or expense incurred in connection with the trial of individual cases or groups of cases, or the case-specific preparation of those cases for trial.

D. EXPENSE PRESENTATION.

Each attorney or law firm seeking an award of Common Benefit expenses ("Applicant") shall prepare and present an "Expense Presentation" in the form of a sworn affidavit based on personal knowledge, which shall include the following information:

1. A description of each item of expense for which reimbursement is claimed, the date it was expended, the person or entity to whom that amount was paid and a certification that the amount has not been reimbursed by any individual client, group of individual clients or any other person or entity (NOTE: to satisfy this requirement, the ***Expense Summary Report*** (see ***Exhibit "1"***) must be completed and receipts attached pursuant to Paragraph B(1));

2. The "Expense Presentation" should be filed with the Court and captioned "NOTICE OF EXPENSE REQUEST." The ***Expense Summary Report*** should be attached as an exhibit. Service via certified mail return receipt requested should be made on Plaintiffs' Liaison Counsel, R. Eric Kennedy, Weisman, Goldberg & Weisman Co., L.P.A., 1600 Midland Building, 101 Prospect Ave. West, Cleveland, OH 44115.

3. The "Expense Presentation" should be filed no later than 21 days from the date of this Order.

4. Where the request for expenses is related to the services of more than one attorney employed by or associated with any law firm, only one "Expense Presentation" should be filed in support of the request.

E. FEE PRESENTATION.

Each attorney or law firm seeking an award of Common Benefit fees ("Applicant") shall prepare and present a "Fee Presentation" in the form of a sworn affidavit based on personal knowledge, which shall include the following information:

1. A narrative statement detailing and describing with particularity the professional services performed and the contribution provided by the Applicant for the benefit of Class Members as a whole. (NOTE: This narrative statement should not exceed three pages, double-spaced, and may include comment on the value of the work performed by other attorneys);
2. A biographical sketch for each attorney seeking an award of fees and reimbursement of expenses, setting forth the qualifications of the attorney and his or her law firm (NOTE: this description shall not exceed one page for each such attorney);
3. A list of the current hourly billing rates for each attorney and paraprofessional whose professional time is the subject of the Fee Presentation, from the inception of this litigation to the present. If an Applicant temporarily employed an attorney for the sole or primary purpose of working on this case, the Applicant shall disclose the hourly rate at which that attorney was paid.
4. A summary of the professional time for which compensation or reimbursement is claimed (NOTE: If contemporaneous time records were kept, then Common Benefit time must be itemized on ***Daily Common Benefit Time Summary Sheets*** (see ***Exhibit "2"***). The ***Daily Common Benefit Time Summary Sheets*** must

be attached to Monthly Common Benefit Time Summary Sheets (see **Exhibit “3”**). A **Total Common Benefit Time Summary Sheet** (attached as **Exhibit “4”**) must also be submitted, which is computed by adding all **Monthly Common Benefit Time Summary Sheets**). However, if contemporaneous time records were not kept by the Applicant or the Applicant Firm, then the Applicant must explain why contemporaneous time records were not maintained and must make a good faith effort to reconstruct the time spent and work done and summarize and categorize such work;

5. A complete description of any arrangement or agreement under which the Applicant is obligated or expects to pay any portion of any fee awarded by the Court from any of the common benefit fee sources to any other person;

6. A complete description of any arrangement or agreement under which the Applicant is entitled or expects to receive any portion of any fee awarded by the Court to persons other than the Applicant;

7. The Class Action Settlement Agreement dated March 13, 2002 states in Section 5.5 that “the Court shall consider, among other factors, any contingent fee paid to a Common Benefit Attorney pursuant to Section 5.1 and Section 5.2 when making an award of a fee, pursuant to Section 5.5.” In consideration of this provision, where the Applicant represents individual Class Members or opt-outs who have undergone revision surgery, (defined in the Settlement Agreement as an “APRS”) or individual Class Members for whom the Applicant has or expects to apply for Extraordinary Injury Fund (“EIF”) benefits, the Applicant must submit the number of all such individuals, whether they

underwent APRS, are EIF claimants, or both, and the anticipated attorneys' fees that the Applicant Firm expects to receive on behalf of such Class Members or opt-outs. If the Applicant Firm has reduced or waived attorneys fees or expenses for Class Members or opt-outs, then such information should be included in the Fee Presentation. The Applicant may submit an itemized statement, with supporting documentation, of any unreimbursable expenditures incurred in connection with the handling of this litigation. (To satisfy this requirement, the ***Contingent Fee Report*** must be submitted, which is attached as ***Exhibit "5"***).

8. Given the limited amount of funds available for payment of common benefit fees and expenses, the Court must examine each Applicant's common benefit efforts relative to each other Applicant. Accordingly, the Applicant shall not provide a "total fee request" or otherwise suggest a specific amount of fees to be awarded to the Applicant or his Firm.

9. The "Fee Presentation" should be filed with the Court and captioned "NOTICE OF FEE REQUEST." Service, via certified mail return receipt requested, should be made on Plaintiffs' Liaison Counsel, R. Eric Kennedy, Esq., Weisman, Goldberg & Weisman Co., L.P.A., 1600 Midland Building, 101 Prospect Ave. West, Cleveland, OH 44115.

10. The "Fee Presentation" should be filed no later than 45 days from the date of this Order.

11. Where the request for fees is related to the services of more than one

attorney employed by or associated with any law firm, only one "Fee Presentation" should be submitted.

F. OBJECTION TO EXPENSE OR FEE REQUEST.

Within ten (10) days of the filing of a NOTICE OF EXPENSE REQUEST or NOTICE OF FEE REQUEST, any Applicant or class member may file an objection with the Court to any Expense or Fee Request. Any response by the Applicant to the objection shall be filed no later than ten (10) days after the objection is filed. Service of any objection and/or response shall be made, via certified mail return receipt requested, upon Plaintiffs' Liaison Counsel, R. Eric Kennedy, Esq., Weisman, Goldberg & Weisman, 1600 Midland Building, Cleveland, OH 44115.

G. JOINT MEMORANDUM.

No later than 60 days from the date of this Order, the Common Benefit Attorney Fee Committee shall submit to the Court a Joint Memorandum outlining the law as it applies to an award of common benefit fees and expenses. Applicants may file a response memoranda, not to exceed five pages, within 14 days of the date of filing of the Committee's Joint Memorandum, directed solely to the issues raised in the Joint Memorandum. The Joint Memorandum and any response memoranda are for the convenience of the Court and will be used as reference sources when considering the Fee and Expense Presentations. The Joint Memorandum will include an Expense Summary

Report from the litigation expense funds created in MDL 1401, the California Consolidated Proceedings, and the Texas Consolidated Proceedings, and will request approval for the expenditures made from these funds.

H. MISCELLANEOUS.

1. Any attorney, law firm or other person who does not timely submit their professional time and expenses shall not be eligible to receive an award of attorneys' fees and reimbursement of litigation expenses except by leave of Court upon a showing of good cause.

2. Any intentional violation of these Guidelines is grounds for the Court to deny a request for payment of counsel fees or reimbursement of litigation expenses in whole or in part, as well as for such other sanctions and penalties as may be appropriate under the law.

3. The only exceptions to these Guidelines shall be as specifically approved by the Court.

4. Each attorney submitting a time and expense statement shall be considered as representing to the Court, under oath, that the time and expense submitted meets the criteria set forth herein.

5. The Court or Common Benefit Attorney Fee Committee reserve the right to request additional information as may be deemed necessary.

6. Given the timing of the Expense and Fee Requests, and the availability of

funds to pay these requests, the Court expects it will make its ruling on the Expense Request prior to its ruling on the Fee Request.

7. All Expense and Fee Applications, and the Court's final ruling on the Applications, shall be publically filed.

I. ROLE OF COMMON BENEFIT ATTORNEY FEE COMMITTEE.

The Common Benefit Attorney Fee Committee will review the Common Benefit Fee and Expense submissions for accuracy and will advise the Court with respect to the involvement of the Applicants in the prosecution of the federal and state cases, including common benefit discovery, organizational and coordination efforts, and settlement negotiations. However, the Committee will not provide advice regarding specific amounts to be awarded to individual attorney fee applicants. The deliberations of the Committee, the communications by the Committee and its members to the Court, and the discussions, if any, between the Court and the Committee shall be confidential. The Committee members shall not disclose to any Applicant the substance of any advice or comments made by the Committee or any of its members to the Court, nor the substance of the communications between the Court and the Committee members. Absent good cause shown, no discovery of the discussions among the Committee members or between the Committee members and the Court will be permitted.

When the application of a member of the Committee is under review by the Committee, that member shall not participate in the discussions. The views, comments, or

advice of the Fee Committee with respect to a member's own application shall not be shared with the member whose fee application is under review; nor shall the member participate in any discussions of the fee application between the members of the Committee and the Court.

IT IS SO ORDERED.

s/Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

IN RE: SULZER HIP/KNEE PROSTHESIS LITIGATION - MDL NO. 1401
EXPENSE SUMMARY REPORT*

APPLICANT (FIRM) NAME:

DESCRIPTION	AMOUNT
LONG DISTANCE TELEPHONE CHARGES	
FACSIMILE CHARGES	
PHOTOCOPYING CHARGES	
FEDERAL EXPRESS/OVERNIGHT DELIVERY/COURIER	
POSTAGE CHARGES	
ON-LINE RESEARCH i.e. LEXIS AND WESTLAW	
SECRETARIAL AND CLERICAL OVERTIME	
TRANSCRIPTS OF PROCEEDINGS OR DEPOSITIONS	
EXPERT WITNESS FEES	
OTHER PROFESSIONAL SERVICES (ITEMIZE):	
AIR TRAVEL	
MEALS	
MILEAGE	
HOTEL	
LITIGATION FUND ASSESSMENTS	
OTHER (ITEMIZE):	
TOTAL EXPENSES:	\$

*PLEASE ATTACH DOCUMENTATION FOR EACH EXPENSE ITEM.

I believe that these expenses are properly documented and were incurred for the common benefit of the entire plaintiff class.

Signature

Date

EXHIBIT 1

IN RE: SULZER HIP/KNEE PROSTHESIS LITIGATION - MDL-1401
DAILY COMMON BENEFIT TIME SUMMARY SHEET

<u>Date</u>	<u>Description of Services</u>	<u>Hours</u>
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EXHIBIT 2

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IN RE: SULZER HIP/KNEE PROSTHESIS LITIGATION - MDL1401

COMMON BENEFIT TIME SUMMARY SHEET

MONTHLY

REPORTING FIRM: _____

MONTH/YEAR: _____

1.

Preparation of pleadings, motions and supporting briefs;
Legal research
2.

Preparing and responding to written discovery requests
3.

Taking depositions, including preparation
4.

Administration of Document Repository
5.

Inspection of documents
6.

Technical research and consultation with experts
7.

Scientific Research and Review
8.

Preparation for court appearance
9.

Court appearance
10.

Management Administration and Liaison Activities
11.

Settlement Negotiations
12.

Settlement Drafting and Implementation

	1	2	3	4	5	6	7	8	9	10	11	12	TOTAL HOURS	HOURLY RATE	TOTAL
ATTORNEY															
PARALEGAL															
TOTALS															

PLEASE ATTACH COPIES OF DAILY RECORDS FOR ALL TIME REPORTED. THESE RECORDS MAY BE COMPUTER GENERATED OR TYPED COPIES OF DAILY RECORDS. PLEASE ORGANIZE THE RECORDS BY TIMEKEEPER. PLEASE REMEMBER THAT **ONLY** TIME EXCLUSIVELY RELATED TO COMMON BENEFIT WORK SHOULD BE REPORTED.

I believe that these hours are properly documented and were incurred for the common benefit of the entire plaintiff class.

Signature

Date

IN RE: SULZER HIP/KNEE PROSTHESIS LITIGATION - MDL1401
COMMON BENEFIT TIME SUMMARY SHEET

TOTAL

(To Be Computed by Adding All Monthly Common Benefit Time Summary Sheets)

REPORTING FIRM: _____

1.

Preparation of pleadings, motions and supporting briefs;
Legal research
2.

Preparing and responding to written discovery requests
3.

Taking depositions, including preparation
4.

Administration of Document Repository
5.

Inspection of documents
6.

Technical research and consultation with experts
7.

Scientific Research and Review
8.

Preparation for court appearance
9.

Court appearance
10.

Management Administration and Liaison Activities
11.

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12.

Settlement Drafting and Implementation

	1	2	3	4	5	6	7	8	9	10	11	12	TOTAL HOURS	HOURLY RATE	TOTAL
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TOTALS															

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I believe that these hours are properly documented and were incurred for the common benefit of the entire plaintiff class.

Signature

Date

IN RE: SULZER HIP/KNEE PROSTHESIS LITIGATION - MDL-1401
CONTINGENT FEE REPORT

CLIENT <i>(Can be identified by number)</i>	APRS <i>(check if applicable)</i>	EXPECTED APRS FEE	AMOUNT by which APRS FEE is Reduced from contract, if any	EIF <i>(Record expected benefit, if applicable)</i>	EXPECTED EIF FEE	AMOUNT by which EIF FEE is Reduced from Contract, if any
TOTAL:						

EXHIBIT 5