



Sue Wilkinson #2
April , 2016
No. S095493
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DENNIS JONES and SUSAN WILKINSON

Plaintiffs

AND:

ZIMMER GMBH, ZIMMER, INC., and
ZIMMER OF CANADA LIMITED

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

AFFIDAVIT OF SUSAN GWEN WILKINSON #2

I, Susan Gwen Wilkinson, of 6005 97th Street, Osoyoos, in the Province of British Columbia licensed practical nurse, SWEAR THAT:

1. I am the court appointed representative plaintiff in this certified class action, and as such have knowledge of the facts stated in this affidavit. Where facts are not within my personal knowledge, I have stated the source of my information and I believe those facts to be true.

My Experience with the Durom Hip Implant

2. On April 28, 2008, I underwent surgery to replace my left hip with a prosthetic implant. The surgery was performed by Dr. Cameron Taylor at Penticton Hospital. I am informed by Dr. Taylor that I was implanted with a Zimmer Durom hip implant.

3. I initially felt that I was recovering following my hip replacement surgery. I experienced some pain in my left leg starting in July 2008 that Dr. Taylor told me probably resulted from a hairline crack in my femur. The pain and clicking sensation became worse over the ensuing months. I bought a cane in January 2009, to help alleviate the pressure on my left hip. I had difficulty sleeping as I could not turn in bed because of the pain to my left hip.

4. I am a licensed practical nurse employed by the Interior Health Region where I primarily work at the McKinney Place extended care facility in Oliver, British Columbia. My job requires me to spend 10 hours of 12 hour shifts on my feet, to physically reposition residents, to push patient wheel chairs, and to transport heavy boxes of medicines. The pain in my hip made it very difficult for me to continue with my work, and I was physically unable to take on extra shifts offered to me by my employer.

5. I saw Dr. Taylor in May 2009, and I explained my worsening symptoms to him. Dr. Taylor told me that it had come to his attention that the type of hip implant I received had been experiencing a higher than normal incidence of failure. After being examined by Dr. Taylor, he recommended me for revision surgery to remove my Durom Cup implant, and he referred me to Dr. Nelson Greidanus in Vancouver to perform this procedure.

6. Dr. Greidanus performed the revision surgery on me on October 29, 2009 at Vancouver General Hospital. I was advised by Dr. Greidanus that the implant cup popped out of my hip and fell onto the operating room floor when Dr. Greidanus merely pushed on it with his hand.

7. I had long period of recovery following this first revision surgery, and I missed many months of work. Ultimately, this first revision surgery was not successful, and a second revision was performed on January 9, 2012. Since then, my health and mobility has improved.

8. The failure of my hip implant has been an ordeal. I have experienced long periods of pain and disability, and I have undergone multiple surgeries. Because of my injuries, I missed extended periods of work. There has also been substantial impact on my family, and on my daily activities. I incurred significant out-of-pocket expenses, including travel costs back and forth between Osoyoos and Vancouver to seek medical care.

My Service as Representative Plaintiff and My Recommendation on the Settlement

9. I contacted Klein Lyons (now Klein Lawyers) on June 15, 2009, regarding my injuries. Mr. Klein had previously represented me in another legal matter, and I was hopeful that he might be willing to help me with a claim involving my hip implant.

10. I was referred to Mr. Lennox at Klein Lawyers who agreed to investigate my potential claim. He explained to me that the firm had recently been contacted by another British Columbia resident who was experiencing similar problems with a Durom Cup implant, and so they had already begun researching this product, and its potential defects. (I later learned that this was Dennis Jones, my co-plaintiff).

11. Following their investigation, Mr. Lennox and Mr. Klein recommended that I pursue a class action against the manufacturers of the Durom Cup with myself and Mr. Jones as the first two plaintiffs in Canada to start such a claim. I agreed with their recommendations, and I signed a retainer with them on June 25, 2009, a copy of which is attached as **Exhibit A**.

12. A Statement of Claim was issued on my behalf, and that of Mr. Jones, and the proposed class on July 24, 2009. This is attached as **Exhibit B**.

13. Thereafter my lawyers have kept me informed of their progress. We discussed the case on many occasions, by phone call, email and in-person, and my lawyers have provided me with numerous court documents, including mediation briefs, which have explained the issues in the lawsuit. I understand that Mr. Justice Bowden was appointed as the case management judge in the lawsuit, and that my lawyers appeared before Mr. Justice Bowden at regular intervals to set a schedule in the proceeding, to obtain class certification, and then to advance the case through discoveries, and obtain a trial date. I provided instructions to my lawyers as necessary, I received updates from them, and I delivered an affidavit in support of class certification.

14. A first mediation was scheduled in this proceeding for March 7 and 8, 2012. It was held in Toronto before retired Ontario court judge, Mr. George Adams. I traveled from my home in Osoyoos to Toronto to attend the mediation. In order to make the trip, I had to use up vacation time from my job. The case did not settle at the mediation, which was frustrating. I did however get a chance to meet the Ontario plaintiffs, and I appreciated the opportunity to share experiences with my fellow class members.

15. A second mediation was held in Toronto on July 30 and 31, 2013, also before Mr. Adams. Again, I made the long trip from Osoyoos to Toronto to attend the mediation. Again, I consumed scarce vacation days in order to make the trip. This mediation also failed.

16. A third mediation was held in Toronto on June 4 and 5, 2014, before Mr. Adams. It was not possible for me to attend this third mediation. I can take only limited time away from my job, and I had already consumed many vacation days because of my injuries and the prior mediations.

17. Having attended two prior mediations, however, I had confidence in my lawyers, and I had an understanding of the issues. Also, I had come to know the Ontario plaintiffs, Mr. and Mrs. McSherry and Mr. Emond from the prior mediations, and I had confidence in them as advocates for our fellow class members. Further, my lawyers kept in touch by phone and email during the third mediation, provided me with the briefs, explained the issues, and confirmed my instructions.

18. An agreement-in-principle was reached at the third mediation. Thereafter, it was necessary to convert this agreement-in-principle into a formal agreement. There was a long process of further negotiations to achieve this. Finally, a formal agreement was executed. A copy of the settlement agreement is attached as Exhibit C.

19. I understand that there were some delays in completing the execution of the agreement related to issues concerning counsel in proposed class action in Quebec. Lawyers for the Merchant Law Group attended the second and third mediation on behalf of a proposed class action in Quebec, although their client, Mr. Wainberg, did not. I understand that Mr. Wainberg passed away on December 8, 2015 without signing the settlement agreement, and that on March 7, 2016, Mr. Justice Gouin of the Quebec Superior Court removed Merchant as counsel, and the late Mr. Wainberg as proposed representative plaintiff in the Quebec proceedings and instead appointed the Montreal law firm of Trudel Johnston & Lesperance as Quebec class counsel, and Montreal resident, Michel Major, as the Quebec proposed representative plaintiff. An addendum to the settlement agreement was executed, replacing Merchant/Wainberg with Trudel/Major, and completing the terms of the settlement by incorporating the Quebec proceedings. This addendum is attached as Exhibit D.

20. I have reviewed the settlement agreement with my lawyers and I believe this agreement is in the best interests of the class as a whole. I ask that the courts in British Columbia, Ontario and Quebec approve it.

21. I am happy with the work that my lawyers have done for the class, and I request that the courts award them a class counsel fee.

22. I further request that the courts award payment of an honorarium to me for my service to the class. My lawyers have explained to me that the factors that the court will look at when deciding whether to award an honourarium are as follows:

- (a) active involvement in the initiation of the action and retainer of counsel;
- (b) genuine exposure to adverse costs award;
- (c) hardship or inconvenience in prosecuting the action;
- (d) contributions of time and effort;
- (e) communication and interaction with class members;
- (f) participation during the various stages of the action including discovery, settlement negotiation, and trial.

23. With respect to (a), I actively sought out Klein Lawyers to help me with this case, and I helped persuade them to take it on.

24. With respect to (b), I understand from my lawyers that this factor may not be relevant to British Columbia.

25. With respect to (c), the job of representative plaintiff in this case this has not been an easy one. Concurrently with helping to direct this litigation, I have had to deal with serious personal injuries and repeated surgeries, and their impacts on my career and family. I would have preferred not to have been the first person in Canada to start a lawsuit against the Defendants so that I could have directed my energies elsewhere.

26. Among other things, my participation in this litigation repeatedly consumed scarce vacation time from my work, as it was necessary for me to travel across the country to attend mediations on behalf of a national class. These vacation days are a finite resource which, but for my service to the class, I would have preferred to have used for other purposes, including to help cope with my injuries, or to have banked them with my employer for other contingencies, or to have simply enjoyed them with my family.

27. Moreover, this case was the subject of media interest, and my name was published in news reports covering Mr. Justice Bowden's certification decision, including the *Globe and Mail* and the *Vancouver Sun*. I would have preferred to have maintained my privacy, like the majority of class members who do not have to come forward and lend their names to litigation.

28. Despite my personal preferences to maintain my privacy, to focus upon my health, and to use my vacation days for other purposes, I believed that there were other Canadians out there, just like me, who had been harmed by this implant, and I thought that it was important to get the word out about this medical product, even at personal cost. In talking with my doctors, they had told me that they were starting to see other patients who were experiencing problems with the Durom Cup. At the time I commenced my lawsuit, the Durom Cup had not yet been recalled in Canada. I wanted to alert other Canadians as to the potential risks of the Durom Cup so that they

might safeguard their health, and so that they might not suffer as I had. I told my lawyers to start this lawsuit even if it meant that I had to be the first Canadian to come forward.

29. With respect to (d), I have contributed my time and effort to prosecuting this action, including traveling and taking time away from work to help resolve this case on behalf of my fellow class members.

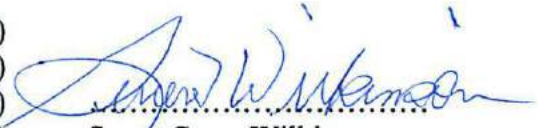
30. With respect to (e), I have met with, and communicated with my fellow class members, including Mr. and Mrs. McSherry, and Mr. Emond.

31. With respect to (f), I have participated at various stages of this action, including providing affidavits, and participating in settlement negotiations.

32. In sum, I am glad to see that this case has been brought to a conclusion. I have helped direct this lawsuit with the assistance of my lawyers for almost 7 years. It has been an interesting experience, and I hope that many Canadians will benefit from this settlement.

SWORN BEFORE ME
at Osoyoos, British Columbia
on this 20 day of April, 2016.

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A commissioner for taking
affidavits for British Columbia

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) Susan Gwen Wilkinson
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JOHN R. COOPER

Barrister & Solicitor
8145 Main St.
P.O. Box 100 - Osoyoos, B.C.
V0H 1V0
Ph: 250-495-2626

FEE AGREEMENT BY REPRESENTATIVE PLAINTIFF

I, Susan Wilkinson, retain Klein Lyons to act as counsel on my behalf, and on behalf of a class of persons who were injured by a Zimmer hip implant.

I authorize you to take all necessary steps, incur all reasonable expenses, and employ such agents and counsel as you consider necessary.

The legal fee paid to KLEIN, LYONS will be one-third (33.33%) of the amount that I receive, and that class members receive, for damages, interest and costs, plus disbursements and taxes. The legal fee will be paid from any judgment or settlement. I shall have no personal liability for fees or disbursements in the event that there is no recovery.

Klein Lyons will be reimbursed for all disbursements incurred, plus interest on those disbursements. Interest on disbursements will be calculated at the rate of 10% per annum, not compounded. The payment of legal fees, disbursements, interest and taxes to Klein Lyons shall be a first charge on the proceeds of any settlement or judgment payable in such manner that the Court shall direct.

If I terminate the services of KLEIN LYONS before a settlement or damage award, they will have the right to a reasonable fee based on services rendered, and to the recovery of disbursements.

Section 38 of the Class Proceedings Act provides that "An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court on application of the solicitor." It also requires that a fee estimate be provided. If the total recovery to the class were \$3 million, the fee would be \$1 million, plus disbursements, taxes and interest.

I acknowledge receiving a copy of this retainer and contingency fee agreement.

Dated at OSOYOOS, BC on June 25 2009 (insert city) (insert date)

Susan Wilkinson (handwritten signature)

This is Exhibit A referred to in the affidavit of Susan Owen Wilkinson sworn before me, this 9th day of April 2016

JOHN R. COOPER Barrister & Solicitor 8145 Main St P.O. Box 100 - Osoyoos, B.C. V0H 1V0 Ph. 250-495-2626



S-095493

Court File No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

DENNIS JONES and SUSAN WILKINSON

Plaintiffs

and:

ZIMMER GMBH, ZIMMER, INC., and ZIMMER OF CANADA LIMITED

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

STATEMENT OF CLAIM

The Parties

1. The Plaintiff, Dennis Jones, is a resident of Langley, British Columbia.
2. The Plaintiff, Susan Wilkinson, is a resident of Osoyoos, British Columbia.
3. The Plaintiffs bring this action on their own behalf, and on behalf of a class of persons resident in British Columbia, and elsewhere in Canada, who were implanted with a Durom Hip Resurfacing System.
4. The Defendant, Zimmer, Inc. ("Zimmer US"), is incorporated in the State of Delaware with its principal place of business in Warsaw, Indiana. It is licensed by Health Canada as a manufacturer of medical devices.
5. The Defendant, Zimmer GMBH ("Zimmer Europe"), is a Swiss corporation with its principal place of business in Winterthur, Switzerland. It is licensed by Health Canada as a manufacturer of medical devices.

This is EXHIBIT B referred to in the
 affidavit of Susan Gwen Wilkinson
 sworn before me, this 20
 day of April 2016
JOHN R. COOPER
 Barrister & Solicitor
 8145 Main St.
 P.O. Box 100 - Osoyoos, B.C.
 V0H 1V0
 Ph: 250-495-2626

6. The Defendant, Zimmer of Canada Limited ("Zimmer Canada"), is incorporated in Ontario with its head office in Toronto, Ontario. Zimmer Canada is registered as an extra-provincial company in British Columbia with its address for delivery at 1500 - 1040 West Georgia Street, Vancouver, British Columbia V6E 4H8. It is a wholly owned subsidiary of Zimmer US. It imports and distributes into Canada medical devices manufactured by related Zimmer corporations.

The Durom Cup Hip Implant

7. The Defendants individually and collectively participated in one or more of the following: the development, manufacture, distribution, marketing, promotion and importation of the "Durom Hip Resurfacing System", (hereinafter referred to as the "Product"). The Product is a Class III medical device under the *Food and Drugs Act*, R.S.C. 1985, F-27. It may only be sold in Canada with the licence and approval of Health Canada. The Defendants obtained the license to sell the Product in Canada in or about April 2005.

8. The Plaintiffs were implanted with the Product during hip surgery. The Product was defective. The Plaintiffs require surgery to remove the Product and replace it with another hip implant. The Plaintiffs have suffered personal injuries as a result.

9. The source of the Product's defect is one of its components, the Durom Acetabular Component or Durom Cup. This is a non-cemented cup with a coating of titanium plasma spray. It is designed to act as an artificial joint socket and to allow the patient's bone to grow into or around it, thus keeping the cup or artificial socket in place.

10. The cup was defective in that it fails to properly heal or adhere to the surrounding bone. Instead, it remains loose, or separates from the bone, causing the patient excruciating pain. It must be removed, requiring the patient to undergo further hip surgery.

11. Problems with the Durom Cup became publicly known in or about April 2008, when Lawrence Dorr, MD., a world-renowned orthopedic surgeon and Director of the Dorr Institute for Arthritis Research and Education, wrote a letter dated April 22, 2008 to his colleagues at the American Association of Hip and Knee Surgeons, warning of failures and defects associated with the Defendants' Durom Cup. Dr. Dorr wrote:

"This failure rate has occurred within the first two years. In the first year the x-rays looked perfect. We have revised four that did not have any radiolucent lines or migration (and John Moteland revised one). These early cups fooled us, but the symptoms were so classic for a loose implant that we operated the patients. When we hit the edge of the cup it would just pop free. As time goes by the cups begin developing radiolucent lines. We now have one cup at two years that has actually migrated a short distance. It has tilted into varus. We do not believe the fixation surface is good on these cups. Also there is a circular cutting surface on the periphery of the cup that we believe prevents the cup from fully seating. We stopped using the cup after the first revisions."

12. Prior to writing that letter, Dr. Dorr had communicated his concerns about the product to the Defendants in early 2008. The Defendants failed to initiate a timely investigation into these concerns. Instead, the Defendants took the position that surgical error was the cause of any problems with the Product, even though the concerns relayed to the Defendants were coming from a highly experienced and respected surgeon.

13. Subsequent to the publication of Dr. Dorr's letter, the Defendants received many more complaints from orthopedic surgeons about the Product's failures. Finally, in late May 2008, the Defendants began an investigation into these complaints.

14. On July 22, 2008, the Defendants recalled the Product in the United States. To date, the Defendants have not initiated a similar recall in Canada.

15. According to the Defendants own investigation, as of July 2008, some clinics using the Product experienced a failure of at least 5.7%.

16. Notwithstanding the absence of a recall in Canada, a similarly high rate of failure has been seen in this country with the Durom Cups.

Defendants' Negligence

17. As the manufacturers, marketers, developers, distributors, and/or importers of the Product, the Defendants were in such a close and proximate relationship to the Plaintiffs, and other class members, as to owe them a duty of care. They caused the Product to be introduced into the stream of commerce in Canada, and they knew that any defect in the Product would cause foreseeable injury to the Plaintiffs and class members.

18. The Defendants were negligent in the research, development, testing, manufacture, distribution and sale of the Product. Effective adhesion of the Durem Cup to the patient's bone was critical to the safety and medical efficacy of the Product. The Defendants owed a duty to use all reasonable care and skill to ensure that the Product was effective at adhering to bone before marketing it, and to continually monitor its safety thereafter. The Defendants further owed a duty to warn the Plaintiffs, class members, their health care providers, and the regulator of any safety problems with the Product.

19. Particulars of the Defendants' negligence are:

- (a) manufacturing and/or marketing a device which they knew, or ought to have known, had an unreasonably high risk of loosening and of implant failure in patients;
- (b) failing to adequately test the safety and efficacy of the Product before bringing it to market;
- (c) failing to do follow-up studies on the safety and efficacy of the Product after bringing it market;
- (d) failing to monitor and follow up on reports of adverse reactions to the Product;
- (e) failing to recall the Product;
- (f) failing to warn consumers, their health care providers, and Health Canada, of the increased risks of loosening and implant failure presented by the Product;

- (g) marketing a product which was unsafe, not fit for its intended purpose, and not of merchantable quantity;
- (h) designing, manufacturing and/or marketing a product which was not reasonably safe and effective in comparison with already available, alternative designs; and
- (i) incorrectly blaming failures of the Product on surgical error instead of properly and promptly investigating the Product's unreasonably high rate of failure as due to design defects.

20. The Defendants' common law duties are informed by the *Medical Devices Regulations*, SOR/92/82. Pursuant to s.1 of those regulations, each of the Defendants is a "manufacturer". They designed and assembled the Product, attached their trade name to it, labeled it and assigned it a purpose.

21. The regulations impose continuous obligations on the Defendants, commencing at licensing and continuing thereafter. They require the Defendants to ensure the safety of the Product before selling it, and to continuously monitor the safety of the Product thereafter, monitoring any complaints from doctors, hospitals and patients, keeping up with any new developments in the scientific literature, conducting further testing as necessary, and promptly taking corrective action, including issuing a warning or recall, if new information becomes available which alters the Product's risk profile.

22. Pursuant to s. 9(2) of the *Medical Devices Regulations*, the Defendants were required to maintain objective evidence to establish the safety of the device. The Defendants breached this section. They failed to adequately obtain such information before licensing and they failed to promptly update such information thereafter.

23. Pursuant to s. 10 of the *Medical Devices Regulations*, the Defendants were required to identify the risks of the device, to eliminate or reduce those risks if possible, and to provide safety information with the device concerning those risks which remained. The

Defendants breached this section. They failed to eliminate the risk that the Product would loosen or fail and they failed to warn against this risk.

24. Pursuant to s. 11 of the *Medical Devices Regulations*, the Defendants were required to assess the risks of the Product against its benefits, and to not sell a product whose risks outweigh its benefits. The Defendants breached this section. The risks of the Product outweighed its benefits.

25. Pursuant to s. 12 of the *Medical Devices Regulations*, the Defendants were required to ensure that the product was effective for the uses for which it was represented. The Defendants breached this section. The Product was not effective.

Business Practices and Consumer Protection Act

26. The Defendants' solicitations, offers, advertisements, promotions, sales and supply of the Product for personal use by the Plaintiffs and by class members were "consumer transactions" within the meaning of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA"). With respect to those transactions, the Plaintiff and class members who were implanted with the Product in British Columbia are "consumers" and the Defendants are "suppliers" within the meaning of the BPCPA.

27. The Defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of the Product, as particularized above, had the capability, tendency or effect of deceiving or misleading consumers regarding the safety and efficacy of the Product. The Defendants' conduct in its solicitations, offers, advertisements, promotions, sales and supply of the Product were deceptive acts and practices contrary to s.4 of the BPCPA. The Defendants' deceptive acts and practices included the Defendants' failure to properly disclose all material facts regarding the safety and efficacy of the Product.

28. Further, in their marketing brochures, promotional materials, and website directed both to consumers and their physicians, the Defendants made representations concerning the

efficacy of the Product, including a description of studies that suggested that the Product had a success rate of up to 99%. In reality, the Product's failure rate is unreasonably high compared to other, available implants. The Defendants knew or ought to have known that their marketing claims regarding the Product were inaccurate, incomplete or misleading, and that the Product had an unreasonably high failure rate. Such marketing claims were deceptive and had the tendency, capability or effect of misleading consumers and their physicians.

29. As a result of the Defendants' deceptive acts and practices, the Plaintiffs and class members have suffered loss and damages. The Plaintiffs seek injunctive relief and declaratory relief and damages and statutory compensation pursuant to ss.171 and 172 of the BPCPA on their own behalf and on behalf of class members implanted with the Product in British Columbia.

Plaintiffs' Injuries

30. The Plaintiff, Mr. Jones, underwent hip surgery on January 14, 2008. He was implanted with the Product.

31. His implant failed. He required further surgery on May 11, 2009, in which the Product was removed and a new implant was inserted.

32. Mr. Jones has experienced pain and suffering as a result of the failure of the Product, and the additional surgery. He has incurred, and will continue to incur, loss of employment income and out of pocket expenses.

33. The Plaintiff, Ms. Wilkinson, underwent hip surgery on April 28, 2008. She was implanted with the Product.

34. Her implant failed. She has been advised that she requires further surgery and that the implant must be replaced. She is currently on the waiting list for surgery to remove the Product.

35. Ms. Wilkinson has experienced pain and suffering as a result of the failure of the Product. She will incur further pain when she undergoes replacement surgery. She has incurred, and will continue to incur, loss of employment income and out of pocket expenses.

Causation and Damages

36. As a result of the Defendants' negligence and the Defendants' deceptive acts and practices, the Plaintiffs and class members have suffered and will continue to suffer loss and damage. Such loss and damage was foreseeable by the Defendant. Particulars of the loss and damage suffered by the Plaintiffs and class members which were caused or materially contributed to by the aforementioned acts of the Defendants include:

- (a) pain, suffering, loss of quality and enjoyment of life;
- (b) damages for past and future loss of income; and
- (c) special damages and expenses including medical expenses.

37. The Defendants' conduct was reprehensible and departed to a marked degree from ordinary standards of decent behaviour. The Defendants' reckless disregard for public safety is deserving of punishment and condemnation by means of an award of punitive damages. The Defendants' failure to initiate a recall in Canada, even while calling one in the United States, is particularly worrisome. This case raises issues of general deterrence. A punitive damage award in this case is necessary to express society's condemnation of conduct such as the Defendants', to advance public safety and to achieve the goal of both specific and general deterrence.

Health Care Cost Recovery Act

38. The Plaintiffs and class members have a claim for the recovery of health care costs incurred by provincial health ministries on their behalf. The Plaintiffs plead the *Health Care Cost Recovery Act*, S.B.C. 2008, c.27, and comparable legislation in other provinces.

Jurisdiction

39. The Plaintiffs rely upon ss. 3, 7 and 10 of the *Court Jurisdiction and Proceedings Transfer Act*.

Joint Enterprise

40. The Defendants functioned as a joint enterprise for the promotion and sale of their brands of the Product within Canada. The Defendants dividing among themselves certain responsibilities for the manufacture and marketing of the Product, but each had an independent right and responsibility to ensure the safety of the Product and to ensure that timely and adequate warnings were issued with respect to the Product. Within this joint enterprise, the Defendants individually and jointly researched, tested, developed, marketed, manufactured, imported, promoted, licensed, labeled, monitored adverse reactions to, and placed into the stream of commerce the Product for sale in Canada.

Relief Sought

41. The Plaintiffs claim, on their own behalf, and on behalf of class members:
- (a) an order certifying this action as a class proceeding;
 - (b) general damages;
 - (c) special damages;
 - (d) punitive damages;
 - (e) declaratory and injunctive relief as well as damages and statutory

compensation available under the BPCPA;

- (f) pre-judgment interest;
- (g) costs; and
- (h) such further and other relief as this Honourable Court may deem just.

Dated: July 7, 2009


Solicitor for the Plaintiff

David A. Klein
Douglas Lennox
Klein Lyons
Barristers & Solicitors
1100 - 1333 W. Broadway
Vancouver, British Columbia
V6H 4C1

**CANADIAN DUROM ACETABULAR HIP IMPLANT CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT**

Between

DENNIS JONES and SUSAN WILKINSON

(the "British Columbia Plaintiffs")

and

GLORIA MCSHERRY

(the "Ontario Plaintiff")

and

BEN WAINBERG

(the "Quebec Plaintiff")

and

ZIMMER GMBH, ZIMMER, INC., ZIMMER BIOMET HOLDINGS, INC. (FORMERLY
KNOWN AS ZIMMER HOLDINGS, INC.), and ZIMMER OF CANADA LIMITED

(the "Defendants")

This is Exhibit C referred to in the
affidavit of Susan Gwen Wilkinson
sworn before me, this 20th
day of April 2016

A COMMISSIONER, ETC.

THE
 STATE OF NEW YORK
 COUNTY OF ...
 IN SENATE
 JANUARY 21, 1902
 REPORT
 OF THE
 COMMISSIONERS OF THE
 LAND OFFICE
 CONCERNING
 THE
 ...

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**CANADIAN DUROM ACETABULAR HIP IMPLANT CLASS ACTION
NATIONAL SETTLEMENT AGREEMENT**

RECITALS

- A. WHEREAS the British Columbia Plaintiffs commenced Action No. S095493 ("the BC Proceeding") in the British Columbia Court alleging that the Defendants marketed a defective hip implant known as the Durom Acetabular Component ("Durom Cup");
- B. AND WHEREAS Susan Wilkinson was appointed as representative plaintiff in the BC Proceeding;
- C. AND WHEREAS the Ontario Plaintiff commenced Action No. CV-10-40836500 CP ("the Ontario Proceeding") in the Ontario Court alleging that the Defendants marketed a defective hip implant known as the Durom Cup;
- D. AND WHEREAS, with the consent of the Defendants in relation to this Settlement Agreement, Gloria McSherry was appointed as representative plaintiff in the Ontario Proceeding;
- E. AND WHEREAS the Quebec Plaintiff commenced Action No. 500-06-000543-104 ("the Quebec Proceeding") in the Quebec Court alleging that the Defendants marketed a defective hip implant known as the Durom Cup;
- F. AND WHEREAS no representative plaintiff has been appointed in the Quebec Proceeding;
- G. AND WHEREAS the Defendants deny liability in respect of the claims alleged in the Proceedings, and believe that they have good and reasonable defences in respect of the merits in the Proceedings;
- H. AND WHEREAS the Defendants assert that they would actively pursue these defences in respect of the merits at trials if the British Columbia Plaintiff, the Ontario Plaintiff, or the Quebec Plaintiff continued the Proceedings against them;
- I. AND WHEREAS the Parties have negotiated and entered into this Settlement Agreement to avoid the further expense, inconvenience, and burden of this litigation, and to achieve final resolution of all claims asserted or that could have been asserted against the Defendants by the British Columbia Plaintiff on her own behalf and on behalf of the class she represents, the Ontario Plaintiff on her own behalf and on behalf of the class she represents, the Quebec Plaintiff on his own behalf and potentially on behalf of a Quebec-specific class (collectively, the "Plaintiffs") or the respective Provincial Health Insurers, and avoid the risks inherent in uncertain, complex, and protracted litigation, and thereby to put to rest this controversy;



- J. **AND WHEREAS** counsel for the Defendants and counsel for the Plaintiffs have engaged in extensive arms-length settlement discussions and negotiations in respect of this Settlement Agreement;
- K. **AND WHEREAS** as a result of these settlement discussions and negotiations, the Defendants, the Plaintiffs, and the Provincial Health Insurers have entered into this Settlement Agreement, which embodies all of the terms and conditions of the Settlement between the Defendants, the Plaintiffs, and the Provincial Health Insurers, subject to the approval of the British Columbia, Quebec, and Ontario Courts;
- L. **AND WHEREAS** the Plaintiffs and the Provincial Health Insurers have agreed to accept this Settlement, in part, because of the monetary payments to be provided by the Defendants under this Settlement Agreement, as well as the attendant risks of litigation in light of the potential defences that may be asserted by the Defendants;
- M. **AND WHEREAS** the Defendants do not admit through execution of this Settlement Agreement any of the conduct alleged in the Proceedings;
- N. **AND WHEREAS** the Plaintiffs, Class Counsel, the Provincial Health Insurers, the Provincial Health Insurers' Counsel, and Defendants agree that neither this Settlement Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an admission by or evidence against the Defendants or evidence of the truth of any of the Plaintiffs' or the Provincial Health Insurers' allegations against the Defendants;
- O. **AND WHEREAS** the Plaintiffs, the Provincial Health Insurers, and their counsel have reviewed and fully understand the terms of this Settlement Agreement and, based on their analyses of the facts and law applicable to the Plaintiffs and the Provincial Health Insurers, and having regard to the burdens and expense in prosecuting the Proceedings, including the risks and uncertainties associated with trials and appeals, the Plaintiffs, the Provincial Health Insurers, and their counsel have concluded that this Settlement Agreement is fair, reasonable, and in the best interests of the Plaintiffs, the Classes they seek to represent, and the Provincial Health Insurers;
- P. **AND WHEREAS** the Defendants are entering into this Settlement Agreement in order to achieve a final and nation-wide resolution of all claims in respect of the Durom Cup asserted or that could have been asserted against them by the Plaintiffs and the Provincial Health Insurers in the Proceedings or otherwise, and to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation;
- Q. **AND WHEREAS** the Parties therefore wish to, and hereby do, finally resolve on a national basis, without admission of liability, all of the Proceedings against the Defendants;
- R. **AND WHEREAS** the BC Proceeding was certified on November 22, 2011;

- S. **AND WHEREAS** the Ontario Proceeding was certified on September 24, 2014;
- T. **AND WHEREAS** Defendants have consented, or will consent, to the authorization of a class action in the Quebec Proceeding consisting only of Quebec residents who have not opted into the BC Proceeding; and
- U. **AND WHEREAS** for the purposes of settlement only and contingent on orders by the Courts as provided for in this Settlement Agreement, the Plaintiffs have consented to a dismissal of the Proceedings against the Releasees, as that term is defined in Section 1 below, and release of all claims that have been or could have been asserted against Releasees.

NOW THEREFORE, in consideration of the covenants, agreements, and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Proceedings be settled and dismissed on the merits with prejudice as to the Releasors, on the following terms and conditions:

SECTION 1 – DEFINITIONS

For the purpose of this Settlement Agreement only, including the Recitals and Schedules hereto:

- (1) *Account* means an interest-bearing trust account under the control of the Claims Administrator at a Schedule 1 chartered Canadian bank. All interest accrued will be added to the fund used to compensate Approved Claimants.
- (2) *Approved Claimant* means a Class Member or Derivative Member whose claim has been approved for payment by the Claims Administrator.
- (3) *Settlement Agreement or Settlement* means this Agreement, including the Recitals and Schedules hereto.
- (4) *Approval Hearings* means the hearings on the motions before the BC Court, Quebec Court, and the Ontario Court for the approval of the Settlement Agreement.
- (5) *BC Class Member* means a Class Member in the BC Proceeding. This includes Class Members resident in British Columbia who did not opt out of the BC Proceeding on or before the December 31, 2013 opt-out deadline set by the Supreme Court of British Columbia, and Class Members who are not resident in British Columbia who opted into the BC Proceeding on or before the opt-in deadline set by the Supreme Court of British Columbia.
- (6) *BC Court* means the Supreme Court of British Columbia.
- (7) *BC/Ontario Class Counsel* means Klein Lawyers LLP.

- (8) *BC Plaintiff* means Susan Wilkinson.
- (9) *BC Proceeding* means *Dennis Jones and Susan Wilkinson v. Zimmer GmbH et al.*, Action No. S095493, Vancouver Registry.
- (10) *Bilateral Revision* means that a Class Member had a Durom Cup implanted into both his/her left and right hips and has undergone surgery(ies) to remove both Durom Cups.
- (11) *Claimant Declaration* means the form attached as Schedule A.
- (12) *Claims Administrator* means the entity appointed to administer the Settlement pursuant to the terms of this Settlement Agreement.
- (13) *Claims Deadline* means the date that is 270 days after the date on which the Notice of Settlement Approval is disseminated.
- (14) *Claims Period* means the 270 day period after the date on which the Notice of Settlement Approval is disseminated.
- (15) *Class Counsel* means Klein Lawyers LLP in the BC Proceeding and the Ontario Proceeding, and Merchant Law Group LLP in the Quebec Proceeding.
- (16) *Class Counsel Fees* means the fees, costs, and other applicable taxes or charges of Class Counsel specified in Section 9 of this Settlement Agreement.
- (17) *Class or Class Members* means, for purposes of this settlement, all persons who were implanted with the Durom Cup in Canada, including their estates.
- (18) *Complication* means the medical conditions identified in Schedule L that occurred as a result of a Revision Surgery.
- (19) *Court(s)* means the BC Court, the Ontario Court, and the Quebec Court, as appropriate.
- (20) *Defendants* mean Zimmer GmbH, Zimmer, Inc., Zimmer Biomet Holdings, Inc. (formerly known as Zimmer Holdings, Inc.), and Zimmer of Canada Limited.
- (21) *Defendants' Counsel* means Fasken Martineau DuMoulin LLP.
- (22) *Derivative Claimant(s)* means all residents of Canada asserting the right to sue the Defendants independently or derivatively by reason of their familial relationship to a Class Member as defined herein, and shall mean for the purposes of this Settlement Agreement, either a Principal Caregiver who is a family member of a Class Member or Minor Child of a Class Member who has undergone a Single Revision or Bilateral Revision for the purpose of explanting a Durom Cup or is Medically Precluded from undergoing a Revision Surgery.



(23) *Disbursements* means funds paid out by Class Counsel in connection with the BC Proceeding, the Ontario Proceeding, or the Quebec Proceeding.

(24) *Durom Cup* means the device at issue in these Proceedings, which bears the lot and reference (sometimes referred to as "catalogue") numbers that were subject to and included in the November 9, 2009 Field Safety Notification.

(25) *Effective Date* means the latest date on which any of the Final Orders in British Columbia, Ontario, or Quebec take effect.

(26) *Eligibility Deadline* means September 1, 2015.

(27) *Extraordinary Expense Pool* means the amount established by this Settlement Agreement to compensate Class Members who believe they have incurred extraordinary expenses. The Extraordinary Expense Pool totals \$50,000.00 (CAD).

(28) *Final Order(s)* means the final orders entered by the Courts in respect of the approval of this Settlement Agreement once the time to appeal such order has expired without any appeal being taken, or if an appeal from a final order is taken, once there has been affirmation of the approval of this Settlement Agreement upon a final disposition of all appeals.

(29) *Initial Deposit* means the sum of \$5 million paid by the Defendants into the Account.

(30) *Medically Precluded* means that a Class Member for whom a Revision Surgery is necessary is unable to undergo a Revision Surgery due to the existence of a medical condition that is documented by a verified statement from the Class Member's treating physician.

(31) *Minor Child* means the child of a Class Member who has undergone a Single Revision, Bilateral Revision, or is Medically Precluded from undergoing Revision Surgery who was less than eighteen years of age when the Class Member was implanted with his or her Durom Cup.

(32) *Notice and Administration Costs* means all fees, costs, PST, GST, and HST taxes, and any other amounts incurred for the approval, implementation and operation of this Settlement Agreement, including the costs of notices, the costs of translation of the notice, and the fees and expenses of the Claims Administrator, but excluding Class Counsel Fees and Disbursements.

(33) *Notice of Approval Hearing* means the form of notice agreed to by the Plaintiffs and the Defendants, as set forth in the attachments to Schedules B1, B2, and B3, or such other form as may be approved by the BC Court, the Ontario Court, or the Quebec Court, that informs the Class of the date and location of an Approval Hearing, the principal elements of this Settlement Agreement, and the process by which Class Members may object to the Settlement.

(34) *Notice of Settlement Approval* means the form of notice, agreed to by the Plaintiffs and the Defendants, as set forth in Schedules H, I, and J, or such other form as may be approved by the BC Court, Quebec Court, or the Ontario Court, that informs the Class of the approval of this Settlement Agreement.

- (35) **Ontario Class Member** means a Class Member in the Ontario Proceeding. This includes Class Members who did not opt out of the Ontario Proceeding on or before December 17, 2014, excluding BC Class Members and Quebec Class Members.
- (36) **Ontario Court** means the Ontario Superior Court of Justice.
- (37) **Ontario Plaintiff** means Gloria McSherry.
- (38) **Ontario Proceeding** means *Gloria McSherry v. Zimmer GmbH, et al.*, Action No. CV-10-40836500 CP.
- (39) **Parties** means the parties to this Settlement Agreement, including Plaintiffs, the Provincial Health Insurers, and the Defendants.
- (40) **Plaintiffs** means the BC Plaintiff, the Ontario Plaintiff, and the Quebec Plaintiff.
- (41) **Principal Caregiver** means an immediate family member who provided care for a Class Member who underwent a Single Revision, Bilateral Revision, or is Medically Precluded from undergoing a Revision Surgery.
- (42) **Proceedings** mean the BC Proceeding, the Ontario Proceeding, and the Quebec Proceeding.
- (43) **Provincial Health Insurers** means all provincial and territorial Ministries of Health or equivalents, Provincial and Territorial Governments, and/or provincial and territorial plans funding medical services throughout Canada.
- (44) **Provincial Health Insurers' Counsel** means Klein Lawyers LLP.
- (45) **Quebec Class Counsel** means Merchant Law Group LLP.
- (46) **Quebec Class Member** means a Class Member resident in Quebec who has not opted out of the Quebec Proceeding on or before the opt out deadline set by the Quebec Court and who has not opted into the BC Proceeding.
- (47) **Quebec Court** means the Superior Court of Quebec.
- (48) **Quebec Plaintiff** means Ben Wainberg.
- (49) **Quebec Proceeding** means *Ben Wainberg v. Zimmer, Inc., et al.*, Action No. 500-06-00543-104.
- (50) **Released Claims** means any and all manner of claims, demands, actions, suits, civil law and statutory liabilities, and causes of action alleged or that could have been asserted in the Proceedings, whether direct or indirect, class, individual, or otherwise in nature, whether



personal or subrogated, damages whenever incurred, liabilities of any nature whatsoever, including interest, costs, expenses, penalties, and lawyers' fees that Releasors, or any one of them, whether directly, indirectly, representatively, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have against the Releasees, whether known or unknown, relating in any way to the Durom Cup, including but not limited to the use, purchase, implantation, or revision of the Durom Cup.

(51) *Releasees* means, jointly and severally, the Defendants and their respective present and former parents, subsidiaries, affiliates, officers, directors, employees, insurers, agents, attorneys, servants, and representatives, and the successors, heirs, executors, administrators, trustees, and assigns of each of the foregoing, as well as any other person, corporation, or entity, including without limitation any health care professionals, health care providers, and hospitals or other health care facilities, against whom a Class Member asserted or could have asserted a claim relating in any way, directly or indirectly, to the Durom Cup.

(52) *Releasors* means, jointly and severally, individually and collectively, the Plaintiffs, Provincial Health Insurers, BC Class Members, Ontario Class Members, and Quebec Class Members, including all Derivative Claimants, and their respective successors, heirs, executors, administrators, trustees, and assigns, and their affiliated, predecessor, successor, and related companies or entities.

(53) *Revision Surgery* means an operation to remove a Durom Cup.

(54) *Settlement Amount* means the aggregate amount payable by the Defendants pursuant to Section 4 of this Settlement Agreement.

(55) *Single Revision* means Revision Surgery of one Durom Cup implanted into the hip of a Class Member.

(56) *Subsequent Deposit* means further amounts paid by the Defendants into the Account.

(57) *Unrevised* means that a Class Member has not undergone a Revision Surgery.

SECTION 2 - CALCULATION OF DEADLINES AND CONDITION PRECEDENT

(1) If any deadline identified in the Settlement Agreement falls on a weekend or Canadian national holiday, the deadline shall occur on the following weekday that is not a Canadian national holiday.

(2) Subject to section 8.1 below, this Settlement Agreement shall be null and void and of no force or effect unless the BC Court, the Ontario Court, and the Quebec Court each approve this Settlement Agreement and the orders so made have become Final Orders and the Effective Date has occurred.

SECTION 3 – SETTLEMENT APPROVAL

3.1 Best Efforts

The Parties shall use their best efforts to effect this settlement and to secure the prompt, complete, and final dismissal with prejudice of the Proceedings against the Defendants.

3.2 Motion Approving Notice

At a time mutually agreed to by the Parties after the Settlement Agreement is executed, (1) the BC Plaintiff shall bring a motion before the BC Court for an order in the form of Schedule B1 approving the Notice of the Approval Hearing, (2) the Ontario Plaintiff shall bring a motion before the Ontario Court for an order in the form of Schedule B2 approving the Notice of the Approval Hearing, and (3) the Quebec Plaintiff shall bring a motion before the Quebec Court for an order in the form of Schedule B3 approving the Notice of the Approval Hearing after the Quebec Court has authorized a proceeding as a class action.

3.3 Motion for Approval

(1) The BC Plaintiff shall file a motion in the BC Court for an order approving this Settlement Agreement. The order shall be generally in accordance with the form attached at Schedule C.

(2) The Ontario Plaintiff shall file a motion in the Ontario Court for an order approving this Settlement Agreement. The order shall be generally in accordance with the form attached at Schedule D.

(3) After the Quebec Court has authorized the settlement class and subject to the requirements of section 3.4 of the Settlement Agreement, the Quebec Plaintiff shall file a motion in the Quebec Court for an order approving this Settlement Agreement. The order shall be generally in accordance with the form attached at Schedule E.

3.4 Sequence of Motions

The Quebec Plaintiff shall not proceed with the motion described in section 3.3(3) until the BC Court and the Ontario Court approve the Settlement Agreement. The Defendants may agree to waive this provision.

3.5 Effect of Court's Approval

(1) Subject to the Court's approval, the order or judgment of approval of this Agreement shall:

(a) Describe the group as all persons who are or may be members of the Class;



- (b) Ascribe the status of representative and/or designated person to the BC Plaintiff, the Ontario Plaintiff, and the Quebec Plaintiff;
 - (c) Approve this Agreement and order the Parties and all members of the Class to comply with it;
 - (d) Declare that this Agreement constitutes a "transaction" pursuant to Article 1025 of the Code of Civil Procedure, which is binding on the Parties and all Quebec Class Members;
 - (e) Declare that, subject to Article 1008 of the Code of Civil Procedure, any Quebec Class Member who has not opted out from the Class by _____ shall be bound by this Settlement Agreement and judgment of approval;
 - (f) Declare that this Agreement is reasonable, fair, adequate, and in the best interest of the Class;
 - (g) Order publication of the Notice of Settlement Approval as well as the form, contents, and method of its dissemination;
 - (h) Confirm the appointment of the Claims Administrator;
 - (i) Enter such other orders as are needed to effectuate the terms of the Settlement Agreement; and
 - (j) Enjoin all members of the Class (other than those who have validly opted out of the Class) entitled to benefits hereunder from asserting and/or continuing to prosecute claims against Defendants or any other Releasee, as well as any Released Claim that such Class member has, had, or may have in the future.
- (2) Subject to the Court's approval, the Parties agree that the Quebec Proceeding will be authorized only for the purpose of this Agreement.

3.6 Publication of Notice of Settlement Approval

After the Settlement Agreement has been approved by the BC Court, Ontario Court, and Quebec Court, and the Class has been authorized pursuant to the Settlement Agreement, Class Counsel shall disseminate the Notice of Settlement Approval to the Class. Pursuant to Defendants' obligations in Paragraph 4.2(10) of the Settlement Agreement, Defendants will pay the cost of dissemination.



SECTION 4 – SETTLEMENT BENEFITS

4.1 Applicable Currency

All monetary amounts provided herein, including all amounts due to Approved Claimants, are stated and payable in Canadian dollars. The parties agree that the Defendants shall make all payments to the Claims Administrator in U.S. dollars, and the Claims Administrator shall promptly convert the payment funds to Canadian dollars no later than one business day after receipt of the funds from Defendants.

4.2 Payment of Settlement Amount

(1) An individual is eligible for recovery under this Settlement Agreement only if:

(a) He or she is a BC Class Member, an Ontario Class Member, or a Quebec Class Member; and

(b) He or she meets the eligibility requirements provided in Schedule N.

(2) With the exception of the Provincial Health Insurers, which are entitled to compensation under this Settlement Agreement as provided in Paragraph 9 of this Section, only BC Class Members, Ontario Class Members, and Quebec Class Members who have submitted all necessary information to the Claims Administrator by the Claims Deadline shall be entitled to receive compensation under the Settlement Agreement. For all claimants, "necessary information" includes a completed Claimant Declaration (Schedule A) and the information described in Schedule N. As described below and in the Claimant Declaration, certain claimants will also be required to submit a completed Physician's Declaration (Schedule F).

(3) The amount of recovery for any Class Member otherwise eligible for recovery under Sections 4.2(1) and (2) above shall be established according to the patient's status as of the Eligibility Deadline. If a Class Member has scheduled, but not undergone, a Revision Surgery before the Eligibility Deadline, he or she will be eligible to receive the compensation available to Approved Claimants who underwent a Revision Surgery under this Settlement Agreement, so long as the Class Member's Revision Surgery occurs before the Claims Deadline, and the Class Member submits a Physician's Declaration that provides confirmation of, and information relating to, the scheduling of the Revision Surgery by the Eligibility Deadline and the occurrence of the Revision Surgery on or before the Claims Deadline.

(4) If a Class Member who indicated that he or she did not want to be part of the class by opting out of, or not opting into, the BC Proceeding, Ontario Proceeding, or Quebec Proceeding submits a Claimant Declaration under this Settlement Agreement prior to the Claims Deadline, the opt out or failure to opt in shall be deemed revoked, and such Class Member will be deemed to be a BC Class Member, Ontario Class Member, or Quebec Class Member, as determined by the Claims Administrator. However, this change in status does not impact Defendants' right of termination under Section 8.1(g) of the Settlement Agreement.

- (5) Any amount paid to an Approved Claimant under the Settlement Agreement has been paid as damages on account of alleged personal physical injuries or illness of the Approved Claimant, including physical injuries or illness resulting from alleged emotional harm.
- (6) The Defendants agree to pay amounts in accordance with this Settlement Agreement, in full satisfaction of all of the Released Claims against the Releasees, contingent on dismissal of the claims of the certified classes in British Columbia and Ontario, authorization of the proposed class in the Quebec Action, and subsequent dismissal of the claims of the authorized class in Quebec.
- (7) BC Class Members, Ontario Class Members, and Quebec Class Members shall be compensated as follows, less their respective pro rata share of any Class Counsel Fees that the Court may award to Class Counsel in accordance with section 9.1(3) of this Settlement Agreement:
- (a) BC Class Members, Ontario Class Members, and Quebec Class Members who are Unrevised and are not Medically Precluded from undergoing a Revision Surgery each receive \$600 (CAD);
 - (b) BC Class Members, Ontario Class Members, and Quebec Class Members who are Unrevised and are Medically Precluded from undergoing a Revision Surgery each receive \$40,000 (CAD) less pro rata Class Counsel Fees;
 - (c) Subject to paragraph (g), BC Class Members, Ontario Class Members, and Quebec Class Members who have undergone a Single Revision each receive \$70,000 (CAD) less pro rata Class Counsel Fee;
 - (d) Subject to paragraph (g), BC Class Members, Ontario Class Members, and Quebec Class Members who have undergone Bilateral Revision each receive \$90,000 (CAD) less pro rata Class Counsel Fees;
 - (e) Subject to paragraph (g), BC Class Members, Ontario Class Members, and Quebec Class Members who have undergone either a Single Revision or a Bilateral Revision and who have experienced a Complication will receive additional funds up to \$40,000 (CAD) less pro rata Class Counsel Fees. The amount to which a BC Class Member, Ontario Class Member, or Quebec Class Member may be entitled for a Complication sustained is identified in Schedule L;
 - (f) Any payment to a BC Class Member, Ontario Class Member, or Quebec Class Member who underwent either a Single Revision or Bilateral Revision and whose Durom Cup was *in vivo* for more than 6 years at the time of the Revision Surgery will be reduced by \$10,000 (CAD);
 - (g) BC Class Members, Ontario Class Members, and Quebec Class Members who underwent a revision surgery for a purpose other than explanting a Durom Cup are not entitled to the compensation provided in paragraphs (c), (d), (e), and (h).

(b) Subject to paragraph (g), BC Class Members, Ontario Class Members, and Quebec Class Members who have undergone either a Single Revision or a Bilateral Revision and who purchased the Durom Cup with their own funds will be reimbursed for the cost of the device, less pro rata Class Counsel Fees. This reimbursement is separate from the reimbursement for expenses described in section 4.2(7)(i) below. The Claims Administrator will be responsible for determining and subtracting any pro rata class counsel fees.

(i) BC Class Members, Ontario Class Members, and Quebec Class Members who underwent a Single Revision, a Bilateral Revision, or who are Medically Precluded from undergoing a Revision Surgery will be reimbursed for the expenses they incurred in connection with the Durom Cup, upon submission of all documentation required by Schedules A and G of this Settlement Agreement and approval for reimbursement from the Claims Administrator, as follows:

(i) BC Class Members, Ontario Class Members, and Quebec Class Members who do not have receipts to support their expenses will each receive up to \$750 (CAD), less pro rata Class Counsel Fees;

(ii) BC Class Members, Ontario Class Members, and Quebec Class Members who have receipts documenting their expenses will each receive the amount of those documented expenses, up to a cap of \$2,500 (CAD), less pro rata Class Counsel Fees; and

(iii) BC Class Members, Ontario Class Members, and Quebec Class Members who believe they have incurred extraordinary expenses in connection with their Durom Cup(s) may apply for reimbursement from the Extraordinary Expense Pool. Pro rata Class Counsel Fees will be deducted from any Extraordinary Expense Pool award. If the total amount of approved claims payable from the Extraordinary Expense Fund exceeds \$50,000 (CAD), each reimbursable claim will be reduced on a pro rata basis. If the total amount of approved disbursements payable from the Extraordinary Expense Fund is less than \$50,000 (CAD), the Claims Administrator shall refund the difference to Defendants.

(8) Derivative Claimants shall be compensated as follows:

(a) The Principal Caregiver is entitled to \$5,000 (CAD), less pro rata Class Counsel Fees;

(b) Up to two Minor Children are entitled to \$500 (CAD) each, less pro rata Class Counsel Fees.



- (9) Provincial Health Insurers shall be compensated as follows:
- (a) Each Provincial Health Insurer will receive \$15,000 (CAD) for each Revision Surgery that a Class Member who submits a proper and approved claim for recovery under this Settlement Agreement underwent in the Provincial Health Insurer's province.
- (b) Upon approval from the Claims Administrator, each Provincial Health Insurer is permitted to recover \$15,000 for each Revision Surgery that a Class Member who does not submit a proper and approved claim for recovery under this Settlement Agreement underwent in the Provincial Health Insurer's province, provided that the Provincial Health Insurer properly completes all information pertaining to such Class Members required by Schedule M and submits Schedule M to the Claims Administrator no later than 90 days after the Claims Deadline. All requests for compensation submitted by Provincial Health Insurers that do not meet the requirements of Schedule M will be denied.
- (10) Defendants will pay up to \$250,000 (CAD) in Notice and Administration Costs. All other Notice and Administration Costs shall be borne by Class Counsel, subject to the provisions of Section 9.1(2) of the Settlement Agreement.
- (11) Within 30 days of the Effective Date, the Defendants shall pay the Initial Deposit into the Account.
- (12) The Claims Administrator shall pay Class Counsel for Counsel Fees and Disbursements owing under sections 9.1(1) and (2) from the Account, and the Claims Administrator may draw upon the Account to pay the Notice and Administration Costs.
- (13) The Claims Administrator shall make determinations as to the entitlement of Approved Claimants prescribed by sections 4.2(7)(a)-(i) and 4.2(8). It shall pay those entitlements to the Approved Claimants, or their legal representation or counsel, less each Approved Claimant's pro rata portion of Class Counsel Fees prescribed by section 9.1(3), from the Account.
- (14) At the same time the Claims Administrator pays each Approved Claimant, the Claims Administrator shall also remit from the Account the pro rata Class Counsel Fees prescribed by sections 9.1(3) and 9.1(4) to BC/Ontario Class Counsel or to Quebec Class Counsel. Class Counsel Fees owing under sections 9.1(3) and 9.1(4) shall be remitted to BC/Ontario Class Counsel for Approved Claimants who are BC Class Members or Ontario Class Members or their estate representatives. Class Counsel Fees owing under sections 9.1(3) and 9.1(4) shall be remitted to Quebec Class Counsel for Approved Claimants who are Quebec Class Members or their estate representatives. The Claims Administrator determines to which class an Approved Claimant belongs.
- (15) If the amount in the Account falls below \$500,000, the Defendants will forthwith make a Subsequent Deposit of \$1 million into the Account.

(16) Once the Claims Administrator determines that all amounts owing under this Settlement Agreement have been paid, the Claimants Administrator shall notify the Defendants and Class Counsel.

(17) The Claims Administrator will maintain the funds received pursuant to this Settlement Agreement in an Account. All interest accrued will be added to the funds used to compensate Approved Claimants.

(18) The Claims Administrator shall maintain the Account and shall not pay out funds from the Account in a manner inconsistent with the provisions of this Settlement Agreement except by Court order made on notice to, or on the consent of, the Defendants' Counsel and Class Counsel.

4.3 Appointment and Role of Claims Administrator

(1) The Parties will agree upon a Claims Administrator to be appointed by the BC Court for the purpose of administering the Settlement.

(2) The Claims Administrator shall make a determination as to whether each Class Member who seeks payment under the Settlement Agreement is an Approved Claimant. If such person is an Approved Claimant, the Claims Administrator shall determine the amount of funds due to the Approved Claimant under the Settlement Agreement. The Claims Administrator shall be subject to removal by the BC Court for cause.

(3) The Claims Administrator shall sign and adhere to a confidentiality statement, in a form satisfactory to the Parties, by which it agrees to keep confidential any information concerning Class Members or Defendants. Further, the Claims Administrator shall institute and maintain procedures to ensure that the identity of all Class Members and all information regarding any claims and submissions will be kept strictly confidential.

(4) The Claims Administrator shall administer all monies payable under the Settlement Agreement, except as specifically provided for herein, and process all claims of Class Members and Provincial Health Insurers in accordance with the terms of this Settlement Agreement.

(5) The funds payable under the Settlement Agreement that Defendants are required to submit to the Claims Administrator under the Settlement Agreement shall be held in an Account. The Claims Administrator shall distribute payments under the Settlement Agreement under the supervision of the BC Court, the Ontario Court, and the Quebec Court. Funds submitted to the Claims Administrator shall be maintained and invested in a manner consistent with that of a prudent and reasonable administrator.

(6) Defendants shall retain a reversionary interest in all funds provided to the Claims Administrator and interest earned on the funds. If any funds remain in the Claims Administrator's trust account 365 days after the Claims Deadline, those funds and any interest accrued shall be immediately returned to Defendants' Counsel upon written request to the Claims Administrator (copy to Class Counsel), less any funds that have been approved for payment to an Approved Claimant but have not yet been paid out.

- (7) The Claims Administrator shall offer its services in both English and French.
- (8) The Claims Administrator shall report monthly to Class Counsel and Defendants' Counsel on the number of claims received in that month and the decisions made by it in respect of any claim. Such reports will include the name of each Approved Claimant or approved Provincial Health Insurer, the category and amount of each payment from the Account, and whether the claim relates to a BC Class Member, Ontario Class Member, Quebec Class Member, or Provincial Health Insurer.
- (9) The Claims Administrator shall retain all records relating to each Class Member's or Provincial Health Insurer's claim. Defendants' Counsel, Defendants, and the Releasees, as well as their respective insurers, may, at their expense and upon providing seven days' written notice to Plaintiffs' Counsel, inspect the Claims Administrator's records. Any party inspecting the Claims Administrator's records under this paragraph shall maintain the confidentiality of the records to the extent necessary to protect the identity and privacy of Class Members.
- (10) All submissions, requests, or motions made by the Claims Administrator to the BC Court, the Ontario Court, or the Quebec Court must be served at least 15 days prior to the proposed date for the hearing of the request or motion.

4.4 Claims and Claimants

- (1) In order to recover under this Settlement Agreement, BC Class Members, Ontario Class Members, and Quebec Class Members must hand-deliver, email, mail, or fax a properly executed Claimant Declaration in the form attached as Schedule A along with a Physician's Declaration (if applicable) in the form attached as Schedule F such that they are received by the Claims Administrator no later than 5:00 p.m. Eastern time on the Claims Deadline.
- (2) To recover from the Extraordinary Expense Pool, BC Class Members, Ontario Class Members, and Quebec Class Members must hand-deliver, email, mail, or fax a properly executed Extraordinary Expense Pool Claim Form in the form attached as Schedule G, and any supporting documentation, such that it is received by the Claims Administrator no later than 5:00 p.m. Eastern time on the Claims Deadline.
- (3) No later than 60 days from the date that the Claims Administrator receives a completed version of Schedule A to this Settlement Agreement from a Class Member or a completed version of Schedule M from a Provincial Health Insurer, the Claims Administrator shall notify the Class Member or Provincial Health Insurer about whether he, she, or it will receive payment under this Settlement Agreement, and if the Class Member or Provincial Health Insurer will not receive payment, the reason why the claim for compensation was rejected.
- (4) If the Claims Administrator determines that the materials submitted by a Class Member or Provincial Health Insurer are deficient, the Claims Administrator shall notify the Class Member or Provincial Health Insurer in writing of the deficiency and shall provide the Class Member or Provincial Health Insurer with 90 days to rectify the deficiency by delivering further or amended materials.



(5) The Claims Administrator shall determine and certify, in its sole discretion, whether a claim for compensation under Schedule A or Schedule M to this Settlement Agreement has been properly made. The decision of the Claims Administrator regarding a Class Member's or Provincial Health Insurer's eligibility to recover under this Settlement Agreement shall be final and not subject to review. All other decisions made by the Claims Administrator in connection with a Class Member's recovery under this Settlement Agreement may be appealed by a Class Member or Defendants within the time frame and by following the Appeal Protocol outlined in Schedule O. A Claims Administrator's decision will be deemed received seven days after it is mailed to a Class Member. All appeals will be decided by The Honourable Marion J. Allan, The Honourable Andre Forget, or such other person upon whom Class Counsel and Defendants' Counsel agree in writing, for decision based only on written submissions from the parties involved. All decisions rendered by The Honourable Marion J. Allan, The Honourable Andre Forget, or such other person upon whom Class Counsel and counsel for Defendants agree in writing shall be final and not subject to further review or appeal.

(6) After approving a claim for payment made by a Provincial Health Insurer, BC Class Member, Ontario Class Member, or Quebec Class Member, the Claims Administrator shall promptly pay the Provincial Health Insurer, Approved Claimant or the Approved Claimant's legal representatives or counsel. However, payment under the Settlement Agreement shall not be made to an Approved Claimant until the Approved Claimant satisfies the requirements of Section 4.4, paragraph 8, and Schedule N.

(7) Class Members and Class Counsel agree to secure all authorizations from Provincial Health Insurers necessary to facilitate settlement under the Settlement Agreement.

(8) Within 30 days after receiving notice that he or she will receive payment under the Settlement Agreement, a Class Member is required to return his or her explanted Durom Cup, if the Durom Cup is in his or her possession, custody, or control, to Defendants' Counsel at the address below, or take all actions necessary for a third-party to return the explanted Durom Cup to Defendants' Counsel.

SECTION 5 -- DISTRIBUTION OF THE SETTLEMENT AMOUNT AND ACCRUED INTEREST

5.1 Settlement Distribution

Any Settlement Amounts held by the Claims Administrator shall be held in trust for the benefit of Class Members and Provincial Health Insurers, and after the Effective Date, shall only be paid in accordance with the provisions of this Settlement Agreement.

5.2 Monies in the Account

In no event shall the Defendants have any responsibility, financial obligations, or liability whatsoever with respect to the investment, distribution, use, or administration of monies in the Account, including, but not limited to, the costs and expenses of such investment, distribution, use and administration, Administration Expenses, and Class Counsel Fees, except as otherwise provided for in sections 4 and 9.1 of this Settlement Agreement.

5.3 Taxes and Interest

- (1) All interest earned on funds in the Account shall become and remain part of the Account.
- (2) Plaintiffs, Class Counsel, and Provincial Health Insurers' Counsel shall bear all risks related to investment of the funds in the Account.
- (3) All funds held by the Claims Administrator shall be deemed and considered to be *in custodia legis* of the BC Court and shall remain subject to the jurisdiction of the BC Court until such time as such funds are distributed pursuant to the Settlement Agreement and/or further order of the BC Court.
- (4) All taxes payable on any interest that accrues on the funds in the Account shall be the responsibility of the Class. The Claims Administrator, in consultation with Class Counsel, shall be solely responsible to fulfill all tax reporting and payment requirements arising from the Settlement Amount in the Account, including any obligation to report taxable income and make tax payments. All taxes (including interest and penalties) due with respect to the income earned by the Settlement Amount shall be paid from the Account.
- (5) The Defendants shall have no responsibility to make any tax filings relating to the Account and shall have no responsibility to pay tax on any income earned by the funds in the Account or pay any taxes on the monies in the Account.

SECTION 6 – OBJECTIONS

6.1 Procedure to Object

- (1) A Class Member may object to the approval of the Settlement by sending a written objection by pre-paid mail, courier, fax, or email to Class Counsel. Class Counsel is required to forward all objections to Defendants' Counsel within 48 hours after receiving an objection.
- (2) Objections must be received before 5:00 p.m. Eastern time on a date that is five days before the date of the Approval Hearing applicable to the Class Member's claim.
- (3) A Class Member who wishes to object to the approval of the Settlement shall state in his/her objection:

(a) The full name, current mailing address, fax number, telephone number, and email address of the person who is objecting;

(b) A brief statement of the nature and reasons for the objection;

(c) A declaration that the person believes he or she is a member of the Class and the reason for that belief including, if available, the reference/catalogue and lot numbers of his/her Durom Cup;

(d) Whether the person intends to appear at the relevant Approval Hearing or intends to appear by counsel, and, if by counsel, the name, address, telephone number, fax number, and email address of counsel; and

(e) A declaration under the penalty of perjury that the foregoing information is true and correct.

(4) Class Counsel shall, no later than three days before the date of the relevant Approval Hearing, report to the Court, by affidavit, with a copy to counsel for the Defendants, the names of persons who objected and copies of any objections.

SECTION 7 – RELEASES AND DISMISSALS

7.1 Release of Releasees

(1) Upon the Effective Date, and in consideration of the payment of the Settlement Amount and for other valuable consideration set forth in the Settlement Agreement, the Releasors forever and absolutely release the Releasees from the Released Claims, including all claims, actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts, and demands whatsoever that were asserted, or could have been asserted, in the litigation that is the subject of this Settlement Agreement. For the consideration provided herein, the Releasors agree not to make any claim or take or continue any proceedings arising out of or relating to the subject matter of the Released Claims against any other person, corporation, or entity (including, without limitation, any health care professionals, health care providers, and hospitals or other health care facilities) that might claim damages and/or contribution and indemnity and/or other relief under the provisions of the *Negligence Act* or other comparable provincial legislation and any amendments thereto, the common law, equity, Quebec civil law, or any other statute, for any relief whatsoever, including relief of a monetary, declaratory, or injunctive nature, from one or more of the Releasees.

(2) Without limiting any other provisions herein, each Class Member who does not affirmatively opt out of the Proceedings or who has affirmatively opted into the BC Proceeding, and the Provincial Health Insurers, whether or not he, she, or it submits a claim or otherwise receives an award, will be deemed by this Settlement Agreement completely and unconditionally to have released and forever discharged the Releasees from any and all Released Claims, including all claims, actions, causes of action, suits, debts, duties, accounts, bonds, covenants,

contracts, and demands whatsoever that were asserted, or could have been asserted, in the litigation that is the subject of this Settlement Agreement.

(3) Each Class Member who does not affirmatively opt out of the Proceedings, or who affirmatively opted into the BC Proceeding, and the Provincial Health Insurers, whether or not he, she, or it submits a claim or otherwise receives an award, will be forever barred and enjoined from continuing, commencing, instituting, or prosecuting any action, litigation, investigation, or other proceeding in any court of law or equity, arbitration, tribunal, proceeding, governmental forum, administrative forum, or any other forum, directly, representatively or derivatively, asserting against any of the Defendants or Releasees any claims that relate to or constitute any Released Claims covered by this Settlement Agreement.

7.2 No Further Claims

The Releasors shall not now or hereafter institute, continue, maintain, or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, any action, suit, cause of action, claim, or demand against any Releasees, or against any other person who may claim contribution or indemnity from any Releasees in respect of any Released Claim or any matter related thereto. The Parties agree that no Class Members shall recover, directly or indirectly, any sum from Defendants or Releasees other than those authorized under the Settlement Agreement in connection with the Durom Cup.

7.3 Dismissal of the Proceedings

(a) The Proceedings shall be dismissed with prejudice and without costs as against the Defendants.

(b) All lawsuits relating to the Durom Cup in which clients of the Merchant Law Firm seek class certification will be dismissed on consent by the Merchant Law Firm.

SECTION 8 – TERMINATION OF SETTLEMENT AGREEMENT

8.1 Right of Termination

(1) The Defendants shall have the right to terminate this Settlement Agreement if:

(a) The BC Court, Quebec Court, or the Ontario Court declines to approve this Settlement Agreement or any term or part thereof deemed material by Defendants;

(b) Any order approving the Settlement Agreement does not become a Final Order;

(c) The Quebec Court declines to authorize the proposed class in the Quebec Action;

(d) Any order dismissing the Quebec Proceeding does not become a Final Order;



- (e) The form and content of any of the Final Orders approved by the BC Court, the Ontario Court, or the Quebec Court do not comply with the terms of this Settlement agreement;
- (f) The Provincial Health Insurers do not accept this Settlement Agreement or any material term or part thereof; or
- (g) More than 200 Class Members opt out.

(2) To exercise a right of termination, the Defendants shall deliver a written notice of termination to Class Counsel and Provincial Health Insurers' Counsel. Upon delivery of such a written notice, this Settlement Agreement shall be terminated and, except as provided for in sections 8.2 and 8.3, it shall be null and void and have no further force or effect, shall not be binding on the Parties, and shall not be used as evidence or otherwise in any litigation.

8.2 If Settlement Agreement is Terminated

(1) If this Settlement Agreement is not approved by the BC Court, the Ontario Court, or the Quebec Court, is terminated in accordance with its terms, or otherwise fails to take effect for any reason:

- (a) Any order approving this Settlement Agreement shall be set aside and declared null and void and of no force or effect, and anyone shall be estopped from asserting otherwise;
- (b) All negotiations, statements, and proceedings relating to the settlement and the Settlement Agreement shall be deemed to be without prejudice to the rights of the Parties, and the Parties shall be deemed to be restored to their respective positions existing immediately before it was executed;
- (c) All funds in the Account (including accrued interest) shall be returned to Defendants' Counsel within 10 days after the date of termination; and
- (d) Authorization of the Quebec Proceeding will be reversed and/or set aside.

8.3 Survival of Provisions after Termination

If this Settlement Agreement is not approved by the BC Court, the Ontario Court, or the Quebec Court, is terminated in accordance with its terms, or otherwise fails to take effect for any reason, the provisions of this section and sections 8.2, 12.2, and the Recitals, Definitions, and Schedules applicable thereto shall survive the termination and continue in full force and effect. In addition, the Parties agree that termination of the Settlement Agreement warrants class authorization through ordinary procedures, and nothing shall prevent Defendants and the Releasees from contesting or opposing class authorization in this action or any other action for any purpose.

SECTION 9 – LEGAL FEES AND DISBURSEMENTS

9.1 Class Counsel Fees

Class Counsel will be compensated as follows:

- (1) \$500,000 (CAD) in Class Counsel Fees payable by the Defendants;
- (2) Up to \$500,000 (CAD) in Disbursements payable by the Defendants. Any unused Disbursement monies shall be used to pay Notice and Administration Costs exceeding \$250,000 (CAD). If unused Disbursement monies remain after satisfying Notice and Administration Costs, the remaining unused monies will revert to the Defendants;
- (3) Additional Class Counsel fees payable by Class Members, which may be determined and approved by the BC Court, the Ontario Court, and/or the Quebec Court.
- (4) The amounts payable under sections 9.1(1) and (2) will be allocated as between BC/Ontario Class Counsel and Quebec Class Counsel as agreed by them or as directed by the Courts. The amounts payable under sections 9.1(3) in respect of Approved Claimants whose claims related to BC Class Members or Ontario Class Members will be paid to BC/Ontario Class Counsel. The amounts payable under sections 9.1(3) in respect of Approved Claimants whose claims relate to Quebec Class Members will be paid to Quebec Class Counsel.

9.2 Procedure

- (1) Class Counsel will bring motions, with notice to Defendants' Counsel, to the BC Court, the Quebec Court, and/or the Ontario Court for determination and approval of Class Counsel Fees and Disbursements payable by the Class Members in accordance with sections 9.1(3) and (4). In any such Court application, Class Counsel shall serve and file documentation that itemizes and supports the amount of Class Counsel Fees claimed.
- (2) Class Counsel Fees and Disbursements payable pursuant to sections 9.1(1) and (2) may be paid out of the Account only after Class Counsel obtains the approval of the BC Court, the Ontario Court, and the Quebec Court. Payment of Additional Class Counsel Fees under sections 9.1(3) in respect of BC Class Members is subject to approval of the BC Court. Payment of Additional Class Counsel Fees under sections 9.1(3) in respect of Ontario Class Members are subject to approval of the Ontario Court. Payment of Additional Class Counsel Fees under sections 9.1(3) in respect of Quebec Class Members are subject to approval of the Quebec Court. Class Counsel Fees and Disbursements shall be paid in the manner prescribed by sections 4.2(7), (12) and (14).
- (3) Class Members who have retained, or in the process of making a claim do retain, lawyers to assist them in making their individual claims in this Settlement shall be responsible for the legal fees and expenses of such lawyers.



(4) For the purposes of allocating fees payable under section 9.1(3) as between BC/Ontario Class Counsel and Quebec Class Counsel, where an Approved Claimant's Claimant Declaration has been filed by BC/Ontario Class Counsel, then that Approved Claimant's claim shall be deemed to relate to the BC Class Members or Ontario Class Members, and where an Approved Claimant's Claimant Declaration has been filed by Quebec Class Counsel, then that Approved Claimant's claim shall be deemed to relate to the Quebec Class Members.

9.3 Payment of Appeal-Related Fees and Costs

Payment of all fees and costs charged by The Honourable Marion J. Allan, The Honourable Andre Forget, or other such person who will serve as the appeal adjudicator by written agreement of Class Counsel and Defendants' Counsel in connection with any appeal initiated by a Class Member or Defendants, will be made as specified in Schedule O.

SECTION 10 – ADMINISTRATION AND IMPLEMENTATION

10.1 Mechanics of Administration

Except to the extent provided for in this Settlement Agreement, the mechanics of the implementation and administration of this Settlement Agreement shall be determined by the BC Court on motion brought by the Parties, or any one of them.

10.2 Notices Required

- (1) Each Class Member shall be given notice of:
 - (a) The hearing applicable to the Class Member's claim at which the BC Court, the Ontario Court, or the Quebec Court will be asked to approve the Settlement Agreement; and
 - (b) Settlement approval, if applicable.
- (2) Class Counsel and Defendants' Counsel will jointly prepare such Notices as may be required, substantially in the form attached in Schedules H, I, and J, respectively, as well as a plan for dissemination of the Notices (Schedule K). Counsel acknowledge that all Notices and the plan for dissemination of Notices must be approved by the BC Court, the Ontario Court, and the Quebec Court. No notices shall be disseminated until such time as they are approved by the BC Court, the Ontario Court, and the Quebec Court.

SECTION 11 – NO ADMISSION OF LIABILITY

The Parties agree that whether or not this Settlement Agreement is approved by the BC Court, the Ontario Court, or the Quebec Court, or is terminated, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions, and

proceedings associated with this Settlement Agreement, and any action taken to carry out this Settlement Agreement, shall not be deemed, construed, or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing of liability by the Releasees, or of the truth of any of the claims or allegations made in the Proceeding or in any other pleading filed by the Plaintiffs.

The Parties further agree that whether or not this Settlement Agreement is approved by the BC Court, the Ontario Court, or the Quebec Court, or is terminated, neither this Settlement nor any document relating to it shall be offered in evidence in any action or proceeding in any court, agency, or tribunal, except to seek court approval of this Settlement Agreement or to give effect to and enforce the provisions of this Settlement Agreement.

SECTION 12 – MISCELLANEOUS

12.1 Motions for Directions

(1) The BC Plaintiff, Ontario Plaintiff, Quebec Plaintiff, Class Counsel, the Claims Administrator, the Provincial Health Insurers, or the Defendants may apply to the BC Court for directions in respect of the implementation and administration of this Settlement Agreement.

(2) All motions contemplated by this Settlement Agreement, including applications to the BC Court for directions, shall be on notice to the Parties.

12.2 Releasees Have No Liability for Administration

The Releasees shall have no responsibility for and no liability whatsoever with respect to the administration of the Settlement Agreement.

12.3 Headings, etc.

In this Settlement Agreement, the division of the Settlement Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement. The terms "this Settlement Agreement," "the Settlement Agreement," "hereof," "hereunder," "herein," "hereto," and similar expressions refer to this Settlement Agreement and not to any particular section or portion of this Settlement Agreement.

12.4 Ongoing Jurisdiction

The BC Court shall retain exclusive jurisdiction over all matters relating to the implementation and enforcement of this Settlement Agreement.

12.5 Governing Law

This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of British Columbia.

12.6 Entire Agreement

This Settlement Agreement and the Schedules attached hereto constitute the entire agreement among the Parties, and supersede any and all prior and contemporaneous understandings, undertakings, negotiations, representations, communications, promises, agreements, agreements in principle, and memoranda of understanding in connection herewith. The Parties agree that they have not received or relied on any agreements, representations, or promises other than as contained in this Settlement Agreement. None of the Parties shall be bound by any prior obligations, conditions, or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein. This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment must be approved by the BC Court, the Ontario Court, and the Quebec Court.

12.7 Survival

The representations and warranties contained in this Settlement Agreement shall survive its execution and implementation.

12.8 Counterparts

This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile signature shall be deemed an original signature for purposes of executing this Settlement Agreement. This Settlement Agreement may be delivered and is fully enforceable in either original, faxed, or other electronic form provided that it is duly executed.

12.9 Negotiated Agreement

This Settlement Agreement has been the subject of negotiations and discussion among the Parties, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties further agree that the language contained or not contained in previous drafts of this Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Settlement Agreement.



12.10 Language

The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English; les parties reconnaissent avoir exigé que la present convention et tous les documents connexes soient rédigés en anglais.

12.11 Dates

Dates referred to in this Settlement Agreement may be altered with the written consent of the Parties and with the approval of the BC Court, the Ontario Court, and the Quebec Court.

12.12 French Translation

The Parties acknowledge that they have required that the Settlement Agreement, including Schedules, be prepared in English and French. The English version of the Settlement Agreement is authoritative in British Columbia and Ontario (and is authoritative as to all Class Members in any province or territory of Canada except Quebec), and the French and English versions of the Settlement Agreement have equal force in Quebec (and are authoritative as to all Class Members who reside in Quebec). A French translation of the settlement agreement and all notices pursuant to this Settlement Agreement shall be paid for by the Defendants.

12.13 Confidentiality

The Parties agree that no public statements shall be made regarding these Proceedings or their settlement that are in any way inconsistent with the terms of the Settlement Agreement.

In particular, the Parties agree that any public statements regarding these Proceedings will indicate only that the settlement has been negotiated and agreed by the parties and approved by the BC Court, Quebec Court, and the Ontario Court without any admissions or findings of liability or wrongdoing and without any admissions or conclusions as to the truth of any of the facts alleged in the Proceedings, all of which are specifically denied.

12.14 Recitals

The recitals to this Settlement Agreement are true and form part of the Settlement Agreement.

12.15 Schedules

The Schedules annexed hereto form part of this Settlement Agreement and are:

- Schedule A – Claimant Declaration
- Schedule B1 – Order on Notice of Approval Hearing (BC Court)
- Schedule B2 – Order on Notice of Approval Hearing (Ontario Court)

- Schedule B3 -- Order on Notice of Approval Hearing (Quebec Court)
- Schedule C -- Order on Approval of Settlement Agreement (BC Court)
- Schedule D -- Order on Approval of Settlement Agreement (Ontario Court)
- Schedule E -- Order on Approval of Settlement Agreement (Quebec Court)
- Schedule F -- Physician's Declaration
- Schedule G -- Extraordinary Expense Pool Claim Form
- Schedule H -- Notice to BC Action Class Members
- Schedule I -- Notice to Ontario Action Class Members
- Schedule J -- Notice to Quebec Action Class Members
- Schedule K -- Plan for Dissemination of Class Notices
- Schedule L -- List of Complications and Corresponding Payment Amounts
- Schedule M -- Health Insurer Claim Form
- Schedule N -- Eligibility Requirements
- Schedule O -- Appeal Protocol

12.16 Acknowledgements

Each of the Parties hereby affirms and acknowledges that:

- (1) He, she, or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has read and understood the Settlement Agreement;
- (2) The terms of this Settlement Agreement and the effects thereof have been fully explained to him, her, or the Party's representative by his, her, or its counsel;
- (3) He, she, or the Party's representative fully understands each term of the Settlement Agreement and its effect; and
- (4) No Party has relied upon any statement, representation, or inducement (whether material, false, negligently made, or otherwise) of any other Party with respect to the first Party's decision to execute this Settlement Agreement.

12.17 Authorized Signature

Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement.

12.18 Notice

Where this Settlement Agreement requires a Party to provide notice or any other communication or document to another, such notice, communication, or document shall be provided by email, facsimile, or letter by overnight delivery to the representatives for the Party to whom notice is being provided, as identified below:

For Plaintiffs, Provincial Health Insurers, Class Counsel, and Provincial Health Insurers' Counsel:

David Klein
 Klein Lawyers LLP
 Suite 400
 1385 West 8th Avenue
 Vancouver, BC V6H 3V9
 Telephone: 604-874-7171
 Facsimile: 604-874-7180
 Email: dklein@callkleinlawyers.com

Daniel Chung
 Merchant Law Group LLP
 200 - 10 Notre-Dame E.
 Montréal, Québec H2Y 1B7
 Telephone: 514-248-7777
 Facsimile: 514-842-6687
 Email: dchung@merchantlaw.com

For Defendants and Defendants' Counsel:

Peter Pliszka
 Fasken Martineau DuMoulin LLP
 Suite 2400
 333 Bay Street
 Toronto, ON M5H 2T6
 Telephone: 416-868-3336
 Facsimile: 416-364-7813
 Email: ppliszka@fasken.com

The Parties have executed this Settlement Agreement on the dates provided below.

CLASS COUNSEL:

Klein Lawyers LLP

Date: November 24, 2015

By: [Signature]

Printed: David Klein

TRUDEL JOHNSON LESPERAUCS
Merchant Law Group LLP

Date: April 13, 2016

By: [Signature]

Printed: PHILIPPE TRUDEL

PROVINCIAL HEALTH INSURERS:

Date: November 24, 2015

By: [Signature]

Printed: David Klein

Its: Solicitor

Date: November 23, 2015

DEFENDANTS:

By: 

Printed: Chad F. Phipps

Senior Vice President,

Its: General Counsel & Secretary

ADDENDUM TO CANADIAN DUROM ACETABULAR HIP IMPLANT CLASS ACTION NATIONAL SETTLEMENT AGREEMENT

RECITALS

- A. Whereas the Defendants, the BC Plaintiff, the Ontario Plaintiff, BC/Ontario Class Counsel and the Provincial Health Insurers have signed the Canadian Durom Acetabular Hip Implant Class Action National Settlement Agreement on November 23 and 24, 2015, respectively (the "Settlement Agreement");
B. And Whereas the plaintiff in the Quebec Proceeding, Ben Wainberg, died on December 8, 2015 without he or his counsel signing the Settlement Agreement;
C. And Whereas, by order of Mr. Justice Gouin in the Quebec Action, dated March 7, 2016, Ben Wainberg has been replaced as the representative plaintiff by Michel Major;
D. The parties to this Addendum have signed this Addendum to modify and amend the Settlement Agreement so that they can complete the terms of the Settlement Agreement.

AMENDMENTS TO THE SETTLEMENT AGREEMENT

- 1.1 All references to "Ben Wainberg" or "Wainberg" in the Settlement Agreement are struck, and are replaced with "Michel Major" or "Major". The Quebec Plaintiff in the Settlement Agreement is therefore Michel Major.
1.2 All references in the Settlement Agreement to the "Merchant Law Group LLP" in the Settlement Agreement are struck, and are replaced with "Trudel Johnston & Lesperance". The Quebec Class Counsel in the Settlement Agreement is therefore Trudel Johnston & Lesperance.
1.3 Section 7.3(b) of the Settlement Agreement is struck.
1.4 The parties to the Addendum may make such amendments to the Schedules to the Settlement Agreement as they may agree upon, or as the Courts may direct, to conform to this Addendum.
1.5 The parties to this Addendum have executed it on the dates provided below.

BC/ONTARIO CLASS COUNSEL:

Klein Lawyers LLP

Date: April 8, 2016

By: [Signature]

Printed: DOUGLAS LENNON

This is Exhibit D referred to in the affidavit of Susan Gwen Wilkinson

sworn before me, this 8th day of April 2016

JOHN R. COOPER, Barrister & Solicitor, 8145 Main St, P.O. Box 100, Mission, B.C. V0H 1V0, Ph: 250-495-2626

QUEBEC CLASS COUNSEL:

Trudel Johnston & Lesperance

Date: 13 AVRIL 2016

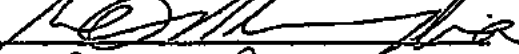
By: 

Printed: PHILIPPE TRUDEL

DEFENDANTS' COUNSEL:

Fasken Martineau DuMoulin LLP

Date: April 11, 2016

By: 

Printed: Peter Pliszka

PROVINCIAL HEALTH INSURERS:

Date: April 8, 2016

By: 

Printed: DOUGLAS LENNOX

Its: COUNSEL