

Food and Drug Administration
Center for Device and
Radiologic Health
9200 Corporate Boulevard
Rockville, Maryland 20850

WARNING LETTER

VIA FEDERAL EXPRESS

Dennis Devinney, DO
700 Olympic Plaza Circle
Suite 600
Tyler, TX 75701

APR 21 2006

Dear Dr. Devinney,

This Warning Letter is to inform you of objectionable conditions observed during the Food and Drug Administration (FDA) inspection conducted at your clinical site from January 9, 2006 - January 23, 2006, by an investigator from the FDA Dallas District Office. The purpose of this inspection was to determine whether activities and procedures related to your participation in the clinical study, "[REDACTED]" complied with applicable federal regulations. The "[REDACTED]" is a device as that term is defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act (the Act), 21 U.S.C. 321(h). This letter also requests prompt corrective action to address the violations cited.

The inspection was conducted under a program designed to ensure that data and information contained in requests for Investigational Device Exemptions (IDE), Premarket Approval (PMA) applications, and Premarket Notification submissions (510(k)) are scientifically valid and accurate. Another objective of the program is to ensure that human subjects are protected from undue hazard or risk during the course of scientific investigations.

Our review of the inspection report prepared by the district office revealed serious violations of Title 21, Code of Federal Regulations (21 C.F.R.) Part 812 -- Investigational Device Exemptions and Part 50 -- Protection of Human Subjects. At the close of the inspection, the FDA investigator presented an inspectional observations Form FDA 483 for your review and discussed the observations listed on the form with you. The deviations noted on the Form FDA 483, and our subsequent review of the inspection report are discussed below:



Protecting and Promoting Public Health

Failure to obtain proper informed consent prior to any study related procedures. [21 CFR 50.20, 50.27(a), 812.100, and 812.140(a)(3)(i)]

Investigators are responsible for ensuring that informed consent is obtained using an IRB-approved consent document prior to any study related procedures and that records of informed consent are kept in accordance with FDA regulations. Our investigation revealed that, for nine of the nineteen subjects enrolled in the study, proper informed consent was not obtained. Two of the subjects had study-related procedures prior to being consented and seven of the subjects were consented with a version of the consent document which was not IRB-approved. Examples of this failure include but are not limited to the following:

- A) Subject [REDACTED] had the pre-operative visit on [REDACTED], the [REDACTED] device was implanted on [REDACTED]; however the subject did not sign the informed consent document until July 14, 2004.
- B) Subject [REDACTED] had the pre-operative visit on [REDACTED], had the [REDACTED] device implanted on [REDACTED], however the subject did not signed the informed consent document until October 20, 2004.
- C) Subjects [REDACTED] and [REDACTED] were consented utilizing an informed consent document that was not IRB-approved.

Please provide copies of policies, procedures, and training with expected completion dates that are being developed and implemented to ensure that informed consent is obtained from all subjects prior to any study-related procedures being performed. In addition, please provide copies of policies, procedures, and training with expected completion dates that are being developed and implemented to ensure the most current IRB-approved informed consent document is provided to each subject.

Failure to ensure an investigation is conducted in accordance with the signed agreement, the investigational plan, and applicable FDA regulations. [21 CFR 812.100 and 21 CFR 812.110(b)]

As a clinical investigator it is your responsibility to conduct the clinical investigation in accordance with the signed investigator agreement, investigational plan, and applicable FDA regulations. You failed to conduct the investigation in accordance with the investigational plan. Examples of this failure include but are not limited to the following:

- 1) You implanted three subjects with unapproved [REDACTED] that were not part of the investigational plan. The investigational plan specifically called for the implantation of [REDACTED] only. [REDACTED] were not part of the investigational plan. Subjects [REDACTED] received a [REDACTED]. Subject [REDACTED] received a [REDACTED].

Please submit documentation that these subjects have been informed of their receiving an unapproved [REDACTED] that is not part of the investigational plan and, in addition, your plan for the follow-up care and evaluation of these subjects to assure their safety and welfare.

2) You enrolled subjects that did not meet the inclusion/exclusion criteria. In addition, there is no documentation the sponsor and IRB approved of these deviations. You must obtain prior approval by the sponsor for changes in or deviations from a plan, and, in addition, by FDA and IRB when the changes or deviations may affect the soundness of the plan or the rights, safety, or welfare of human subjects (21 CFR 812.150(a)(4)). Examples of this failure include but are not limited to the following:

- A) A pain scale rating of 3 (ranging from 0-10) was documented on the pre-op visit on [REDACTED], for subject [REDACTED]. Inclusion criteria 6 states the subjects must have a pain rating of at least 5 to be included. In addition, there was no documentation of the baseline range of [REDACTED] assessment for this subject.
- B) A pain scale rating of 0 was documented on the pre-operative visit on [REDACTED] for subject [REDACTED]. In addition, there was no documentation of the baseline [REDACTED] assessment for this subject.

Please provide documentation of sponsor and IRB notification and approval for the aforementioned deviations from the investigational plan.

3) You did not conduct follow-up procedures and exams in accordance with the investigational plan. Examples of this failure include but are not limited to the following:

- Subject [REDACTED] was implanted with the [REDACTED] on [REDACTED]. The three month follow-up was due between [REDACTED]; however, the subject has a documented visit on [REDACTED].

4) You failed to submit unanticipated adverse device effect reports to the reviewing IRB, as required by 21 CFR 812.150(a)(1) (i.e., as soon as possible, but in no event later than 10 working days after first learning of the effect).

- A) Subject [REDACTED] was hospitalized for pneumonia on [REDACTED], however, there is no record of the IRB being notified of this effect.
- B) Subject [REDACTED] had a documented suture abscess on [REDACTED]; however, the IRB was not notified until [REDACTED].

Please provide copies of policies, procedures, and training with expected completion dates that are being developed and implemented to ensure the conduct of the clinical investigation is in accordance with the signed investigator agreement, investigational plan, and applicable FDA regulations.

Failure to maintain accurate, complete, and current case histories. [21 CFR 812.140(a)(3)]

An investigator is responsible for maintaining accurate, complete, and current records of each subject's case history and exposure to the device, which includes the case report forms and supporting data. You failed to maintain accurate, complete, and current case histories. Examples of incomplete documentation include but are not limited to the following:

- 1) Subject [REDACTED]
 - A) Baseline [REDACTED] assessment results were not documented for the right arm active cross body adduction and all right and left arm passive. These assessments are to be used to evaluate the subject's [REDACTED] in both shoulders throughout the study.
 - B) The three month post-op visit did not have documentation of the Short Form Health Survey, functional assessment, and physician's assessment of [REDACTED].
 - C) The six month post-operative visit ([REDACTED]), the physician's assessment [REDACTED] did not include right arm passive internal rotation, cross-body adduction, and left active and passive assessment results.
 - D) The one year post-op follow-up visit ([REDACTED]), did not have documentation of the physician's assessment of [REDACTED] for right arm active internal rotation and cross-body adduction and left arm active and passive assessments.

2) In sixteen of [REDACTED] subject's records reviewed, at least one of the tests involved in the physician assessment [REDACTED] were not documented.

Please provide copies of policies, procedures, and training with expected completion dates that are being developed and implemented to ensure you maintain accurate, complete, and current case histories.

Eleven of [REDACTED] subjects enrolled are not being followed for various reasons; three subjects withdrew, four were lost to follow-up, and the additional four did not receive any follow-up. This lack of follow-up is a safety concern since these subjects were implanted with an investigational device. It is essential that discussion of the follow-up involved in a clinical trial is discussed and agreed to by the subject prior to enrollment. In addition, subject compliance should be considered when evaluating a subject for inclusion in an investigation.

The violations described above are not intended to be an all inclusive list of problems that may exist with your clinical study. It is your responsibility as a clinical investigator to ensure compliance with the Act and applicable regulations.

The inspectional report notes that you state the sponsor stated the devices were [REDACTED] you could use them in accordance with the investigational plan. The regulations in 21 C.F.R. Part 812 describe sponsor responsibilities as well as those of investigators. IRB responsibilities are spelled out in 21 C.F.R. Part 56, Institutional Review Boards. These three sets of responsibilities overlap to ensure appropriate

conduct of clinical studies and the protection of the rights and welfare of participating subjects. Therefore, though the sponsor and IRB involved in your study may have been remiss in fulfilling their responsibilities, you are still held responsible for knowing and following the regulations pertinent to your activities as a clinical investigator in FDA-regulated studies.

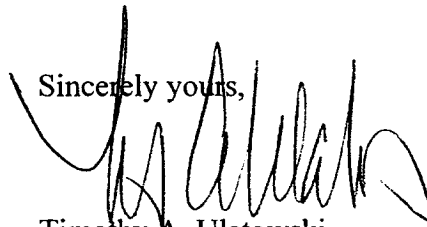
Within fifteen (15) working days of receiving this letter, please provide written documentation of the actions you have taken or will take to correct these violations and prevent the recurrence of similar violations in current or future studies for which you are the clinical investigator. In addition, please provide a complete list of all clinical trials in which you have participated for the last five years, including the name of the study and test article, the name of the sponsor, the number of subjects enrolled, and the current status of the study. Failure to respond to this letter and take appropriate corrective action could result in the FDA taking regulatory action without further notice to you. In addition, FDA could initiate disqualification proceedings against you in accordance with 21 C.F.R. 812.119.

You will find information to assist you in understanding your responsibilities and planning your corrective actions in the FDA Information Sheets Guidance for Institutional Review Boards and Clinical Investigators, which can be found at <http://www.fda.gov/oc/ohrt/irbs/>. Any submitted corrective action plan must include projected completion dates for each action to be accomplished. Send your response to: Attention: [REDACTED], Food and Drug Administration, Center for Devices and Radiological Health, Office of Compliance, Division of Bioresearch Monitoring, 9200 Corporate Boulevard, HFZ-311, Rockville, Maryland 20850.

A copy of this letter has been sent to the Dallas District Office, 4040 North Central Expressway, Suite 300, Dallas, TX 75204. Please send a copy of your response to that office.

If you have any questions, please contact [REDACTED],
[REDACTED]

Sincerely yours,



Timothy A. Ulatowski
Director

Office of Compliance
Center for Devices and Radiological Health