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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHN P. HERNANDEZ and ESTELLA M. HERNANDEZ,

Plaintiffs,

v.

ZIMMER HOLDINGS, INC., a Delaware Corporation, and ZIMMER, INC., a Delaware Corporation,

Defendants.

Case No.

**COMPLAINT FOR DAMAGES**

**JURY TRIAL DEMANDED**

COME NOW Plaintiffs JOHN HERNANDEZ and ESTELLA HERNANDEZ (collectively "Plaintiffs"), by their attorneys, Lieff, Cabraser, Heimann & Bernstein, LLP and the Garrett Law Office, P.C., and for their Complaint against Defendants, allege as follows:

## PARTIES

1. Plaintiffs JOHN HERNANDEZ and ESTELLA HERNANDEZ are adult individuals and they are residents of Bakersfield, Kern County, California.

2. Defendant Zimmer Holdings, Inc., is a corporation incorporated under the laws of the State of Delaware and has its principal place of business in the State of Indiana.

3. Defendant Zimmer, Inc., is a corporation incorporated under the laws of the State of Delaware, and has its principal place of business in the State of Indiana.

4. Defendants Zimmer Holdings, Inc. and Zimmer, Inc. (collectively "Zimmer" or "Defendants") manufactured, marketed and distributed and continue to manufacture, market and distribute orthopedic products, including reconstructive implants used in hip replacement surgery.

5. Zimmer is the nation's largest producer of orthopedic devices, and it does a substantial amount of business in Kern County, California, including marketing and sales of the Durom Cup, the orthopedic device at issue in this case.

## JURISDICTION AND VENUE

6. This Court has diversity jurisdiction over the parties pursuant to 28 U.S.C. § 1332(a). No Defendant is a citizen of the same state as the Plaintiffs and the amount in controversy exceeds $75,000.00 for both Plaintiffs, exclusive of interest and costs.

7. Venue in this jurisdiction is proper pursuant to 28 U.S.C. § 1391(a).

## FACTUAL ALLEGATIONS

8. Zimmer was founded in 1927, and purports to be a worldwide leader in the design and manufacture of orthopedic reconstructive, spinal and trauma devices, dental implants, and related orthopedic surgical products. Zimmer's 2008 sales exceeded $4 billion.

9. Total hip arthroplasty (THA), also called total hip replacement, is a common medical procedure performed on more than 442,000 patients in the U.S. each year,

according to a Millennium Research Group report issued March 2008. The surgery is designed to help relieve pain and improve joint function in people with severe hip degeneration due to arthritis or trauma.

10. The Zimmer Metasul® Durom® Acetabular Component (hereinafter "Durom Cup") is a metal monoblock cup made of cobalt chromium (CoCr) alloy cup with a coating of titanium plasma spray. It is intended for press-fit fixation in the acetabulum (hip socket), which is the cup-shaped cavity at the base of the hipbone into which the ball-shaped head of the femur fits. The Durom Cup is not cemented or screwed in place during implantation; rather, the patient's bone is supposed to bond to the implant. Unlike traditional hip replacement parts, the Zimmer Durom Cup is made from a single piece of material and is designed to address some of the more common problems with hip replacement components, such as wear of the bearing, limited range of motion, and instability.

11. The Durom Cup was launched in Europe in 2003 for hip resurfacing, a procedure that requires less bone removal than conventional THA, but also uses a different surgical technique. In the United States, the Durom Cup was approved for use in THA by the FDA on or around March of 2006.

12. The Durom Cup model distributed in the United States differs from the model distributed in Europe in that the coating on the Durom Cup sold in the United States has a different structure and is thicker compared to the coating on the model sold outside the United States. Additionally, with respect to the implantation of the Durom Cup, orthopedic surgeons implanting the Durom Cup model distributed outside the United States received different training and instructions than those surgeons implanting the Durom Cup model marketed within the United States.

13. In April of 2008, Lawrence Dorr, M.D., a former consultant for Zimmer and veteran of more than 5,000 hip replacement surgeries, notified the Defendant that approximately 23 percent of his patients who had the Durom Cup implanted required a revision surgery and that he was discontinuing use of the product.

14. On July 22, 2008, Defendants sent a letter to surgeons notifying them that they were temporarily suspending the marketing and distribution of the Durom Cup in the United States to allow Zimmer time to update labeling to provide more detailed surgical technique instructions and implement a surgical training program for U.S. surgeons. Although Defendants denied that the product was defective in its manufacturing or design, they admitted that "additional surgical technique instructions and training are necessary in the United States, and we strongly recommend that U.S. surgeons stop implanting the Durom Cup until receiving such training."

15. In a press release dated July 22, 2008, Zimmer stated that it had reviewed data on more than 1,300 patients that had the Durom Cup implanted in the United States (approximately 10 percent of all Durom Cup procedures in the United States as of that date). Defendants further claimed that where "appropriate and necessary surgical techniques" had been used, the revision rate was 1.5 percent. By contrast, the revision rate for remaining patients was claimed by Zimmer to be 5.7 percent. In fact, the revision rate is far higher than claimed by Zimmer, and is actually at least 20 to 30 percent, if not higher.

16. In a letter dated August 16, 2008 to hip surgeons in the United States, Defendants provided those surgeons with updated product labeling on the Durom Cup, more detailed surgical technique instructions, and specific information regarding a comprehensive surgical training program, which Defendants stated they developed in collaboration with several experts.

17. In addition to the updated documents, Defendant also announced that they were launching a comprehensive surgical skills training curriculum.

18. Defendant noted that surgeons must complete at least an online training course, which reviewed the critical aspects of the Durom Cup design, preoperative planning considerations, and comprehensive information regarding the critical technique steps to implant the device. This was the minimum required training to resume product use.

19. Zimmer also established webcasts as follow-up to the online training; a surgical skills course that offered experience with cadavers to practice implantation of the Durom

Cup in a controlled environment, and a surgeon-to-surgeon training course with one-on-one learning with an expert in the operating room.

20. From 2006 through the date of this Complaint, Defendants generally manufactured, labeled, packaged, distributed, supplied, marketed, advertised, and/or otherwise engaged in all activities that are part and parcel of the sale and distribution of a medical device, and by said activities, caused the Durom Cup to be placed into the stream of commerce throughout the United States, including in the State of California.

21. Defendants made, participated in, and/or contributed to filings with the FDA in conjunction with the 510(k) approval process for the Durom Cup.

22. Upon information and belief Defendants were in control of the design, assembly, manufacture, marketing, distribution, packaging, labeling, processing, supplying, promotion, sales, and the issuance of product warnings and related information with respect to the Durom Cup.

23. Defendants were at all times material hereto subject to the laws of the United States of America, including provisions relating to the FDA, and the rules and regulations thereof, in conjunction with the approval process, labeling, and other after-market activities that pertain to the Durom Cup.

24. The Durom Cup has been widely advertised, marketed, and represented by the Defendants as a safe and effective treatment.

25. From the time the Defendants first began selling the Durom Cup in the United States through at least on or about August 16, 2008, the product labeling and product information for the Durom Cup failed to contain adequate information, instructions, and warnings concerning implantation of the product and the risks that the Durom Cup can loosen and separate from acetabulum (hip socket) in patients.

26. Despite its knowledge of the serious injuries associated with use of the Durom Cup, Defendants engaged in a marketing and advertising program which, as a whole, by affirmative and material misrepresentation and omissions, falsely and deceptively sought to create

the image and impression that the Durom Cup was safe and effective for use in hip replacement surgery.

27. Defendants downplayed and understated the health hazards and risks associated with the use of the Durom Cup and through promotional literature as well as sales visits to orthopaedic surgeons, deceived doctors and potential users of the Durom Cup by relaying positive information, while concealing the nature and extent of known adverse and serious health effects.

**Plaintiffs' Experience with the Durom Cup and Resulting Injuries**

28. Prior to July 15, 2008, the orthopedic surgeon for Plaintiff, as well as Plaintiff John Hernandez, were exposed to the aforementioned advertising and marketing campaign directly by the Defendant.

29. Plaintiff and Plaintiff's orthopedic surgeon, either through direct promotional contact with Defendants, through word-of-mouth from other health care providers, and/or through promotional materials, received the information the Defendants intended that they receive, to wit: that the Durom Cup was safe and effective for use in total hip replacement ("THA") procedures.

30. Sometime prior to July 15, 2008, Defendants manufactured the Zimmer Metasul® Durom® Acetabular Component, Reference No. 01.00214.152, Lot No. 2357515, with additional components, which were subsequently implanted into the body of Plaintiff John Hernandez.

31. Sometime prior to July 15, 2008, Defendants provided this Zimmer Metasul® Durom® Acetabular Component and additional components to Plaintiff's orthopedic surgeon for implantation, and all of these components were subsequently implanted into the body of Plaintiff John Hernandez.

32. Using the training and instruction provided by Defendants, on July 15, 2008 Plaintiff's orthopedic surgeon implanted this Zimmer Metasul® Durom® Acetabular Component and other Zimmer components into the body of Plaintiff John Hernandez at Bakersfield Memorial Hospital in Bakersfield, California.

33. Following this surgery, Plaintiff John Hernandez's wounds healed without infection, x-rays showed the hip replacement to be properly positioned and affixed, and the hip replacement suffered no unexpected impacts.

34. Despite these ideal conditions for a hip replacement, at some time following this surgery, Plaintiff John Hernandez began to experience pain and extreme weakness in the hip and quadriceps.

35. Prior to and during this time, Defendants were aware of a high rate of failures of Durom Cups, but did not provide this information to Plaintiff or to Plaintiff's orthopedic surgeon.

36. As a result of Defendants failure to provide this crucial information to Plaintiff's orthopedic surgeon, Plaintiff's orthopedic surgeon had no reason to suspect that the source of Plaintiff's post-surgery pain and weakness was the result of the failure of the Durom Cup.

37. As a direct and proximate result of the use of the Durom Cup, Plaintiff John Hernandez suffered, and continues to suffer, serious bodily injury and harm. Plaintiff incurred, and continues to incur, medical expenses to treat his injuries and condition.

38. At no time material to the use of the Durom Cup was the Plaintiff or Plaintiff's orthopedic surgeon told, warned, or given information about the risks of the use of the Durom Cup.

## CAUSES OF ACTION

### COUNT I
### (Fraudulent Concealment)

39. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here, and further allege on information and belief as follows:

40. Prior to and after Plaintiff John Hernandez was implanted with the Durom Cup, Defendants fraudulently suppressed material information regarding the safety and efficacy of the Durom Cup, including information that the Durom Cup could loosen and separate from the hip socket, causing severe pain and injury, and requiring further treatment, including revision hip

replacement surgery. On information and belief, Defendants' fraudulent misrepresentation described herein was intentional and was made to maintain the sales volume of the Durom Cup.

41. Defendants fraudulently concealed safety issues with the Durom Cup in order to induce orthopedic surgeons to implant the Durom Cup into patients, including Plaintiff John Hernandez.

42. At the time Defendants concealed the fact that the Durom Cup was not safe, Defendants were under a duty to communicate this information to orthopedic surgeons, the FDA, the medical community, and the general public in such a manner that they could appreciate the risks associated with the Durom Cup.

43. Plaintiff and Plaintiff's physician relied upon the Defendants' untruths regarding the safety of the Durom Cup.

44. As a direct and proximate result of Defendants' malicious and/or intentional concealment of material life-altering information from Plaintiff and Plaintiff's orthopedic surgeon, Defendants caused or contributed to Plaintiff's injuries.

45. It is unconscionable and outrageous that Defendants would risk the safety of consumers. Despite their knowledge of defects and the high failure rate likely in the Durom Cup, the Defendants made conscious decisions not to redesign, label, warn or inform the unsuspecting consuming public and the medical community. Defendants' outrageous conduct rises to the level necessary that Plaintiffs should be awarded punitive damages to deter Defendants from this type of outrageous conduct in the future and to discourage Defendants from placing profits above the safety of patients.

46. Defendants' fraudulent concealment tolled the statute of limitations because only Defendants knew the true dangers associated with the Durom Cup as described herein. Defendants did not disclose this information to the Plaintiff, Plaintiff's physician, the medical community, or the general public. Without full knowledge of the dangers of the Durom Cup, Plaintiffs were unable to promptly evaluate whether or not Plaintiff John Hernandez had been injured by his implanted Durom Cup.

47. As a direct and proximate cause of the Defendants' misconduct as set forth herein, Plaintiff John Hernandez has suffered and continues to suffer serious and permanent physical injuries, and non-economic and economic injuries.

**COUNT II**
**(Strict Liability – Failure to Warn)**

48. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

49. Defendants researched, developed, designed, tested, manufactured, inspected, labeled, distributed, marketed, promoted, sold, and otherwise released into the stream of commerce the Durom Cup and, in the course of same, directly advertised or marketed the product to the FDA, healthcare professionals, and consumers, or persons responsible for consumers, and therefore had a duty to warn of the risks associated with the use of the Durom Cup.

50. Defendants failed to adequately warn healthcare professionals and the public, including the Plaintiff and Plaintiff's orthopedic surgeon, of the true risks of the Durom Cup, including that the Durom Cup could loosen and separate from the hip socket, causing severe pain and injury and requiring further treatment, including revision hip replacement surgery.

51. Defendants failed to timely and reasonably provide adequate instructions and training to Plaintiff's physicians concerning safe and effective use of the Durom Cup.

52. The Durom Cup, which was researched, developed, designed, tested, manufactured, inspected, labeled, distributed, marketed, promoted, sold, and otherwise released into the stream of commerce by Defendants, was defective due to inadequate post-marketing warnings and/or instructions because Defendants knew or should have known that there was reasonable evidence of an association between the Durom Cup and failure of hip surgeries using the Durom Cup, causing serious injury and pain to patients undergoing those surgeries. Defendants failed to provide adequate warnings to healthcare professionals and the consuming public, including Plaintiff, and continued to aggressively promote the Durom Cup.

53. Defendants failed to perform or otherwise facilitate adequate testing; failed to reveal and/or concealed testing and research data; and selectively and misleadingly revealed and/or analyzed testing and research data.

54. As a direct and proximate cause of the Defendants' misconduct as set forth herein, Plaintiff John Hernandez has suffered and continues to suffer serious and permanent non-economic and economic injuries.

**COUNT III**
**(Strict Liability – Defective Design)**

55. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

56. Defendants are the researcher, developer, manufacturer, distributor, marketer, promoter, supplier, and seller of the Durom Cup, which is defective and unreasonably dangerous to consumers.

57. The Durom Cup is defective in its design or formulation in that it is not reasonably fit, suitable, or safe for its intended purpose and/or its foreseeable risks exceed the benefits associated with its design and formulation. The Durom Cup is defective in design or formulation in that it lacks efficacy and/or poses a greater likelihood of injury than other hip replacement devices and similar hip replacement devices on the market and is more dangerous than ordinary consumers can reasonably foresee.

58. If the design defect were known at the time of manufacture, a reasonable person would have concluded that the utility of the Durom Cup did not outweigh the risk of marketing a product designed in that manner.

59. The defective condition of the Durom Cup rendered it unreasonably dangerous and/or not reasonably safe, and the Durom Cup was in this defective condition at the time it left the hands of the Defendant. The Durom Cup was expected to and did reach consumers, including Plaintiffs, without substantial change in the condition in which it was designed, manufactured, labeled, sold, distributed, marketed, promoted, supplied, and otherwise released into the stream of commerce.

60. Plaintiffs were unaware of the significant hazards and defects in the Durom Cup. The Durom Cup was unreasonably dangerous and/or not reasonably safe in that it was more dangerous than would be reasonably contemplated by the ordinary user. During the period that Plaintiff was implanted with the Durom Cup, it was being utilized in a manner that was intended by Defendants. At the time Plaintiff received and was implanted with the Durom Cup, it was represented to be safe and free from latent defects.

61. Defendants are strictly liable to Plaintiffs for designing, manufacturing, and placing into the stream of commerce a product which was unreasonably dangerous for its reasonably foreseeable uses at the time it left the control of the Defendants because of the design defects.

62. Defendants knew or should have known of the danger associated with the use of the Durom Cup, as well as the defective nature of the Durom Cup, but has continued to design, manufacture, sell, distribute, market, promote, and/or supply the Durom Cup so as to maximize sales and profits at the expense of the public health and safety, in conscious disregard of the foreseeable harm caused by the Durom Cup.

63. As a direct and proximate cause of the Defendants' misconduct as set forth herein, Plaintiff John Hernandez has suffered and continues to suffer serious and permanent non-economic and economic injuries.

**COUNT IV**
**(Negligence)**

64. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

65. Prior to and after the Plaintiff was implanted with the Durom Cup, Defendants knew or had reason to know of the true risks and dangerous conditions of the Durom Cup, including that the Durom Cup could loosen and separate from the hip socket, causing severe pain and injury, and requiring further treatment, including revision hip replacement surgery.

66. Defendants had a duty to exercise reasonable care in the design, testing, manufacturing, quality assurance, quality control, labeling, advertising, marketing and sale,

warnings, and distribution of the device to insure that it was fit for its intended use and safe for use by consumers.

67. Defendants failed to exercise ordinary care in the design, testing, manufacturing, quality assurance, quality control, labeling, advertising, marketing and sale, warnings, and distribution of the Durom Cup, in that the Defendants knew or should have known that the implant created a high risk of unreasonable harm and injury to consumers.

68. Defendants were negligent in the design, testing, manufacturing, quality assurance, quality control, labeling, advertising, marketing and sale, warnings, and distribution of the Durom Cup, in that, among other things, they:

a. Failed to use due care in designing and manufacturing the Durom Cup, so as to avoid the aforementioned risks to individuals;

b. Failed to accompany the implant and its components with proper warnings of the true risks of the true risks and dangerous conditions of the Durom Cup;

c. Failed to provide adequate training and instruction to medical care providers for appropriate use of the Durom Cup (inter-alia, that Defendants failed to instruct implanting surgeons of proper surgical techniques and methods);

d. Placed an unsafe product into the stream of commerce;

e. Were otherwise careless or negligent.

69. As a direct and proximate cause of the Defendants' misconduct as set forth herein, Plaintiff John Hernandez has suffered and continues to suffer serious and permanent non-economic and economic injuries.

**COUNT V**
**(Negligent Misrepresentation)**

70. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

71. Prior to and after the Plaintiff was implanted with the Durom Cup, Defendants misrepresented that the Durom Cup was a safe and effective hip joint replacement system component.

72. Defendants had a duty to provide Plaintiffs, orthopedic surgeons, and other consumers with true and accurate information and warnings of any known risks and dangerous conditions of the orthopedic products they marketed, distributed, and sold.

73. Defendants failed to disclose material facts regarding the safety and efficacy of the Durom Cup, including that the Durom Cup could loosen and separate from the hip socket, causing severe pain and injury and requiring further treatment, including revision surgery and/or hip replacement.

74. Defendants knew or should have known that their representations regarding the safety and efficacy of the Durom Cup were false, in that they did not possess information on which to accurately base those representations and they concealed that there was no reasonable basis for making those representations, and/or based on their prior experience, adverse event reports, studies and knowledge of the efficacy and safety failures with the Durom Cup they concealed the true risks and dangers of the Durom Cup.

75. Defendants made the representations and failed to disclose the material facts with the intent to induce consumers, including Plaintiffs, to act in reliance on those misrepresentations and omissions.

76. In reliance of the Defendants' misrepresentations and omissions, Plaintiff John Hernandez was implanted with the Durom Cup. If Plaintiff had known of the true facts, he would not have agreed to be implanted with the Durom Cup. Plaintiff's reliance on Defendants' misrepresentations and omissions were reasonable because those representations were made by individuals and entities (i.e. Defendants) in a position to know the true facts and dangers.

77. As a direct and proximate cause of the Defendants' misconduct as set forth herein, Plaintiff John Hernandez has suffered and continues to suffer serious and permanent non-economic and economic injuries.

**COUNT VI**
**(Breach of Implied Warranty of Merchantability)**

78. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

79. Defendants designed, manufactured, labeled, advertised, distributed and sold the Durom Cup at issue in this case.

80. At the time, Defendants marketed, distributed, and sold the Durom Cup to Plaintiffs, Defendants impliedly warranted that the Durom Cup was merchantable and fit for the ordinary purposes of its intended use as a hip joint replacement system component.

81. Plaintiffs purchased the product from Defendants. Plaintiff John Hernandez was a foreseeable user of the product and an intended third-party beneficiary of the warranty.

82. The Durom Cup was not merchantable and fit for its ordinary purpose, as the product failed while being used for its intended purpose, causing injury to Plaintiffs.

83. Plaintiffs reasonably relied on Defendants' representations that the Durom Cup was safe hip joint replacement system component and free of defects.

84. As a direct and proximate cause of the Defendants' misconduct as set for herein, Plaintiff John Hernandez has suffered and continues to suffer serious and permanent non-economic and economic injuries.

**COUNT VII**
**(Breach of Implied Warranty of Fitness for a Particular Purpose)**

85. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further alleges on information and belief as follows:

86. Defendants designed, manufactured, labeled, advertised, distributed, and sold the Durom Cup at issue in this case.

87. Defendants sold the Durom Cup with an implied warranted that the product was reasonably fit for the particular purpose as a safe hip joint replacement system component.

88. Plaintiffs purchased the product from Defendants. Plaintiff John Hernandez was a foreseeable user of the product and an intended third-party beneficiary of the warranty.

89. The Durom Cup was not fit for the particular purpose as a safe hip joint replacement system component, as the product failed while being used for its intended particular purpose, causing injury to Plaintiffs.

90. Plaintiffs reasonably relied on Defendants' representations that the Durom Cup was a safe hip joint replacement system component and free of defects.

91. As a direct and proximate cause of the Defendants' misconduct as set forth herein, Plaintiff John Hernandez has suffered and continues to suffer serious and permanent non-economic and economic injuries.

**COUNT VIII**
**(Breach of Express Warranty)**

92. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

93. Defendants designed, manufactured, labeled, advertised, distributed and sold the Durom Cup at issue in this case.

94. Defendants expressly warranted that the Durom Cup was reasonably fit for extended, safe use as a hip joint replacement system.

95. The above representations were contained or constituted affirmations of fact or promises made by the seller to the buyer which related to the goods and became part of the basis of the bargain, creating an express warranty that the goods shall conform to the affirmations of fact or promises.

96. The above representations made by the Defendants were meant to directly or indirectly induce persons such as Plaintiffs and Plaintiff's orthopedic surgeon to purchase the Durom Cup.

97. Plaintiffs purchased the product from Defendants. Plaintiff John Hernandez was a foreseeable user of the product and an intended third-party beneficiary of the warranty.

98. The Durom Cup does not conform to these express representations because the Durom Cup is not reasonably fit, suitable or safe, as the product failed while being used for its intended purpose, causing injury to Plaintiffs.

99. Defendants breached their express warranty in one or more of the following ways:

a. The Durom Cup, as designed, manufactured, sold and/or supplied by the Defendants, was defectively designed and placed into the stream of commerce by Defendants in a defective and unreasonably dangerous condition;

b. Defendants failed to warn and/or place adequate warnings and instructions on the Durom Cup;

c. Defendants failed to adequately test the Durom Cup;

d. Defendants failed to provide a timely and adequate post-marketing warnings and instructions after they knew the risk of injury from the Durom Cup.

100. Plaintiffs reasonably relied on Defendants' representations that the Durom Cup was a safe hip joint replacement system component and free of defects.

101. As a direct and proximate cause of the Defendants' misconduct as set forth herein, Plaintiff John Hernandez suffered and continues to suffer serious and permanent non-economic and economic injuries.

**COUNT IX**
**(Fraud)**

102. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

103. Defendants falsely and fraudulently represented to the medical community, the Plaintiffs and the public in general, that the Durom Cup had been tested and found to be a safe and effective hip joint replacement system component.

104. Defendants knew, or should have known, that their representations were false; yet they willfully, wantonly, and recklessly disregarded their obligation to provide truthful

representations regarding the safety and risks of the Durom Cup to consumers, including Plaintiffs and the medical community.

105. Defendants' representations were made with the intent of defrauding and deceiving consumers, including Plaintiffs and the medical community, with the intent of encouraging and inducing sales of the Durom Cup.

106. Defendant knowingly, consciously, and deliberately placed its financial gain above the rights and safety of Plaintiffs and other consumers.

107. Defendants' fraudulent representations evinced its callous, reckless, willful, and depraved indifference to the health, safety, and welfare of consumers, including Plaintiffs.

108. Plaintiffs were unaware of the falsity of Defendants' representations and reasonably relied upon Defendants' representations.

109. As a direct and proximate result of Defendants' fraudulent misrepresentation pertaining to the Durom Cup, Plaintiffs have sustained serious and permanent injuries, and will continue to suffer injury, harm, and economic losses.

**COUNT X**
**(Violation of Cal. Rev. Stat. Bus. & Prof. Code § 17500, *et seq.*)**

110. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

111. Defendants violated the deceptive trade practices and/or false advertising laws of the State of California by use of false and misleading advertisements and representations and omissions of material fact in connection with the marketing, promotion, and sale of the Durom Cup.

112. Defendants communicated the purported benefits of the Durom Cup, while failing to disclose the true risks and dangerous conditions of the Durom Cup with the intent that consumers, like Plaintiffs, and the medical community rely on the omissions and misrepresentations and purchase and implant the Durom Cup.

113. As a result of violating these deceptive trade practices and/or false advertising laws, Defendants caused Plaintiff John Hernandez to be implanted with the Durom Cup, causing severe injuries and damages as described herein.

**COUNT XI**
**(Strict Liability – Defective Manufacture)**

114. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

115. Defendants are the researcher, developer, manufacturer, distributor, marketer, promoter, supplier, and seller of the Durom Cup, which is defective and unreasonably dangerous to consumers.

116. The Durom Cup is defective in its manufacturing, rendering it unreasonable and unsuitable for its intended purpose.

117. The Defective manufacture of the Durom Cup rendered it unreasonably dangerous and/or unreasonably safe from the moment of manufacture through the time it reached the end user, including the Plaintiffs, without any substantial change in the condition in which it was manufactured through the time it was released into the stream of commerce for consumption.

118. Plaintiffs and the public at large were at no time aware of the manufacturing defects in the Durom Cup.

119. Defendants are therefore strictly liable to the Plaintiffs for designing, manufacturing and placing into the stream of commerce a product that was negligently and defectively manufactured for its reasonably foreseeable use at the time it left the control of the Defendants because of its manufacturing defects.

120. Defendants knew of or should have known of the danger associated with the use of the Durom Cup, as well as the defective manufacture of the Durom Cup, but have continued to design, manufacture, sell, distribute, market, promote, and/or supply the Durom Cup so as to maximize sales and profits at the expense of the public health, safety and welfare in conscious disregard of the foreseeable harm caused by the Durom Cup.

121. As a direct and proximate cause of Defendants' misconduct as set forth herein, Plaintiff John Hernandez has suffered and continues to suffer serious and permanent non-economic and economic injuries.

**COUNT XII**
**(Loss of Consortium – Estella Hernandez)**

122. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

123. Plaintiff Estella Hernandez is married to Plaintiff John Hernandez.

124. As a proximate and direct result of the negligence and other misconduct of all Defendants, as alleged above, Plaintiff Estella Hernandez has suffered loss of consortium and all related and incidental and consequential damages to her marital relationship with John Hernandez, recovery of said damages for which Plaintiff Estella Hernandez now sues.

125. As a direct and proximate result of the negligence of all Defendants as described above, there has been an impairment of the marital relationship between Estella Hernandez and her husband, John Hernandez. Accordingly, Plaintiff Estella Hernandez has suffered a serious loss of the solace, comfort, companionship, society, assistance and services that previously existed in the marital relationship with Plaintiff John Hernandez in excess of the jurisdictional amount of the court, and will continue to suffer such losses and damages into the future.

**DAMAGES – JOHN HERNANDEZ**

126. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth here and further allege on information and belief as follows:

127. As a proximate result of the negligence and other misconduct of all Defendants, Plaintiff John Hernandez has sustained personal injuries to his body and hip, severe mental and emotional distress, including the following damages in the past and in reasonable probability in the future:

a. Physical pain and suffering; past and future;

b. Mental anguish; past and future;

c. Physical Impairment (including but not limited to the loss of enjoyment of life), past and future;

d. Reasonable expenses of necessary medical care, past and future;

e. Lost wages in the past, and

f. Loss of earning capacity in the future.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs pray for relief as follows:

1. Awarding compensatory damages to Plaintiff John Hernandez for past and future damages, including, but not limited to, pain and suffering for severe and permanent personal injuries sustained by the Plaintiff, health care costs, medical monitoring, (all as pled herein) together with interest and costs provided by law;

2. Awarding compensatory damages to Plaintiff Estella Hernandez for past and future damages, including, but not limited to, all of her loss of consortium related damages together with interest and costs provided by law;

3. Punitive and/or exemplary damages for the wanton, willful, fraudulent, reckless acts of the Defendants, who demonstrated a complete disregard and reckless indifference for the safety and welfare of the general public and to the Plaintiffs in an amount sufficient to punish Defendants and deter future similar conduct;

4. Awarding all applicable statutory damages of the state whose law will govern this action;

5. Awarding Plaintiffs pre and post-judgment interest (as allowed by law);

6. Awarding Plaintiffs reasonable attorneys' fees;

7. Awarding Plaintiffs the costs of these proceedings; and

8. Such other and further relief as this Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff demands a jury trial on all issues triable

Respectfully,

DATED: July 19, 2010

LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP

By: _____
Kent L. Klaudt

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