Form 4.02A

2011

Hfx. No 343055

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

JO-ANNE SCHARF

PLAINTIFF

- and –

DEPUY ORTHOPAEDICS, INC., DEPUY INTERNATIONAL LTD., DEPUY, INC., JOHNSON & JOHNSON SERVICES, INC., JOHNSON & JOHNSON S.L., INC., JOHNSON & JOHNSON INC., JOHNSON & JOHNSON INTERNATIONAL, INC. and JOHNSON & JOHNSON ORTHOPAEDICS (P.R.) INC.

DEFENDANTS

Notice of Action

Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28

TO: **DEPUY ORTHOPAEDICS, INC.**
700 Orthopaedic Drive
Warsaw IN 46581

TO: **DEPUY INTERNATIONAL LTD.**
700 Orthopaedic Drive
Warsaw IN 46581

TO: **DEPUY, INC.**
700 Orthopaedic Drive
Warsaw IN 46581

TO: **JOHNSON & JOHNSON SERVICES, INC.**
Corporation Trust Company
Corporation Trust Centre
1209 Orange Street
Wilmington, Newcastle
Delaware, 19801

TO: **JOHNSON & JOHNSON S.L., INC.**
Corporation Trust Company
Corporation Trust Centre
1209 Orange Street
Wilmington, Newcastle
Delaware, 19801

TO: **JOHNSON & JOHNSON INC.**
7101 Notre Dame Street East
Montreal, Québec
H1N 2G4

TO: **JOHNSON & JOHNSON INTERNATIONAL, INC.**
The Company Corporation
2711 Centerville Road
Suite 400
Wilmington, Newcastle
Delaware 19808

TO: **JOHNSON & JOHNSON ORTHOPAEDICS (P.R.) INC.**
Corporation Trust Company
Corporation Trust Centre
1209 Orange Street
Wilmington, Newcastle
Delaware 19801

Action has been started against you

The Plaintiff take action against you.

The Plaintiff started the action by filing this notice with the court on the date certified by the prothonotary. The Plaintiff claim the relief described in the attached statement of claim. The claim is based on the grounds stated in the statement of claim.

Deadline for defending the action

To defend the action, you or your counsel must file a notice of defence with the court no more than the following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia
- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

Judgment against you if you do not defend

The court may grant an order for the relief claimed without further notice, unless you file the notice of defence before the deadline.

You may demand notice of steps in the action

If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a demand for notice.

If you file a demand for notice, the Plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

Rule 57 - Action for Damages Under $100,000

Civil Procedure Rule 57 limits pretrial and trial procedures in a defended action so it will be more economical. The Rule applies if the Plaintiff state the action is within the Rule. Otherwise, the Rule does not apply, except as a possible basis for costs against the Plaintiff.

This action is *not within* Rule 57. [State "within" if the action is for an order for judgment under $100,000, no other order (eg. injunction, declaration) is claimed, and the claim is based on debt, injury to property, injury to a person, supply of goods or services, breach of contract, breach of trust, or dismissal from employment.]

Filing and delivering documents

Any documents you file with the court must be filed at the office of the Prothonotary, 1815 Upper Water Street, Halifax, Nova Scotia (telephone # 424-4900).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information

The Plaintiff designate the following address:

Raymond F. Wagner
Wagners
1869 Upper Water Street
Halifax NS B3J 1S9

Documents delivered to this address are considered received by the Plaintiff on delivery.

Further contact information is available from the prothonotary.

Proposed place of trial

The plaintiff propose that, if you defend this action, the trial will be held in Halifax, Nova Scotia.

Signature

Signed January 10, 2011.

RAYMOND F. WAGNER
Agent for Colin Stevenson

Prothonotary's certificate

I certify that this notice of action, including the attached statement of claim, was filed with the court on JANUARY-10 ~~, 2010.~~ 2011

GEORGE GHOSN
Deputy Prothonotary

Prothonotary

FORM 4.02B

STATEMENT OF CLAIM

Proceeding under *the Class Proceedings Act*, S.N.S 2007, c. 28

I. OVERVIEW

1. DePuy Implants were developed in order to reconstruct human hip joints that are diseased due to conditions such as osteoarthritis, rheumatoid arthritis, avascular necrosis, or fracture. The Depuy Implants are designed to replace all or parts of diseased hip joints in order to alleviate symptoms of these health conditions. Once implanted, the DePuy Implants are designed to last for an average of 15 or more years.

2. The Defendants aggressively marketed the Depuy Implants as having advantages over other hip replacement or resurfacing systems. The Defendants advertised the Depuy Implants as suitable, safe, effective, minimally invasive hip replacements, and as "high performance" systems.

3. For at least two years the Defendants knew, contrary to their marketing campaigns, that a disproportionately high number of Depuy Implants were failing and causing harm to patients. The Defendants were aware of many complaints made to the Food and Drug Administration in the United States and Health Canada regarding the failure of the Depuy Implants. These complaints included component loosening, misalignment, dislocation and fracture, and the creation of abnormal or excessive metal debris in the hip socket. This metal debris could spread to surrounding tissue, causing severe inflammation and damage. The failure of the Depuy Implants often requires complicated, expensive and painful revision surgery to correct.

4. The Defendants were also aware that the Australian Joint Registry had issued seven reports to the Defendants or their Australian affiliates starting in 2007 that identified problems with the Depuy Implants. The Defendants withdrew the Depuy Implants from the Australian market in December 2009.

5. The Defendants, however, consistently failed to disclose or warn Canadian patients of the significant risk of failure in the Depuy Implants. The Defendants knew or ought to have known of the significant risks associated with the use of Depuy Implants.

6. In 2010, the global market for DePuy orthopaedic products was over US$5,000,000,000.00.

7. The Defendants owed to the Plaintiff and the Class a duty of care:

    a. to ensure that the Depuy Implants were appropriately tested to determine whether there were any potentially adverse effects of using the Depuy Implants;

    b. to ensure that the Depuy Implants were fit for their intended or reasonably foreseeable use;

    c. to warn the Plaintiff and the Class that implant of the Depuy Implants carried a significant risk of component loosening, misalignment, dislocation and fracture, and a significant risk of metal debris in the hip socket or related complaints (the risks);

    d. to conduct adequate tests and clinical trials to determine the degree of risk associated with using the Depuy Implants;

    e. to ensure that physicians and surgeons were kept fully and completely informed of all risks associated with using the Depuy Implants;

    f. to conduct ongoing tests and clinical trials with long term follow up to determine the long term effects and risks of continued use of the Depuy Implants;

    g. to monitor, investigate, evaluate and follow up on adverse reactions to the use of the Depuy Implants throughout the world;

    h. to properly inform Health Canada and other regulatory agencies of the risks associated with using the Depuy Implants.

II. THE REPRESENTATIVE PLAINTIFF

8. The Plaintiff, Jo-Anne Scharf, resides at 82 Riverview Crescent in Bedford, Nova Scotia.

9. The Plaintiff seeks to certify this action as a Class Proceeding and pleads *the Class Proceedings Act*, S.N.S. 2007, c. 28, as providing the basis for such certification. The Plaintiff, as the Representative Plaintiff, does not have any interest adverse to any of the members of the proposed class. The Plaintiff states that there is an identifiable class that would be fairly and adequately represented by the Plaintiff; that the Plaintiff's claims

raise common issues; and that a class proceeding would be the preferable procedure for the resolution of such common issues.

10. The Plaintiff proposes to bring a class proceeding on behalf of herself and a class of all other Nova Scotia residents who were implanted with a Depuy Hip Implant at any time between July 2003 to the date of certification of this proceeding (the Class Period). The proposed class will be further defined in the Application for Certification.

11. In this action, the Plaintiff seeks, on her own behalf and on behalf of the Class:

    a. compensation for the personal injuries and other costs they have incurred as a result of having received defective Depuy Hip Implants and/or;

    b. disgorgement of the benefits that accrued to the Defendants as a result of their wrongful acts; and

    c. damages in the form of total funds required to establish a medical monitoring process for the benefit of the Class Members.

12. Class Members have all been implanted with Depuy Hip Implants.

13. Class Members have been harmed by their use of Depuy Hip Implants as hereinafter described.

14. The Plaintiff and Class Members have suffered pain, loss of enjoyment of life, a probable shortening of life, loss of earnings and earning capacity, and therefore, claim both special damages and general damages as a result of their Depuy Hip Implants.

III. DEFENDANTS

15. Johnson & Johnson Inc., located at 7101 Notre Dame Street East Montreal, Quebec H1N 2G4 ("Johnson & Johnson Canada") markets and distributes Johnson & Johnson products in Canada. Johnson & Johnson International, Inc., located at 2711 Centerville Road, Suite 400 Wilmington, Newcastle, Delaware 19808, Johnson & Johnson Services, Inc., located at 1209 Orange Street, Wilmington, New Castle Delaware 19801, Johnson & Johnson S.L. Inc., located at 1209 Orange Street, Wilmington, New Castle Delaware 19801, and Johnson & Johnson Orthopaedics (P.R.) Inc, located at 1209 Orange Street, Wilmington, New Castle Delaware 19801 are subsidiaries of Johnson & Johnson, a New

Jersey corporation. DePuy Orthopaedics, Inc., DePuy International Inc. and DePuy, Inc., all three of which are located at 700 Orthopaedic Drive, Warsaw IN 46581 are also subsidiaries of Johnson & Johnson.

16. Johnson & Johnson Inc., Johnson & Johnson International, Inc., Johnson & Johnson Services, Inc., Johnson & Johnson S.L. Inc., Johnson & Johnson Orthopaedics (P.R.) Inc., DePuy Orthopaedics, Inc., DePuy International Inc. and DePuy, Inc. shall herein be referred to individually by name or jointly as "the Defendants."

17. At all material times the Defendants carried on business jointly in and throughout Canada from Johnson & Johnson Canada's head office in Montreal, Quebec. Collectively the Defendants researched, developed, tested, manufactured, marketed, distributed and sold Depuy Implants as medical products which were appropriate, cost efficient, suitable, safe and effective for use in hip replacement surgery throughout Canada.

IV. NATURE OF THE ACTION

18. The Defendants are U.S. and Canadian corporations involved in the design, manufacture, labelling, marketing, distribution and sale of the hip Implants and hip implant systems and components which are at issue in this action (the "Depuy Implants"). In particular, the Depuy Implants include the Depuy ASR XL Acetabular Hip System and the Depuy ASR Hip Resurfacing System and all components thereof, including heads, sleeve adaptors and shells.

19. The Depuy Implants were designed and manufactured improperly. These systems cause and have caused serious bodily injury and economic loss to the Plaintiff and the Class. The Defendants should not have sold the products given that they were designed and manufactured improperly, which DePuy knew or ought to have known at the time they introduced the products into the marketplace. No proper warning was ever given by the Defendants to the Plaintiff or the Class about the risks associated with these systems.

20. The Defendants conspired to injure the Plaintiff and the Class. The Defendants' actions were unlawful and the Defendants knew or should have known that injury to the Plaintiff and the Class would result from their actions.

21. The Defendants have admitted that the Depuy Implants have been distributed in Canada since at least January 1, 2006 until their recall in August 2010.

22. The Defendants breached their duty of care to the Plaintiff and the Class as described above in the following respects:

a. the Defendants failed to conduct adequate tests and clinical trials initially and on an ongoing basis to determine the risks associated with the use of the Depuy Implants;

b. the Defendants were aware or ought to have been aware that the Depuy Implants were unfit and defective and ought not to have been introduced into the market place;

c. the Defendants manufactured, marketed, distributed and sold the Depuy Implants without adequately disclosing the risks associated with using the Depuy Implants;

d. the Defendants failed to give Health Canada complete and accurate information concerning the Depuy Implants by failing to disclose the risks on a timely basis;

e. the Defendants failed to adequately warn the Plaintiff, the Class and their physicians and surgeons of the risks then known or which were reasonably foreseeable in using the Depuy Implants. Indeed, none of the various warnings provided to the doctors were adequate;

f. the Defendants, with full knowledge that the Depuy Implants posed these significant risks failed to warn the Plaintiff and the Class and instead continued to sell, market and distribute the Depuy Implants throughout Canada;

g. the Defendants failed to warn the Class and their physicians and surgeons about the need for comprehensive regular medical monitoring to ensure early discovery of complications from the use of the Depuy Implants set out above;

h. the Defendants failed to provide proper long term investigations of the effects and risks of continued use of the Depuy Implants;

i. the Defendants failed to adequately monitor, evaluate and act upon high revision rates in Depuy Implants in Canada and throughout the world; and

j. in particular, the Defendants continued to manufacture, distribute and sell the Depuy Implants notwithstanding that

i. the FDA and Health Canada had received numerous complaints involving patients with Depuy Implants; and

ii. the Australian Joint Registry issued seven reports to the Defendants or their Australian affiliates starting in 2007 that identified numerous problems with the Depuy Implants.

23. The risks associated with the Depuy Implants were in the Defendants' exclusive knowledge and control. The extent of the risks was not known and could not have been known to the Plaintiff or the Class. The injuries of the Plaintiff and the Class would not have occurred but for the negligence and conspiracy of the Defendants in failing to ensure that the Depuy Implants were safe for use or, in the alternative, for failing to provide an adequate warning of the risks associated with the Depuy Implants to the Plaintiff, the Class and to their physicians.

24. The Defendants were aware of the high degree of complication and failure rates associated with Depuy Implants before they were recalled.

25. The Defendants were aware of the defect in manufacture and design prior to the recall of the Depuy Implants. Nevertheless they continued to market and distribute the Depuy Implants.

26. The Defendants' conduct was unlawful because they knowingly marketed and sold the Depuy Implants and permitted the Depuy Implants to be implanted into members of the Class. Despite knowing, or having reason to know, that the Depuy Implants were defective, the Defendants concealed the risks from members of the Class, health care providers, the medical community, and regulatory authorities, including Health Canada and the FDA.

V. HARM TO THE PLAINTIFF

27. On or about April 2005, Jo-Anne Scharf underwent surgery to have a Depuy Hip replacement product implanted.

28. On December 12, 2010, Ms. Scharf was informed of the recall concerning Depuy Hip replacement products in Canada.

29. Ms. Scharf is concerned about the possibility of an early revision surgery and her blood ion levels as a result of her Depuy Hip Implant.

V1. CAUSES OF ACTION

(a) Conspiracy

30. During the class period the Defendants, by their directors, officers, servants and agents, wrongfully, unlawfully, maliciously and lacking bona fides, conspired and agreed together, the one with the other and with persons unknown, as hereinafter set out.

31. The Plaintiff pleads that the Defendants' conspiracy involved both lawful and unlawful means with the predominant purpose of causing the Plaintiff and the other Injury Class Members to acquire Depuy Implants when they knew or should have known that such use would cause harm to the Injury Class Members and the Family Class Members.

32. The Defendants conspired with each other and others to unlawfully market, distribute, advertise and sell Depuy Implants, intending that their conduct be directed towards the Injury Class Members, when they knew or should have known that in the circumstances, injury and damage to the Injury Class Members and the Family Class Members was likely to result. They derived substantial compensation and revenues from the conspiracy.

33. As a result of the conspiracy, the Plaintiff and the other Injury Class Members have suffered damage and loss, including other side effects as a result of the use of Depuy Implants.

34. As a further result of the conspiracy, Family Class Members have suffered damages and loss, and continue to suffer damages and loss, including actual expenses reasonably incurred for the benefit of the Injury Class Member, a reasonable allowance for loss of income or the value of services provided to the Injury Class Member and an amount to compensate for the loss of guidance, care and companionship they might reasonably have expected to receive from the Injury Class Member.

35. Some, but not all, of the Defendants' concerns, motivations and intentions in engaging in the conspiracy were to:

(a) increase the sales of Depuy Implants and their profits;

(b) increase or hold their market share;

(c) avoid adverse publicity;

(d) place their profits above the safety of Injury Class Members and others;

(e) maintain brand trust and corporate image;

(f) avoid alerting the Injury Class Members, Health Canada, the FDA, health practitioners, the public and their competitors to the dangerous properties and effects of Depuy Implants; and

(g) cause the Injury Class Members to acquire Depuy Implants and thereby suffer harm.

36. In furtherance of the conspiracy, the following are some, but not all, of the acts carried out by the Defendants or one or some of them:

(a) they submitted false, inaccurate and misleading information to Health Canada for the purpose of obtaining approval to market Depuy Implants in Canada;

(b) they concealed and disguised information about the dangerous properties and effects of Depuy Implants from Health Canada, from health practitioners and from Injury Class Members;

(c) they misled Injury Class Members, health practitioners and others about the efficacy, safety and effect of Depuy Implants;

(d) they refused to issue correcting information or to stop selling Depuy Implants even after their harmful effects became manifest;

(e) they decided not to warn Class Members and others in Canada of the dangers of Depuy Implants; and

(f) they developed and used marketing and promotional strategies that covered up the truth about Depuy Implants' dangerous properties and effects.

(b) Negligence

37. Each of the Defendants owed a duty of care to the Plaintiff and Class Members and breached the requisite standard of conduct expected of them in the circumstances.

38. The Defendants negligently breached their duty of care in that they failed to exercise reasonable care and failed to fulfill the above-stated duty by the manner that they, directly and indirectly, advertised, marketed and promoted Depuy Implants for the treatment of osteoarthritis, rheumatoid arthritis, avascular necrosis, or fracture even though Depuy Implants, in fact, were not safe or effective for any purpose because they caused complications including, but not limited to, loosening, misalignment, dislocation and fracture, and the creation of abnormal or excessive metal debris in the hip socket. Furthermore, the Defendants failed to adequately warn of the increased risk of the above-noted complications which the Defendants knew or should have known about.

39. The Plaintiff and Class Members state that their damages were caused by the negligence of the Defendants. Such negligence includes but is not limited to the following, that the Defendants jointly and severally:

(a) chose not to ensure that Depuy Implants were not dangerous to recipients during the course of their use and that the products were fit for their intended or reasonably foreseeable use;

(b) chose to inadequately test Depuy Implants in a manner that concealed the magnitude of the risks associated with their use;

(c) misinformed Health Canada by providing it with incomplete and inaccurate information;

(d) conducted inadequate or no follow-up studies on the efficacy and safety of Depuy Implants;

(e) concealed and mislead the Plaintiff, Class Members and their physicians with inadequate and incomplete warning of the risks associated with Depuy Implants;

(f) provided the Plaintiff, Class Members and their physicians with inadequate or incomplete or no information and warnings respecting the correct usage of Depuy Implants;

(g) provided inadequate or incomplete or no updated and current information to the Plaintiff, Class Members and their physicians respecting the risks and efficacy of Depuy Implants as it came available from time to time;

(h) chose not to provide warnings of the potential hazards of Depuy Implants on package labels and by other means;

(i) chose not to provide warnings of the risks associated with Depuy Implants on the customer information pamphlets in Canada;

(j) chose not to warn the Plaintiff, Class Members and their physicians about the need for comprehensive regular medical monitoring to ensure early discovery of serious problems from the use of Depuy Implants;

(k) after noticing problems with Depuy Implants chose not to issue adequate warnings, recall the product in a timely manner, publicize the problem and otherwise act properly and in a timely manner to alert the public, including warning the Plaintiff, Class Members and their physicians of the products' inherent dangers;

(l) engaged in a system of improper and inadequate direction to their sales representatives and prescribing physicians respecting the correct usage of Depuy Implants and the risks associated with the products;

(m) represented that Depuy Implants were safe and fit for their intended purpose and of merchantable quality when they knew or ought to have known that these representations were false;

(n) misrepresented the state of research, opinion and medical literature pertaining to the purported benefits of Depuy Implants and their associated risks;

(o) the misrepresentations made by the Defendants were unreasonable in the face of the risks that were known or ought to have been known to the Defendants;

(p) continued to manufacture, market and promote the selling and/or distribution of Depuy Implants when they knew or ought to have known that their products caused or could cause serious problems;

(q) actively encouraged aggressive dispensation of Depuy Implants;

(r) breached other duties of care to the Plaintiff and the Class Members, details of which breaches are known only to the Defendants.

(c) Strict Liability

40. The Defendants are strictly liable for some or all of the damages suffered by the Plaintiff and other Class Members in that:

(a) the Defendants manufactured Depuy Implants;

(b) Depuy Implants are considered to be inherently dangerous;

(c) the Plaintiff and other Class Members had no opportunity to inspect or test Depuy Implants to ensure their safety; and

(d) Depuy Implants were used by the Plaintiff and other Class Members.

(d) Breach of Warranty

41. The Defendants warranted to the Plaintiff and the Class Members that Depuy Implants were of merchantable quality and fit for use. The Defendants breached the warranty to the Plaintiff and the Class Members by designing, testing, researching, formulating, developing, manufacturing, producing, labelling, advertising, promoting, distributing and/or selling Depuy Implants which were inherently dangerous to users and which the Defendants knew or ought to have known would lead to serious complications.

(e) Waiver of Tort

42. As a result of the Defendants' conduct described herein, the Plaintiff and Class Members reserve the right to elect at the trial of the common issues to waive the torts and to have damages assessed in an amount equal to the gross revenues earned by the Defendants, or the net income received by the Defendants or a percent of the proceeds from the sale of Depuy Implants as a result of the Defendants' conduct.

43. The Plaintiff and Class Members claim that such an election is appropriate for the following reasons, among others:

(a) revenue was acquired in a manner in which the Defendants cannot in good conscience retain;

(b) the integrity of the marketplace would be undermined if the court did not require an accounting;

(c) absent the Defendants' tortious conduct Depuy Implants could not have been marketed nor would the Defendants have received any revenue from their sale in Canada; and

(d) the Defendants engaged in wrongful conduct by putting into the marketplace products which cause or have the potential to cause serious risk of injury.

(f) Breach of Section 52 of the *Competition Act*, R.S. 1985, c. C-34

44. The Defendants knowingly or recklessly made material false representations to the Plaintiff and Class Members for the purposes of promotion the supply and use of Depuy Implants.

(g) Breach of the Food and Drugs Act, R.S. 1985, c. F-27

45. The Defendants engaged in unfair trade practices and specifically declared unlawful under ss. 3 and 9 of the FDA. Such practices included making false or misleading representations or advertisements, knowingly or with reason to know, as to the characteristics of Depuy Implants.

(h) Unjust enrichment

46. The Defendants voluntarily accepted and retained profits and benefits, derived from the Plaintiff and Class Members, with full knowledge and awareness that, as a result of their conscious and intentional wrongdoings, the Plaintiff and Class Members did not receive a product of the quality, nature or fitness that had been represented by the Defendants or that Plaintiff and Class Members, as a reasonable consumer, expected.

47. By virtue of the conscious wrongdoings alleged, the Defendants have been unjustly enriched at the expense of the Plaintiff and Class Members.

VII. DAMAGES

48. The Plaintiff' and Class Members' injuries and damages were caused by the Defendants, their servants and agents.

49. The Defendants have caused injury to the Plaintiff and to the Class Members including:

(a) death or a reduced standard of living as a result of illness;

(b) the cost of treatment to combat the adverse health effects caused by their use of Depuy Implants; and

(c) an enhanced risk of future problems attributable to the use of Depuy Implants.

50. As a result of the conduct of the Defendants as hereinbefore set out, the Plaintiff and Class Members have been placed in a position where they have sustained or will sustain serious personal injuries and damages.

51. As a result of the conduct of the Defendants, the Plaintiff and Class Members suffered and continue to suffer expenses and special damages of a nature and an amount to be particularized prior to trial.

52. Some of the expenses related to the medical treatment that the Plaintiff and Class Members have undergone, and will continue to undergo have been borne by provincial health insurer including the Nova Scotia Medical Services Insurance Plan. As a result of the negligence of the Defendants, the provincial health insurer has suffered and will continue to suffer damages.

(A) Manifest Harm and Injuries:

53. In addition, the past and ongoing use of Depuy Implants has resulted in the Plaintiff and Class Members' physical and mental health injuries pleaded above, and have further led to pain and suffering, loss of income, impairment of earning ability, loss of valuable services, future care costs, medical costs, loss of amenities and enjoyment of life, anxiety, nervous shock, mental distress, emotional upset, and out of pocket expenses.

54. The Plaintiff and Class Members assert a claim for each of the types of damages listed above.

(B) Medical Monitoring: Responding to Material Risk of Illness

55. Further, the past and ongoing use of Depuy Implants have also caused or materially contributed to increased health risks to the Plaintiff and other Class Members. As a result of the use, the Plaintiff and Class Members have already and will continue to experience illness, anxiety, loss of amenities and enjoyment of life.

56. There are medically accepted tests and diagnostic tools which, if used properly and on a timely basis, will detect at an early stage the serious problems which may result from the use of Depuy Implants by the Class Members. However, not all of these tests are generally available or being administered to the Class Members despite their elevated risk. The early detection of these conditions will significantly reduce the harm and risk of death therefrom.

57. The Class Members seek to recover damages in the form of the total funds required to establish a 'medical monitoring' process to be made available to the Class Members. Such damages include the costs of medical screening and treatment incurred by or on behalf of the Class Members.

58. The damages referred to above may have been incurred directly by the Plaintiff and Class Members, or may constitute subrogated claims owed to provincial health insurers, or to private health, disability, or group benefit insurers.

59. The Plaintiff further allege that the establishment of a medical monitoring process is a necessary and appropriate step for all of the Defendants to take in the course of fulfilling their obligation to minimize the damages suffered by Class Members.

VIII. AGGRAVATED, PUNITIVE AND EXEMPLARY DAMAGES

60. The Defendants manufactured, marketed, promoted and sold Depuy Implants with full knowledge of the fact that they were adversely impacting the physical and psychological health of the Plaintiff and the Class Members. Knowledge of the risks associated with the use of Depuy Implants was not released to the Plaintiff and Class Members. Despite having specific information that the Plaintiff and Class Members

were at risk of serious problems associated with the use of Depuy Implants, the Defendants continued or permitted the continuation of the manufacturing, marketing, promoting and selling of Depuy Implants without any or reasonable controls.

61. These activities were carried out with reckless, callous and wanton disregard for the health, safety and pecuniary interests of the Plaintiff and other Class Members. The Defendants knowingly compromised the interests of the Plaintiff and Class Members, solely for the purpose of monetary gain and profit. Furthermore, once the Defendants knew of the extraordinary dangers that Depuy Implants posed to the Plaintiff and Class Members, the Defendants failed to advise them in a timely fashion, or fully, or at all.

62. The Defendants' negligence was callous and arrogant and offends the ordinary community standards of moral and decent conduct. The actions, omissions, or both, of the Defendants involved such want of care as could only have resulted from actual conscious indifference to the rights, safety or welfare of the Plaintiff and Class Members.

63. Consequently, the Plaintiff and Class Members are entitled to aggravated damages, and an award of punitive and exemplary damages commensurate with the outrageous behaviour of the Defendants.

64. The Plaintiff and Class Members plead that, by virtue of the acts described herein, the Defendants are liable to them in damages. Each of the Defendants is vicariously liable for the acts and omissions of the others for the following reasons:

(a) each was the agent of the other;

(b) each Defendants' business was operated so that it was inextricably interwoven with the business of the other;

(c) each Defendant entered into a common advertising and business plan with the other to distribute and sell Depuy Implants;

(d) each Defendant owed a duty to the other and to the Plaintiff and Class Member by virtue of the common business plan to distribute and sell Depuy Implants; and

(e) each Defendant intended that the businesses be run as one global business organization.

IX. GENERAL PROVISIONS

65. The Plaintiff states that the Defendants are responsible, jointly and severally, for the injuries and damages suffered by the Plaintiff and other Class Members.

66. The Plaintiff pleads the doctrine of respondeat superior and state that the Defendants are vicariously liable to the Plaintiff and Class Members for the acts, omissions, deeds, misdeeds and liabilities of their contractors, sub-contractors, agents, servants, employees, assigns, appointees and partners.

67. The Plaintiff pleads and relies on the Canada *Food and Drugs Act*, R.S. 1985, c. F-27, the Canada *Competition Act*, R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19, the *Nova Scotia Tortfeasors Act*, R.S.N.S., c. 471, the *Nova Scotia Sale of Goods Act*, R.S., c. 408, s. 1, the *Nova Scotia Consumer Protection Act*, R.S., c. 92, s. 1 and the *Nova Scotia Fatal Injuries Act*, R. S. N. S. 1989, c. 163 as amended.

X. RELIEF SOUGHT

68. The Plaintiff repeats the foregoing paragraphs and states that the Defendants are jointly and severally liable for the following:

(a) an Order certifying this proceeding as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class;

(b) general damages, including aggravated damages for personal injuries;

(c) special damages for medical expenses and other expenses related to the use of Depuy Implants;

(d) aggravated, punitive and exemplary damages;

(e) further or alternatively the Plaintiff claims, on her own behalf and on behalf of the Class Members:

(i) a declaration that the benefits which accrued to the Defendants as a result of their wrongful acts unjustly enriched the Defendants;

(ii) an accounting of the benefits which accrued to the Defendants as a result of their wrongful acts;

(iii)a declaration that the Defendants hold in trust for the Class the benefits which accrued to the Defendants as a result of their wrongful acts;

(iv)disgorgement of the benefits which accrued to the Defendants as a result of their wrongful acts;

(f) damages for the funding of a "Medical Monitoring Program", supervised by the Court, for the purpose of retaining appropriate health and other experts to review and monitor the health of the Class Members, and to make recommendations about their treatment;

(g) subrogated claims on behalf of the Provincial providers of medical services;

(h) interest pursuant to the *Judicature Act*;

(i) costs; and

(j) such further and other relief as this Honourable Court deems just.

PLACE OF TRIAL: Halifax, Nova Scotia

DATED at Halifax, Nova Scotia this 10 day of January, 2011.

RAYMOND F. WAGNER
Wagners
Agent for Colin Stevenson
1869 Upper Water Street
3rd Floor Pontac House
HALIFAX, NS B3J 1S9
Tel: 902-425-7330
Email: raywagner@wagnerslawfirm.com