UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT ASPLIN,

Plaintiff,

v.

ETHICON, INC.,
Serve: Ethicon, Inc.
Attn: Person in Charge
Route 22 West
Sommerville, NJ 08876

And

JOHNSON & JOHNSON, INC.
Serve: M.H. Ullman
One Johnson & Johnson Plaza
New Brunswick, New Jersey 08933

Defendants.

Case No. _____

JURY TRIAL DEMANDED

COMPLAINT

COMES NOW Plaintiff, Robert Asplin ("Plaintiff"), by and through undersigned counsel, and brings this action against Defendants Ethicon, Inc. and Johnson & Johnson (hereinafter "Defendants"), and alleges as follows:

I. PARTIES

1. Plaintiff is, and was, at all relevant times, a citizen and resident of Missouri and the United States.

2. Defendant Johnson & Johnson ("J&J") is a corporation incorporated in New Jersey, with its principal place of business located at One Johnson & Johnson Plaza, New Brunswick, New Jersey. J&J maintains as its citizenship the State of New Jersey.

3. Defendant J&J organizes its subsidiary businesses into individual Business Units to coordinate the development, manufacture, testing, marketing promotion, training, distribution and sale of its products, including, but not limited to, its hernia repair mesh products. Within J&J there are three sectors: medical devices and diagnostics, pharmaceutical, and consumer. Within the medical devices and diagnostic sector are "Business Units" including the "Ethicon Franchise." The Ethicon Franchise was charged by J&J with the design, development, promotion, marketing, testing, training, distribution and sale of the hernia repair mesh products at issue in this case. The Company Group Chairman and Worldwide Franchise Chairman for the Ethicon Franchise, Gary Pruden, is employed by J&J. The companies which comprise the Ethicon Franchise are thus controlled by J&J and include, but are not limited to, Ethicon Inc.

4. Defendant Ethicon, Inc. ("Ethicon") is a wholly owned subsidiary of Defendant Johnson & Johnson. Defendant Ethicon is a corporation incorporated in the State of New Jersey with its principal place of business in Somerville, New Jersey. Ethicon transacts business within the State of Missouri. Ethicon has as its citizenship the State of New Jersey.

5. Ethicon is a medical device company involved in the research, development, testing, manufacture, production, marketing, promotion and/or sale of medical devices including Physiomesh (hereinafter may be referred to as the "product").

6. J&J, directly and/or through the actions of Ethicon, has at all pertinent times been responsible for the research, development, testing, manufacture, production, marketing, promotion, distribution and/or sale of Physiomesh.

7. Defendants are individually, jointly and severally liable to Plaintiff for damages suffered by Plaintiff arising from the Defendants' design, manufacture, marketing, labeling, distribution, sale and placement of its defective mesh products at issue in the instant action, effectuated directly and indirectly through their respective agents, servants, employees

and/or owners, all acting within the course and scope of their representative agencies, services, employments and/or ownership.

8. Defendants are vicariously liable for the acts and/or omissions of its employees and/or agents who were at all times relevant hereto acting on behalf of Defendants and within the scope of their employment or agency with Defendants.

II. JURISDICTION AND VENUE

9. This Court has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) based on complete diversity of citizenship between Plaintiff and all Defendants. The amount in controversy exceeds $75,000.

10. This Court has personal jurisdiction over each of the Defendants pursuant to RSMo. § 506.500. Defendants transact business within the State of Missouri, and Defendants committed tortious acts and omissions in Missouri. Defendants' tortious acts and omissions caused injury to Plaintiff in the State of Missouri. Defendants have purposefully engaged in the business of developing, manufacturing, publishing information, marketing, distributing, promoting and/or selling, either directly or indirectly, through third parties, as successor in interest, or other related entities, medical devices including Physiomesh in Missouri, for which they derived significant and regular income. The Defendants reasonably expected, and in fact anticipated, that that their defective mesh products, including Physiomesh, would be sold and implanted in Missouri.

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2).

III. FACTS COMMON TO ALL COUNTS

12. On or about July 30, 2015, Plaintiff had 7 x 15 cm Physiomesh Composite mesh, catalog number PHY0715R, implanted laparoscopically to repair an incisional hernia.

13. Defendants manufactured, sold, and/or distributed the Physiomesh device to Plaintiff, through his doctors, to be used for treatment of hernia repair. On or about December 22, 2016, Plaintiff was forced to undergo a revision surgery due to complications from Defendants' defective hernia mesh. At revision, Plaintiff was diagnosed with incarcerated omentum, recurrent hernia, pain, and complication from adhesions requiring lysis. Plaintiff's Physiomesh patch was examined and found to have a hole centrally with mesh circumferentially and was well embedded along the wound, which was debrided back. Plaintiff has suffered and will continue to suffer physical pain and mental anguish. Defendants were responsible for the research, design, development, testing, manufacture, production, marketing, promotion, distribution and sale of Physiomesh, including providing the warnings and instructions concerning the product.

14. Among the intended purposes for which Defendants designed, manufactured and sold Physiomesh was use by surgeons for hernia repair surgeries, the purpose for which the Physiomesh was implanted in Plaintiff.

15. Defendants represented to Plaintiff and Plaintiff's physicians that Physiomesh was a safe and effective product for hernia repair.

16. Defendants' Physiomesh was defectively designed and/or manufactured, was not reasonably safe for its intended use in hernia repair, and the risks of the design outweighed any potential benefits associated with the design. As a result of the defective design and/or manufacture of the Physiomesh, there was an unreasonable risk of severe adverse reactions to the mesh or mesh components including: chronic pain; recurrence of hernia; foreign body response; rejection; infection; inadequate or failure of incorporation/ingrowth; migration; scarification; deformation of mesh; improper wound healing; excessive and chronic inflammation; adhesions

to internal organs; erosion; abscess; fistula formation; granulomatous response; seroma formation; nerve damage; tissue damage and/or death; and other complications.

17. Physiomesh has a unique design incorporating five (5) distinct layers: two layers of poliglecaprone-25 ("Monocryl") film covering two underlying layers of polydioxanone film ("PDS"), which in turn coat a polypropylene mesh. This design is not used in any other hernia repair product sold in the United States. The multi-layer coating was represented and promoted by the Defendants to prevent or minimize adhesion and inflammation and to facilitate incorporation of the mesh into the body, but it did not. Instead, the multi-layer coating prevented adequate incorporation of the mesh into the body and caused or contributed to an intense inflammatory and chronic foreign body response resulting in an adverse tissue reaction including migration and damage to surrounding tissue in the form of sclerotic, granulomatous and/or fibrotic tissue and improper healing.

18. When affixed to the body's tissue, the impermeable multi-layer coating of the Physiomesh prevents fluid escape, which leads to seroma formation, and which in turn can cause infection, abscess formation and other complications.

19. The multi-layer coating provides a breeding ground for bacteria in which the bacteria cannot be eliminated by the body's immune response, which allows infection to proliferate.

20. The multi-layer coating of Defendants' Physiomesh is cytotoxic, immunogenic, and not biocompatible, which causes or contributes to complications such as delayed wound healing, inflammation, foreign body response, rejection, infection, and other complications.

21. Defendants knew or should have known of the cytotoxic and immunogenic properties of the multi-layer coating of the Physiomesh prior to introducing it into the stream of commerce.

22. When the multi-layer coating of the Physiomesh is disrupted and/or degrades, the "naked" polypropylene mesh is exposed to the adjoining tissue and viscera, and can become adhered to organs, and cause damage to organs, and potentiate fistula formation.

23. These manufacturing and design defects associated with the Physiomesh were directly and proximately related to the injuries suffered by Plaintiff.

24. Neither Plaintiff nor his implanting physician were adequately warned or informed by Defendants of the defective and dangerous nature of Physiomesh. Moreover, neither Plaintiff nor his implanting physician were adequately warned or informed by Defendants of the risks associated with the Physiomesh or the frequency, severity, or duration of such risks.

25. The Physiomesh implanted in Plaintiff failed to reasonably perform as intended. The mesh caused serious injury and had to be surgically removed via invasive surgery, and necessitated additional invasive surgery to repair the hernia that the Physiomesh was initially implanted to treat.

26. Plaintiff's severe adverse reaction, and the necessity for surgical removal of the Physiomesh, directly and proximately resulted from the defective and dangerous condition of the product and Defendants' defective and inadequate warnings about the risks associated with the product, and the frequency, severity and duration of such risks. Plaintiff has suffered, and will continue to suffer, both physical injury and pain and mental anguish, permanent and severe scarring and disfigurement, lost wages and earning capacity, and has incurred substantial medical bills and other expenses, resulting from the defective and dangerous condition of the product and from Defendants' defective and inadequate warnings about the risks associated with the product.

27. On May 25, 2016, Defendants issued an "Urgent: Field Safety Notice" relating to its Physiomesh Flexible Composite Mesh, the same product implanted in Plaintiff, and sent such notification to hospitals and medical providers in various countries worldwide.

28. In this safety notice, Defendants advise these providers of "a voluntary product recall," citing two international device registries which reported data reflecting recurrence/reoperation rates after laparoscopic placement as being higher than that observed from a data set relating to patient outcomes after being implanted with other mesh. Defendants attributed the high rate of recurrence to a "multifactorial issue" which could involve "possible product characteristics, operative, and patient factors."

29. However, in the United States, Defendants failed to issue a nationwide recall, opting instead to simply remove the product from shelves and cease further sales within the United States. This notice was not sent to patients implanted with the device, nor were physicians instructed to immediately remove the device. Instead, the recall instructed health care practitioners to "continue to follow those patients in the usual manner."

COUNT I

STRICT PRODUCT LIABILITY: DEFECTIVE DESIGN

30. At the time the Physiomesh was implanted in Plaintiff's body, the product was defectively designed. As described above, there was an unreasonable risk that the product would not perform safely and effectively for the purposes for which it was intended, and Defendants failed to design against such dangers, and failed to provide adequate warnings and instructions concerning these risks.

31. Defendants expected and intended the Physiomesh product to reach users such as Plaintiff in the condition in which the product was sold.

32. The implantation of Physiomesh in Plaintiff's body was medically reasonable, and was a type of use that Defendants intended and foresaw when it designed, manufactured and sold the product.

33. The risks of the Physiomesh significantly outweigh any benefits that Defendants contend could be associated with the product. The multi-layer coating, which is not used in any other hernia mesh product sold in the United States, prevents tissue from incorporating into the mesh, leading to encapsulation, deformation, scarification and contraction, migration, erosion and rejection. The impermeable multi-layer coating leads to seroma formation, and provides a breeding ground for infection, and protects bacteria from being eliminated by the body's natural immune response.

34. The multi-layer coating of the Physiomesh, which was marketed, promoted and intended as a barrier against adhesion to the internal organs, was only temporary; it was expected and intended to degrade over time inside the body. Thus, this coating prevented tissue ingrowth in the short term, and degraded in the long-term, eventually leaving the "naked" polypropylene mesh exposed to the internal viscera and tissues. The degradation of this multi-layer coating caused or exacerbated an intense inflammatory and foreign body reaction. Once exposed to the viscera, the polypropylene mesh will inevitably adhere to the viscera, initiating a cascade of adverse consequences. Any purported beneficial purpose of the multi-layer coating (to prevent adhesion to the internal viscera and organs) was non-existent; the product provided no benefit while substantially increasing the risks to the patient.

35. The polypropylene mesh within the defective multi-layer coating of the Physiomesh was in itself dangerous and defective, particularly when used in the manner intended by Defendants in the Physiomesh. When implanted adjacent to the intestines and other internal organs, as Defendants intended for Physiomesh, polypropylene mesh is unreasonably susceptible to adhesion, bowel perforation or erosion, fistula formation and bowel strangulation or hernia incarceration, and other injuries.

36. The appropriate treatment for complications associated with Physiomesh involves additional invasive surgery to remove the mesh from the body, thus eliminating any purported benefit that the mesh was intended to provide to the patient.

37. Physiomesh was designed and intended for intraperitoneal implantation, which involved the product being implanted in contact with the intestines and/or other internal organs, which unnecessarily increased the risks of adhesion, erosion, fistula formation, and other injuries.

38. At the time the Physiomesh was implanted in Plaintiff, there were safer feasible alternative designs for hernia mesh products that would have prevented the injuries he suffered.

39. The Physiomesh product cost significantly more than competitive products because of its unique multi-layer coating, even though the multi-layer coating provided no benefit to consumers, and increased the risks to patients implanted with these devices.

40. The Physiomesh implanted in Plaintiff failed to reasonably perform as intended, and had to be surgically removed necessitating further invasive surgery to repair the very issue that the product was intended to repair, and thus provided no benefit to him.

41. As a direct and proximate result of the defective and unreasonably dangerous condition of the product, Plaintiff suffered injuries and damages as summarized herein.

COUNT II

STRICT LIABILITY – MANUFACTURING DEFECT

42. Plaintiff repeats, reiterates and realleges each and every allegation of this Complaint contained in each of the foregoing paragraphs inclusive, with the same force and effect as if more fully set forth herein.

43. Defendants supplied, manufactured, sold, distributed and/or otherwise placed into the stream of commerce the Physiomesh implanted in Plaintiff. The Physiomesh was defective in

its manufacture and construction when it left the hands of Defendants in that its manufacture and construction deviated from good manufacturing practices and/or manufacturing specifications as would be used and/or maintained by a reasonably prudent and careful medical device manufacturer.

44. The Physiomesh as manufactured and constructed by Defendants was unreasonably dangerous to end consumers including Plaintiff and posed an unreasonable degree of risk, danger and harm to Plaintiff.

45. The Physiomesh was expected to reach and did reach Plaintiff's implanting surgeon and Plaintiff without substantial change in the condition in which it was manufactured, suppled, distributed sold and/or otherwise placed in the stream of commerce.

46. The manufacturing defect in the Physiomesh implanted in Plaintiff was not known, knowable or readily visible to Plaintiff's physician or to Plaintiff nor was it discoverable upon any reasonable examination by Plaintiff's physician or Plaintiff. The Physiomesh was used and implanted in the very manner in which it was intended to be used and implanted by Defendants in accordance with the instructions for use and specifications provided by Defendants.

47. The Physiomesh implanted in Plaintiff was different from its intended design and failed to perform as safely as a product manufactured in accordance with the intended design would have performed.

48. The defective and unreasonably dangerous condition of the Physiomesh product was a proximate cause of damages and injuries suffered by Plaintiff.

49. As a direct and proximate result of the Physiomesh’s aforementioned manufacturing defect, Plaintiff was caused and in the future will be caused to suffer severe

personal injuries, pain and suffering, severe emotional distress, financial or economic loss, including, but not limited to, obligations for medical services and expenses, and other damages.

50. Defendants are strictly liable to Plaintiff.

COUNT III

STRICT PRODUCT LIABILITY: FAILURE TO WARN

51. Plaintiff repeats, reiterates and realleges each and every allegation of this Complaint contained in each of the foregoing paragraphs inclusive, with the same force and effect as if more fully set forth herein.

52. At the time the Physiomesh was implanted in Plaintiff's body, the warnings and instructions provided by Defendants for the Physiomesh were inadequate and defective. As described above, there was an unreasonable risk that the product would not perform safely and effectively for the purposes for which it was intended, and Defendants failed to design and/or manufacture against such dangers, and failed to provide adequate warnings and instructions concerning these risks.

53. Defendants expected and intended the Physiomesh product to reach users such as Plaintiff in the condition in which the product was sold.

54. Plaintiff and his physicians were unaware of the defects and dangers of Physiomesh, and were unaware of the frequency, severity and duration of the defects and risks associated with the Physiomesh.

55. The Defendants' Instructions for Use provided with the Physiomesh expressly understates and misstates the risks known to be associated specifically with the Physiomesh by stating that "Potential adverse reactions are those typically associated with surgically implantable materials." No other surgical mesh sold in the United States – and no other "surgically implantable material" – suffers the same serious design flaws as Physiomesh. No other device or

material contains the dangerous and defective multi-layer coating, which itself causes or increases the risks of numerous complications, including prevention of incorporation, increased risk of seroma formation, immunologic response, increased risk for infection, and increased inflammatory reaction and foreign body response. Defendants provided no warning to physicians about the risks or increased risks specifically associated with the unique design of the Physiomesh.

56. The Defendants' Instructions for Use for the Physiomesh failed to adequately warn Plaintiff's physicians of numerous risks which Defendants knew or should have known were associated with the Physiomesh, including the risks of the product's inhibition of tissue incorporation, pain, immunologic response, dehiscence, encapsulation, rejection, migration, scarification, shrinkage/contraction, adhesion to internal organs and viscera, erosion through adjacent tissue and viscera, bowel obstruction, failure of repair/hernia recurrence, or hernia incarceration or strangulation.

57. Defendants failed to adequately train or warn Plaintiff or his physicians about the necessity for invasive surgical intervention in the event of complications, or how to properly treat such complications when they occurred.

58. Defendants failed to adequately warn Plaintiff or his physicians that the necessary surgical removal of the Physiomesh in the event of complications would leave the hernia unrepaired, and would necessitate further medical treatment to attempt to repair the same hernia that the failed Physiomesh was intended to treat.

59. Defendants represented to physicians, including Plaintiff's physician, that the multi-layer coating would prevent or reduce adhesion, and expressly intended for the Physiomesh to be implanted in contact with the intestines and internal organs and marketed and promoted the product for said purpose. Defendants failed to warn physicians that the multi-layer

coating prevented tissue ingrowth, which is the desired biologic response to an implantable mesh device. Defendants failed to warn physicians that the multi-layer coating was only temporary and therefore at best would provide only a temporary adhesion barrier, and when the coating inevitably degraded, the exposed polypropylene would become adhered to the organs or tissue.

60. With respect to the complications that were listed in the Defendants' warnings, Defendants provided no information or warning regarding the frequency, severity and duration of those complications, even though the complications associated with Physiomesh were more frequent, more severe and lasted longer than those with safer feasible alternative hernia repair treatments.

61. If Plaintiff and/or his physicians had been properly warned of the defects and dangers of Physiomesh, and of the frequency, severity and duration of the risks associated with the Physiomesh, Plaintiff would not have consented to allow the Physiomesh to be implanted in his body, and Plaintiff physicians would not have implanted the Physiomesh in Plaintiff.

62. As a direct and proximate result of the inadequate and defective warnings and instructions, Plaintiff suffered injuries and damages as summarized herein.

COUNT IV

NEGLIGENCE

63. Plaintiff repeats, reiterates and realleges each and every allegation of this Complaint contained in each of the foregoing paragraphs inclusive, with the same force and effect as if more fully set forth herein.

64. Defendants had a duty to use reasonable care in designing, testing, inspecting, manufacturing, packaging, labeling, marketing, distributing, and preparing written instructions and warnings for Physiomesh, but failed to do so.

65. Defendants knew, or in the exercise of reasonable care should have known, that Physiomesh was defectively and unreasonably designed and/or manufactured, and was unreasonably dangerous and likely to injure patients in whom Physiomesh was implanted. Defendants knew or should have known that Plaintiff and Plaintiff's physicians were unaware of the dangers and defects inherent in the Physiomesh.

66. Defendants had a duty to continue to monitor Physiomesh after its introduction into the market to ensure potential consumers would be given proper warning of complications or dangers of the product, but failed to do so.

67. As a direct and proximate result of Defendants' negligence in designing, testing, inspecting, manufacturing, packaging, labeling, marketing, distributing, and preparing written instructions and warnings for Physiomesh, Plaintiff suffered injuries and damages as summarized herein.

COUNT V

BREACH OF EXPRESS WARRANTY

68. Plaintiff repeats, reiterates and realleges each and every allegation of this Complaint contained in each of the foregoing paragraphs inclusive, with the same force and effect as if more fully set forth herein.

69. At all relevant and material times, Defendants manufactured, marketed, sold, distributed and otherwise placed in to the stream of commerce Physiomesh.

70. In advertising, marketing and otherwise promoting Physiomesh to physicians, hospitals and other healthcare providers, Defendants expressly warranted that their Physiomesh was safe for use. In advertising, marketing and otherwise promoting Physiomesh, Defendants intended that physicians, hospitals and other healthcare providers rely upon their representations in an effort to induce them to use Physiomesh for their patients.

71. The Plaintiff was a person whom the Defendants could reasonably have expected to use, consume, or be affected by the Defendants' hernia mesh products as the Defendants specifically designed the Physiomesh for permanent implantation in patients exhibiting hernia such as Plaintiff.

72. With respect to Plaintiff, Defendants intended that Physiomesh be implanted in Plaintiff by his treating surgeon in the reasonable and foreseeable manner in which it was implanted and in accordance with the instructions for use and product specifications provided by Defendants. Plaintiff was in privity with Defendants.

73. Defendants expressly warranted to physicians, hospitals, other healthcare providers and the general public including Plaintiff that Physiomesh was safe and fit for use by consumers including Plaintiff, that it was of merchantable quality, that its risks, side effects and potential complications are minimal and are comparable to other hernia mesh products, that it was adequately researched and tested and was fit for its intended use. Plaintiff and his physicians and healthcare providers relied upon these express representations and warranties made by Defendants and consequently, Plaintiff was implanted with Defendants' Physiomesh.

74. Defendants breached express representations and warranties made to Plaintiff and his physicians and healthcare providers with respect to the Physiomesh implanted in Plaintiff including the following particulars:

a. Defendants represented to Plaintiff and his physicians and healthcare providers through labeling, advertising, arketing materials, detail persons, seminar presentations, publications, notice letters, and regulatory submissions among other ways that the Defendants' Physiomesh was safe, meanwhile Defendants fraudulently withheld and concealed information

about the substantial risks of serious injury associated with using Physiomesh;

b. Defendants represented to Plaintiff and his physicians and healthcare providers that the Defendants' Physiomesh was as safe and/or safer than other alternative procedures and devices then on the market, meanwhile Defendants fraudulently concealed information that demonstrated that Physiomesh was not safer than alternative therapies and products available on the market; and

c. Defendants represented to Plaintiff and his physicians and healthcare providers that the Defendants' Physiomesh was more efficacious than other alternative procedures, therapies and/or devices. Meanwhile Defendants fraudulently concealed information, regarding the true efficacy of Physiomesh.

75. At the time of making such express warranties, Defendants knew or should have known that Defendants' Physiomesh does not conform to the express warranties and Defendants' acts were motivated by financial gain while the adverse consequences of Defendants' conduct was outrageous, fraudulent, oppressive, done with malice or gross negligence and evidenced reckless indifference to Plaintiff's rights, health and safety.

76. As a direct and proximate result of Defendants' breaches of the aforementioned express warranties, Plaintiff was caused and in the future will be caused to suffer severe personal injuries, pain and suffering, severe emotional distress, financial or economic loss, including, but not limited to, obligations for medical services and expenses, impairment of personal relationships, and other damages.

COUNT VI

BREACH OF IMPLIED WARRANTIES OF MERCHANTABILITY

77. Plaintiff repeats, reiterates and realleges each and every allegation of this Complaint contained in each of the foregoing paragraphs inclusive, with the same force and effect as if more fully set forth herein.

78. Defendants breached implied warranties with respect to the Physiomesh including the following particulars:

a. Defendants represented to Plaintiff and his physicians and healthcare providers through its labeling, advertising, marketing materials, detail persons, seminar presentations, publications, notice letters, and regulatory submissions that the Defendants' Physiomesh was of merchantable quality and safe when used for its intended purpose meanwhile Defendants fraudulently withheld and concealed information about the substantial risks of serious injury associated with using Physiomesh;

b. Defendants represented to Plaintiff and his physicians and healthcare providers that the Defendants' Physiomesh was safe, as safe as and/or safer than other alternative procedures and devices, meanwhile Defendants fraudulently concealed information, which demonstrated that the Physiomesh was not safe, as safe as or safer than alternatives and other products available on the market; and

c. Defendants represented to Plaintiff and his physicians and healthcare providers that the Defendants' Physiomesh were more efficacious than other alternative procedures and/or devices. Meanwhile Defendants

fraudulently concealed information, regarding the true efficacy of Physiomesh.

79. In reliance upon Defendants' implied warranty, Plaintiff's implanting surgeon used Physiomesh to treat Plaintiff in the foreseeable manner normally intended, recommended, promoted, and marketed by Defendants and in accordance with the instructions for use and product specification provided by Defendants.

80. Defendants breached their implied warranty to Plaintiff in that the Defendants' Physiomesh was not of merchantable quality, safe and fit for its intended use nor was it adequately tested prior to being placed in the stream of commerce.

81. Defendants' acts were motivated by financial gain while the adverse consequences of the conduct were actually known by Defendants. Defendants' conduct was outrageous, fraudulent, oppressive, done with malice and with gross negligence, and evidenced reckless disregard and indifference to Plaintiff's rights, health and safety.

82. As a direct and proximate result of Defendants' breach of the aforementioned implied warranties, Plaintiff was caused and in the future will be caused to suffer severe personal injuries, pain and suffering, severe emotional distress, financial or economic loss, including, but not limited to, obligations for medical services and expenses, impairment of personal relationships, and other damages.

COUNT VII

VICARIOUS LIABILITY

83. Plaintiff repeats, reiterates and realleges each and every allegation of this Complaint contained in each of the foregoing paragraphs inclusive, with the same force and effect as if more fully set forth herein.

84. Whenever in this complaint it is alleged that Defendants did or omitted to do any act, it is meant that Defendants' officers, agents, servants, employees, or representatives did or omitted to do such act and that at the time such act or omission was done, it was done with the full authorization or ratification of Defendants or was done in the normal and routine course and scope of employment of Defendants' officers, agents, servants, employees, and representatives.

COUNT VIII

VIOLATION OF MISSOURI MERCHANDIZING PRACTICES ACT, § 407.020 *et seq.*

85. Plaintiff repeats, reiterates and realleges each and every allegation of this Complaint contained in each of the foregoing paragraphs inclusive, with the same force and effect as if more fully set forth herein.

86. As alleged herein, the conduct of Defendants constitutes unfair or deceptive acts or practices in trade or commerce as defined in, and in violation of the Missouri Merchandizing Practices Act, V.A.M.S. § 407.020 et seq.

87. The conduct of the Defendants impacted the public interest, had the capacity to deceive a substantial portion of the public, and, in fact, did deceive plaintiff.

88. As a direct and proximate result of these unfair or deceptive acts or practices, Plaintiff has been damaged in an amount to be determined with specificity at trial.

89. Plaintiff seeks both compensatory and punitive damages, and pursuant to V.A.M.S. § 407.025.1, the Plaintiff is entitled to reasonable attorneys' fees incurred in prosecuting this action.

COUNT IX

PUNITIVE DAMAGES

90. Plaintiff repeats, reiterates and realleges each and every allegation of this Complaint contained in each of the foregoing paragraphs inclusive, with the same force and effect as if more fully set forth herein.

91. Defendants continued to manufacture and sell Physiomesh after obtaining knowledge and information that the product was defective and unreasonably unsafe. Defendants were aware of the probable consequences of implantation of the dangerous and defective Physiomesh, including the risk of failure and serious injury, such as suffered by Plaintiff. Defendants willfully and deliberately failed to avoid those consequences, and in doing so, Defendants acted with conscious indifference, indifference to, and/or flagrant disregard of, the safety of those persons who might foreseeably have been harmed by the Physiomesh product, including Plaintiff, justifying the imposition of punitive damages to the full extent allowed by law.

IV. PRAYER FOR RELIEF

WHEREFORE, as a result of the acts and omissions and conduct of Defendants set forth herein, Plaintiff is entitled to recover for his personal injuries; past, present, and future medical and related expenses; past, present, and future lost wages; past, present and future loss of earning capacity; and past, present and future mental and physical pain and suffering; attorneys' fees to the full extent permitted by law and Plaintiff is entitled to punitive damages in an amount sufficient to punish, penalize and deter Defendants from such conduct.

JURY TRIAL DEMANDED

Plaintiff demands trial by jury, judgment against Defendants, jointly and severally, for compensatory and punitive damages in an amount not less than $75,000, as well as costs, attorney fees, interest, or any other relief, monetary or equitable, to which he is entitled.

DATED: April 11, 2017

Respectfully submitted,

ONDER, SHELTON, O'LEARY & PETERSON, LLC

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