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LOS ANGELES  
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

CONSUMER CAUSE,	)	Case No. BC 224731
Plaintiff,	)	[Assigned to Judge Victoria G. Chaney]
vs.	)	(Consolidated with Case Nos. BC 224732,
JOHNSON & JOHNSON; AND ETHICON,	)	BC 233102, BC 225508, BC 225509)
INC., et al.	)	(PROPOSED) ORDER ENTERING
Defendants.	)	CONSENT JUDGMENT
AND CONSOLIDATED CASES	)	

The Motion of Consumer Cause, Inc. to Approve Settlement and to Enter Consent Judgment came on regularly for hearing on December 8, 2003. Morse Mehrban of the Law Offices of Morse Mehrban appeared on behalf of Plaintiff Consumer Cause, Inc.; David B. Sadwick of Tatro Tekosky Sadwick Mendelson LLP appeared on behalf of Defendants Johnson & Johnson, Ethicon, Inc., and Cordis Corporation; Jeffrey B. Margulies of Parker, Milliken, Clark, O'Hara & Samuelian appeared on behalf of Defendants Stryker Corporation and Howmedica Osteonics Corporation; Michael J. Steel of Pillsbury Winthrop LLP appeared on behalf Defendant Warsaw Orthopedic Inc. (dba Sofamor Danek Manufacturing); Edward G. Weil of the State of California Department of Justice appeared

1 on behalf of the Attorney General of the State of California.

2 The Court, having considered the moving papers, the Attorney General's Objections  
3 to the Motion to Approve Settlement and to Enter Consent Judgment, Defendants' Reply to  
4 the Attorney General's Objections, and all additional arguments and evidence properly  
5 offered at the hearing on this matter, makes the following Order:

6 Following factual and expert discovery regarding the scientific aspects of alleged  
7 exposure to chemicals listed under California's Proposition 65 (Cal. Health & safety Code  
8 sections 25249.6 *et seq.*) from a wide variety of implanted medical devices, Plaintiff  
9 Consumer Cause, Inc. and defendants Warsaw Orthopedic Inc. (dba Sofamor Danek  
10 Manufacturing), Johnson & Johnson, Cordis Corporation, Ethicon, Inc., Howmedica  
11 Osteonics Corporation, and Stryker Corporation ("Settling Defendants") reached a  
12 settlement incorporating a scientific approach to the determination of plaintiff's claims that  
13 any such exposures require a warning under Proposition 65. That settlement is embodied in  
14 the attached consent judgment ("Consent Judgment") executed by the parties to these  
15 consolidated cases.

16 The parties have represented to this Court that the Consent Judgment was developed  
17 after extensive expert and fact discovery, and the Attorney General has offered no evidence  
18 to the contrary. Furthermore, the parties have been before this Court on a number of  
19 occasions to discuss their progress in seeking to resolve the case, and have sought this  
20 Court's guidance throughout this process.

21 Pursuant to the applicable regulations, the Consent Judgment was submitted to the  
22 Attorney General for review. The Attorney General of the State of California, appearing by  
23 and through Deputy Attorney General Edward G. Weil, submitted briefs objecting to  
24 portions of the Consent Judgment. The parties made revisions to the proposed Consent  
25 Judgment in an effort to address the objections expressed by the Attorney General, but the  
26 Attorney General continued to object. At a duly noticed hearing to consider the proposed  
27 Consent Judgment, the Attorney General appeared and argued that the Consent Judgment  
28 should not be approved.

1           The Attorney General argues that entering the Consent Judgment would require the  
2 Court to act beyond the scope of its authority to implement a settlement. Specifically, the  
3 Attorney General's objections contain five substantive contentions: (1) the scope of the  
4 settlement is overbroad because it addresses categories of products covered in some, but not  
5 all, of the "sixty-day notices" of intent to sue served on the Attorney General and the  
6 defendants in these consolidated cases; (2) prospective application of the warning standard  
7 is not appropriate because the defendants' products do not currently require a warning  
8 under that standard and because the standard is based on the level of nickel in the products  
9 rather than also addressing other chemicals in those products; (3) that the Consent  
10 Judgment's authorization of additional "sixty-day notices" requires further clarification; (4)  
11 the warning provision in the Consent Judgment is inadequate; and (5) the plaintiff's  
12 attorneys fees were excess and unwarranted. This Court finds that none of the Attorney  
13 General's objections requires further modification of the Consent Judgment beyond that  
14 agreed to by the parties, and none of those objections prevents entry of the Consent  
15 Judgment by the Court.

16           1. Scope of Consent Judgment. The Consent Judgment resolves a total of five  
17 consolidated cases. In each case the Attorney General received a "sixty-day" notice of  
18 intention to sue from the plaintiff, and in none of those cases did the Attorney General elect  
19 to bring an action. Collectively, the notice letters cover all of the products covered by the  
20 Consent Judgment. The Attorney General was on notice about all of the categories of  
21 products at issue, some of which cover general product descriptions and some of which  
22 cover individual, manufacturer-specific products. The Court therefore finds that this  
23 objection lacks merit.

24           2. Warning Standard. The Attorney General expresses concern that parties may not  
25 adopt a warning standard when none of the products over which plaintiff sued currently  
26 violate that standard. There is no question, however, that an actual dispute existed between  
27 plaintiff and defendants over whether defendants' products caused exposures that required a  
28 Proposition 65 warning. Should defendants in the future market products that, by virtue of

1 their nickel content, surface area and/or length of implantation, exceed the no significant  
2 risk level established by the Consent Judgment, they would be required to provide  
3 warnings. Providing some certainty as to the legality of future conducts clearly furthers the  
4 goals of Proposition 65. Even assuming that the consent judgment provides relief that the  
5 Court could not provide after trial, that fact does not prevent the court from approving the  
6 Consent Judgment. *See, e.g., Rich Vision Centers, Inc. v. Board of Medical Examiners*, 144  
7 Cal.App.3d 110 (1983).

8       3. Adequacy of Warnings. As the Attorney General acknowledges, the regulations  
9 implementing Proposition 65 set forth certain warning language and methods of  
10 transmitting a warning that are considered “safe harbors” that “shall be considered clear and  
11 reasonable.” *See 22 California Code of Regulations (“CCR”) section 12601(b)*. The  
12 Consent Judgment’s warning provision complies with the regulatory “safe harbor” for both  
13 method (on the label, as provided by 22 CCR section 12601(b)(1)(A)) and language  
14 (warning for both cancer and reproductive toxicity, as provided by 22 CCR section  
15 12601(b)(4)(A) and (B)). By using the word “shall” and specifying means and the words of  
16 the warning, the regulations resolve this issue and leave no doubt that the warning is proper  
17 under Proposition 65.

18       4. Future Notices of Intent to Sue. The Consent Judgment describes how other  
19 parties situated similarly to defendants might join in this settlement. The Attorney General  
20 asks for clarification of this provision. The Court finds that any such future action by  
21 plaintiff in connection with this Consent Judgment must comply with the requirements of  
22 Proposition 65, including the provision of notice to the Attorney General. If the Attorney  
23 General objects to such future action, his objections should be considered at that time.  
24 Nothing in the attached Consent Judgment prejudices the Attorney General’s right to make  
25 such objections.

26       5. Award of Attorney’s Fees. In addition, the Attorney General objected to any  
27 award of attorney’s fees to plaintiff under Code of Civil Procedure section 1021.5. The  
28 Court finds that the development of the Consent Judgment provides a substantial public

1 benefit in defining when warning for exposure to certain harmful chemicals is required  
 2 under Proposition 65, and that an award to plaintiff of \$58,000 in fees and costs is  
 3 appropriate.

4 Based upon the papers submitted in this action, and the arguments made at the  
 5 hearings held in connection with the proposed settlement and Consent Judgment, and good  
 6 cause appearing therefore, the settlement of the parties to this action is approved and the  
 7 attached Consent Judgment is hereby entered.

8 Dated: 4/30/2004

*Victoria Gerrard Cheney*

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Judge of the Superior Court

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