

CAUSE NO. DC-11-02459-M

MARY BANKS and § IN THE DISTRICT COURT  
BETTY COLSTON, §  
§  
v. § 298th JUDICIAL DISTRICT  
§  
DEPUY ORTHOPAEDICS, INC., §  
KELLY ORTHOPAEDIC SALES, LP, §  
and KOS MANAGEMENT COMPANY, §  
LLC. § OF DALLAS COUNTY

PLAINTIFFS' ORIGINAL PETITION WITH ATTACHED DISCOVERY<sup>1</sup>

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, the Plaintiffs, BETTY COLSTON and MARY BANKS, by and through their attorneys: Hutton W. Sentell of The Ashmore Law Firm, P.C.; Altom M. Maglio of the law firm of Maglio Christopher & Toale, PA; and Brian Franciskato of the law firm of Nash & Franciskato<sup>2</sup>, and hereby sue Defendants DEPUY ORTHOPAEDICS, INC., a foreign corporation, KELLY ORTHOPAEDIC SALES, LP, a Texas limited partnership, and KOS MANAGEMENT COMPANY, LLC, a Texas limited liability company and allege:

DISCOVERY CONTROL PLAN

Plaintiffs intend discovery in this case to be conducted under the provisions of Texas Rule of Civil Procedure 190.4 (Level 3). Plaintiffs respectfully request that the Court enter a Level 3 Discovery Order setting forth: (i) a date for trial; (ii) a discovery period during which either all discovery must be conducted or all discovery requests must be served; (iii) deadlines for amending or supplementing pleadings; and (iv) deadlines for designating expert witnesses.

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<sup>1</sup>The discovery requests for Defendants are attached and incorporated by reference as listed in this Petition.

<sup>2</sup> A motion will be made to this Court to admit Altom M. Maglio and Brian Franciskato pro hac vice.

## PARTIES AND JURISDICTION

1. At all times material to this complaint, MARY BANKS was and continues to be a resident of the State of Texas.

2. At all times material to this complaint, BETTY COLSTON was and continues to be a resident of the State of Oklahoma.

3. At all times relevant to this action, Defendant DEPUY ORTHOPAEDICS, INC. (“DEPUY”), was incorporated in the State of Indiana with its principal place of business in the State of Indiana. DEPUY at all times material to this action has engaged in business in the State of Texas, as more particularly described below. Due to its substantial contacts in the State of Texas, DEPUY maintains a registered agent for service of process in Texas. Defendant DEPUY may be cited by serving its agent for service, C T Corporation System, 350 N. St. Paul Street, Ste. 2900, Dallas, TX 75201. The causes of action alleged herein arise out of this Defendant’s business activities in the state of Texas.

4. At all times material to this complaint, Defendant KELLY ORTHOPAEDIC SALES, LP, (“KELLY”) was a limited partnership organized and existing pursuant to the laws of the state of Texas with its principal place of business in Dallas County, Texas. At present, the principal place of business of Defendant KELLY ORTHOPAEDIC SALES, LP, is at 16175 Addison Road, Addison, TX 75001. Defendant KELLY may be cited by serving its general partner, KOS Management Company, LLC, via its registered agent, George Kelly, 16175 Addison Road, Addison, TX 75001, or wherever he may be found.

5. At all times material to this complaint, Defendant KOS MANAGEMENT COMPANY, LLC, (“KOS”), a limited liability company, was the general partner of Defendant KELLY, and was organized and existing pursuant to the laws of the state of Texas with its principal place of business

in Dallas County, Texas, at 4310 Sunbelt Drive, Addison, TX or 16175 Addison Road, Addison, TX. At present, Defendant KOS may be cited by serving its registered agent, George Kelly, at 16175 Addison Road, Addison, TX 75001, or wherever he may be found.

6. At all times material to this complaint, Defendant DEPUY was doing, and continues to do, business throughout the United States, including within the state of Texas.

7. At all times relevant to this action, Defendant DEPUY, either directly or through its agents, designed, manufactured, labeled, distributed, and sold the product at issue in this matter and instructed physicians regarding the advantages of and the proper method of implanting this product.

8. At times relevant to this Complaint, Defendant KELLY regularly engaged in business in the State of Texas.

9. At all times relevant to this action, Defendant KELLY served as a distributor for Defendant DEPUY of the product at issue in this matter, promoting, selling, distributing, and servicing the product for Defendant DEPUY in Northern Texas and Oklahoma.

10. Defendant KELLY sold products manufactured by DEPUY by placing the products for sale in the stream of commerce and delivering the products to purchasers.

11. Defendant KELLY sold the DePuy ASR Hip Replacement System (“DePuy ASR Hip”) and its individual components comprising the ASR Hip at issue in this matter by placing the products for sale in the stream of commerce and delivering the products for implantation into the bodies of PLAINTIFFS.

12. In its role as distributor of product at issue in this matter, Defendant KELLY utilized sales representatives that were responsible for educating Plaintiffs’ orthopedic surgeons regarding claimed advantages of the product, answering any questions Plaintiffs’ orthopedic surgeons had

regarding the product, assisting Plaintiffs' orthopedic surgeons at surgery regarding the product, and selling the product to Plaintiffs' orthopedic surgeons.

13. The directors, managers, and sales representatives of Defendant KELLY received training and education from Defendant DEPUY including orthopedic and surgical training, product design rationale for the DePuy ASR Hip, surgical technique tips for demonstrating and implanting the DePuy ASR Hip, training in the use of the tools used to implant the DePuy ASR Hip, training in selecting the hip replacement components to mate with the DePuy ASR Hip cup, and training on how to sell orthopedic surgeons on the DePuy ASR Hip rather than its major competitors.

14. Defendant KELLY provided information to PLAINTIFFS' surgeons including but not limited to: the advantages of the DePuy ASR Hip compared to its competitors, information regarding the design rationale for the DePuy ASR Hip, surgical techniques on how to implant the DePuy ASR Hip and demonstrations on how to implant the DePuy ASR Hip, and the components that could best be mated with the DePuy ASR Hip including providing a variety of scenarios involving the various instrumentation used in implanting a DePuy ASR Hip.

15. In their roles as sales representatives for the DePuy ASR Hip in this matter, the sales representatives of Defendant KELLY were responsible for answering any questions or concerns PLAINTIFFS' orthopedic surgeons had regarding the DePuy ASR Hip.

16. The above information was provided by Defendant KELLY to PLAINTIFFS' surgeons and was intended for the purpose of convincing and inducing PLAINTIFFS' surgeons to use the DePuy ASR Hip instead of one of the competing hip replacements.

17. PLAINTIFFS' surgeons, nurses and hospital staff relied on information and assistance from KELLY during PLAINTIFFS' surgical procedure in implanting the DePuy ASR Hip.

## VENUE

18. Venue is proper in Dallas County in that at present and at all times relevant to this action, the principal place of business of Defendant KELLY, was in Dallas County, Texas.

## FACTUAL BACKGROUND

19. In 2005, Defendant DEPUY began selling nationally, and Defendant KELLY began selling in Northern Texas and Oklahoma the DePuy ASR Hip for use in total hip replacement surgeries.

20. At that time Defendant DEPUY began an intensive national campaign to promote the use of ASR Hips by orthopedic surgeons, and KELLY began a corresponding campaign in Texas and Oklahoma.

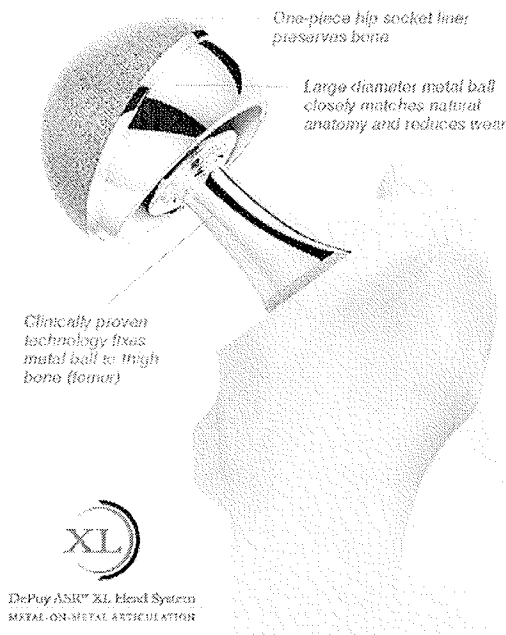
21. Defendant DEPUY would produce brochures and other printed literature and Defendant KELLY would disseminate the literature to the orthopedic community in Northern Texas and Oklahoma.

22. Defendant DEPUY produced and Defendant KELLY disseminated literature stating:

The DePuy ASR™ Articular Replacement System and the DePuy ASR™ XL Head System large diameter, high performance metal-on-metal bearings are designed and manufactured within fine tolerances to facilitate a state of fluid film lubrication. The system is available for use in conjunction with all DePuy stems, cemented and cementless, designed to reduce wear and provide high function for all patients.

23. In a 2006 patient brochure, titled *DePuy ASR™ XL Head System: Metal on Metal Articulation: High Performance Hip Replacement*, Defendant DEPUY and Defendant KELLY touted the advantages of the ASR Hip, including reduced wear:

DEPUY ASR™ XL SYSTEM



24. The 2006 patient brochure contains the below chart stating that the DePuy ASR Hip is “based on a strong clinical history” and “reduces wear compared to traditional hip replacement”:

Benefits <sup>1</sup>	Hip Resurfacing	The ASR™ XL System
Preserves Bone in the Hip Socket	YES	YES
Provides Excellent Range of Motion	YES	YES
Reduces Wear Compared to Traditional Hip Replacement	YES	YES
Provides Ball Diameters that Closely Match Natural Anatomy	YES	YES
Allows Surgeon to Adjust Leg Length and Offset	NO	YES
Involves a Relatively Small Surgical Incision	NO	YES
Based on Strong Clinical History	NO	YES

25. The 2006 patient brochure contains photographs of the below three individuals engaged in demanding athletic activities with the DePuy ASR Hip logo superimposed over one of each of their hips, implying that each has a DePuy ASR Hip implanted in that hip. They include a man with the DePuy ASR logo superimposed over his right hip taking a very aggressive golf swing:



a man with a DePuy ASR logo superimposed over his right hip playing Frisbee with a dog on a loose sand beach:



and a young woman with the DePuy ASR logo superimposed over her left hip jogging on a loose sand beach:



### Warnings from Independent Orthopedic Experts

26. The same year that Defendant DEPUY began selling the ASR Hip in the United States, independent experts from around the world were warning that the design of the DePuy ASR Hip was flawed.

27. Orthopedic experts warned that the DePuy ASR cup was too thin and thus prone to deformation.

28. Orthopedic experts warned that the clearance between the DePuy ASR Hip cup and head was too small and in some patients could lead to jamming of components.

29. Orthopedic experts warned that the treatment of the metal used for the DePuy ASR cup and head was prone to increased wear.

30. By 2005, the DePuy ASR cup was shown to have a fourfold higher rate of revision than a similar cup in the Australian Joint Registry.

31. Defendant DEPUY countered these warnings concerning the defective nature of the DePuy ASR Hip with a host of arguments and continued to heavily promote its ASR Hip for the next four years by and through Defendant KELLY.

32. Defendant DEPUY disseminated their arguments responding to the warnings about the ASR Hip through their distributors including Defendant KELLY.

33. The employees and agents of Defendant KELLY were aware of the problems with the design of the ASR Hip, and also aware of excessive failures necessitating revision of the DePuy ASR Hip at the time of the sale of the DePuy ASR Hip to each of the Plaintiffs, but failed to convey this information to the Plaintiffs' orthopedic surgeons and instead continued to strongly promote the DePuy ASR Hip.

#### Suspension and Recall

34. From 2005 to 2009, hundreds of complaints of failure of ASR Hips were made by orthopedic surgeons and hospitals to Defendant DEPUY and the United States Food and Drug Administration.

35. Independent studies began to show numerous problems with the DePuy ASR Hip including failure of the cup to achieve proper fixation due to the lack of bony ingrowth into the back of the cup, significant metal debris in patients with DePuy ASR Hips, the formation of pseudotumors in patients with DePuy ASR Hips, and hip fractures.

36. In late 2009, Defendant DEPUY, citing decreased sales, stated that it was phasing out sales of the DePuy ASR Hip.

37. In early 2010, Defendant DEPUY sent letters to orthopedic surgeons warning of high failure rates with the DePuy ASR Hip.

38. Finally, on August 24, 2010, Defendant DEPUY announced that it was recalling the DePuy ASR Hip, noting in the Recall Notice that reasons for high failure rates included “component loosening, component malalignment, infection, fracture of the bone, dislocation, metal sensitivity and pain.”

#### Background of Plaintiff MARY BANKS

39. Plaintiff MARY BANKS is a resident of the State of Texas.

40. Ms. Banks was implanted with a DePuy ASR Hip on October 14, 2008 by her orthopedic surgeon Philip M. Graehl, M.D. at Presbyterian Hospital in Plano, Texas.

41. On June 17, 2009, Ms. Banks reported to Dr. Graehl an unusual popping sound emanating from her hip implant associated with pain and tenderness.

42. Ms. Banks suffered debilitating pain that did not respond to the treatments attempted by Dr. Graehl.

43. Upon learning of the ASR Hip recall in August of 2010, Dr. Graehl began to question whether her DePuy ASR Hip cup had failed. At this time he ordered an MRI and blood testing to determine the rate of metal-on-metal wear debris.

44. The MRI displayed the presence of multiple cysts and pseudotumors localized around the implant site and the results from the blood tests reflected a serum chromium and cobalt level multiple times higher than the normal range.

45. The recognition by Dr. Graehl that the DePuy ASR Hip had failed was significantly delayed as a result of Defendant KELLY continuing to provide incomplete and inaccurate

information to Dr. Graehl regarding the DePuy ASR Hip between the June 17, 2009 surgery and until the recall in August of 2010.

46. Dr. Graehl performed a revision surgery to remove the DePuy ASR Hip from Plaintiff MARY BANKS on November 16, 2010.

47. In his operative report of the November 16, 2010, surgery, Dr. Graehl noted the following:

Capsule was incised. Dark cloudy fluid was removed. This was sent for cell count and differential Gram stain and culture, Gram stain and culture revealed no organisms, a few white blood cells, white blood cell count was 4000 in the fluid. There was gray-brown metallosis synovitis throughout the hip joint, and complete synovectomy was performed. Anterior and posterior acetabular retractors were placed. Further synovectomy was performed, especially anteroinferior with removal of further metallosis debris. The acetabular component was tamped with a bone tamp and found to be grossly loose. It was grabbed with a pair of pliers and subsequently removed.

48. Following the surgery to remove the defective DePuy ASR Hip, Plaintiff MARY BANKS has begun a long and painful rehabilitation process.

#### Background of Plaintiff BETTY COLSTON

49. Plaintiff BETTY COLSTON is a resident of the State of Oklahoma.

50. On January 13, 2009, at the Integris Baptist Medical Center, orthopedic surgeon Stephen Davenport, MD converted Ms. Colston's partial hip replacement to a total hip replacement.

51. During the surgery, Dr. Davenport implanted a DePuy ASR Hip into the body of Ms. Colston.

52. Ms. Colston subsequently developed unexplained hip pain.

53. Despite the best efforts of her orthopedic surgeon, the cause of her hip pain remained undiagnosed until August of 2010 when her orthopedic surgeon learned of Defendant DEPUY's recall of the ASR Hip.

54. Upon learning of the DePuy ASR Hip recall, Dr. Davenport began to question whether the DePuy ASR Hip cup had failed.

55. The recognition by Dr. Davenport that the DePuy ASR Hip had failed was significantly delayed as a result of Defendant KELLY continuing to provide incomplete and inaccurate information to Dr. Davenport regarding the DePuy ASR Hip between the January 13, 2009 surgery and until the recall on September 22, 2010.

56. On September 24, 2010, Plaintiff BETTY COLSTON underwent revision surgery under the care of Dr. Davenport.

57. During this surgery, Dr. Davenport noted the presence of cloudy fluid and greenish-brown amorphous material inside the socket.

58. Following the surgery to remove the defective DePuy ASR Hip, Plaintiff BETTY COLSTON has begun a long and painful rehabilitation process.

#### Effect on Plaintiffs

59. Each of the Plaintiffs to this action have a DePuy ASR Hip that was designed, manufactured, labeled, distributed, and sold by Defendant DEPUY.

60. Each of the Plaintiffs to this action has a DePuy ASR Hip that was distributed by Defendant KELLY.

61. In the instance of each of the Plaintiffs to this action, Defendant KELLY was responsible for educating the Plaintiff's orthopedic surgeon regarding the DePuy ASR Hip, answering any questions that the orthopedic surgeon had regarding the DePuy ASR Hip, and

convincing each Plaintiff's orthopedic surgeon to purchase the DePuy ASR Hip on behalf of each of the Plaintiffs.

62. In the instance of each of the Plaintiffs to this action, the DePuy ASR Hip failed to achieve proper bone ingrowth into the cup and thus failed to achieve proper fixation.

63. In the instance of each of the Plaintiffs to this action, the DePuy ASR Hip generated excessive metal debris.

64. In the instance of each of the Plaintiffs to this action, the recognition that the DePuy ASR Hip had failed was delayed by the failure of Defendants DEPUY and KELLY to convey to each Plaintiff's orthopedic surgeon the warnings regarding the product made by independent orthopedic experts and information regarding other failures of DePuy ASR Hips.

65. As a result of this significant delay in the recognition that the DePuy ASR Hip had failed, PLAINTIFFS needlessly suffered pain and damage to the bones of their hips.

66. The defective DePuy ASR Hips implanted in the bodies of the Plaintiffs caused harm and injury to the Plaintiffs.

67. The failure of the DePuy ASR Hip implanted in the bodies of the PLAINTIFFS was a direct result of the defective design of the DePuy ASR Hip warned of by orthopedic experts in 2005, and of which KELLY was aware at the time that KELLY sold the DePuy ASR Hip to PLAINTIFFS.

**FIRST CLAIM FOR RELIEF:**  
**NEGLIGENCE OF DEPUY ORTHOPAEDICS, INC.**

68. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully stated herein.

69. Defendant DEPUY as the manufacturer of the DePuy ASR Hip owed a duty to Plaintiffs to exercise reasonable care in the design, manufacture, labeling, and distribution of the device to insure that it was fit for its intended use.

70. Defendant DEPUY, as the manufacturer of the DePuy ASR Hip, owed a duty to Plaintiffs to inform their orthopedic surgeons in a timely manner of the significant problems being experienced with the product.

71. Defendant DEPUY, in breach of the duties described above, negligently and carelessly designed, manufactured, labeled, and distributed the DePuy ASR Hip implanted in Plaintiffs.

72. As a direct and proximate result of the conduct of Defendant DEPUY, the DePuy ASR Hip was unfit for its intended use and Plaintiffs needlessly suffered pain and weakness.

73. As a direct and proximate result of this breach, Plaintiffs have suffered severe physical distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and have suffered loss of enjoyment of life. The injuries and losses of Plaintiffs are permanent in nature and Plaintiffs will continue to suffer such losses in the future.

**SECOND CLAIM FOR RELIEF:**  
**STRICT LIABILITY OF DEPUY ORTHOPAEDICS, INC.**

74. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully stated herein.

75. At the time that Defendant DEPUY manufactured and sold the DePuy ASR Hip, it contained a defect that made it unreasonably dangerous and unfit for its intended use.

76. The product reached Plaintiffs without substantial change in the condition in which it was sold.

77. As a direct and proximate result of this defect, Plaintiffs have suffered severe physical distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and have suffered loss of enjoyment of life. The injuries and losses of Plaintiffs are permanent in nature and Plaintiffs will continue to suffer such losses in the future.

THIRD CLAIM FOR RELIEF:  
BREACH OF IMPLIED WARRANTY OF DEPUY ORTHOPAEDICS, INC.

78. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully stated herein.

79. Defendant DEPUY designed, manufactured, labeled, distributed and sold the DePuy ASR Hip at issue in this case.

80. Defendant DEPUY impliedly warranted that the product was reasonably fit for its intended use as a hip joint replacement system.

81. Plaintiffs were foreseeable users of the product.

82. Plaintiffs purchased the product from Defendant KELLY as distributor for Defendant DEPUY.

83. The product failed while being used for its intended purpose, causing injury to Plaintiffs.

84. As a direct and proximate result of this breach, Plaintiffs have suffered severe physical distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and have suffered loss of enjoyment of life. The injuries and losses of Plaintiffs are permanent in nature and Plaintiffs will continue to suffer such losses in the future.

FOURTH CLAIM FOR RELIEF:  
BREACH OF EXPRESS WARRANTY OF DEPUY ORTHOPAEDICS, INC.

85. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully stated herein.

86. Defendant DEPUY designed, manufactured, labeled, and distributed the DePuy ASR Hip at issue in this case.

87. Defendant DEPUY expressly warranted by affirmation, promise, description, and sample that the product was reasonably fit for extended, safe use as a hip joint replacement system.

88. The above representations made by Defendant DEPUY were meant to directly or indirectly induce persons such as Plaintiffs and the orthopedic surgeon of Plaintiffs to purchase the DePuy ASR Hip.

89. Plaintiffs were foreseeable users of the product.

90. Plaintiffs purchased the product from Defendant KELLY as distributor for Defendant DEPUY.

91. The product failed while being used for its intended purpose, causing injury to Plaintiffs.

92. As a direct and proximate result of this breach, Plaintiffs have suffered severe physical distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and have suffered loss of enjoyment of life. The injuries and losses of Plaintiffs are permanent in nature and Plaintiffs will continue to suffer such losses in the future.

FIFTH CLAIM FOR RELIEF:  
DECEPTIVE TRADE PRACTICE ACT VIOLATION OF DEPUY ORTHOPAEDICS, INC.

93. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully stated herein.

94. The actions of Defendant DEPUY, as described herein, violate the following provisions of *Tex. Bus. & Comm. Code* §17.41, et seq., known as the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”):

- (1) §17.46(b)(5), (7), and (24) and 17.50 in that Defendant DEPUY represented that the goods, that is, the DePuy ASR Hip manufactured by Defendant DEPUY was of a particular standard, quality, or grade, when it was of another. Specifically, as the DePuy ASR Hip was defectively designed so that it was prone to the creation of excessive metal debris and failure to achieve bony ingrowth.
- (2) Defendant DEPUY failed to disclose information concerning the defective nature of the design of the DePuy ASR Hip to Plaintiffs, which Defendant DEPUY knew was defective at the time of the sales of the DePuy ASR Hips; Defendant DEPUY intended that its misrepresentation and/or concealment would induce Plaintiffs into the purchase of their product, and Plaintiffs relied on Defendant DEPUY’s false representations and concealment of material information. Plaintiffs would not have entered into the transaction had the information been disclosed.
- (3) In addition, Defendant DEPUY engaged in an unconscionable action or course of action in violation of §17.50(a)(3), in that Defendant DEPUY proceeded with actual knowledge of the defective nature of the products at issue. Plaintiffs never would have entered into such a transaction had they known of the truly defective nature of the products at issue. Despite Defendant DEPUY’s actual knowledge and Plaintiffs’ lack of knowledge, Defendant DEPUY nevertheless proceeded with a conscious indifference as to the rights, safety and welfare of Plaintiffs.

95. Defendant DEPUY’s violations of the DTPA were committed knowingly, and therefore Plaintiffs’ claim damages for mental anguish, extra damages, and exemplary damages are permitted pursuant to Sec. 17.50(b)(1) of the DTPA.

96. These violations of the DTPA were a producing cause of Plaintiffs’ damages as alleged herein below.

SIXTH CLAIM FOR RELIEF:  
GROSS NEGLIGENCE/NEGLECT AND/OR MALICE AS TO DEFENDANT DEPUY

97. All prior allegations are incorporated herein by this reference.

98. Plaintiffs further plead that the acts and/or omissions of Defendant DEPUY as set out above constitute such an entire want of care as to indicate that the acts and/or omissions in question were the result of conscious indifference to the rights, welfare or safety of Plaintiffs, and/or constituted gross negligence/neglect and/or malice, which was the proximate cause of physical injury and mental anguish to Plaintiffs.

99. Plaintiffs are entitled to pre-judgment interest and post-judgment interest on the damages described above.

SEVENTH CLAIM FOR RELIEF:  
NEGLIGENCE OF KELLY ORTHOPAEDIC SALES, LP

100. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully stated herein.

101. Defendant KELLY, as the promoter, seller, distributor, and servicer of the DePuy ASR Hip, owed a duty to Plaintiffs to provide accurate information to both Plaintiffs and their orthopedic surgeons.

102. As the seller of the DePuy ASR Hip, prior to selling the DePuy ASR Hip, Defendant KELLY owed a duty to Plaintiffs to inform Plaintiffs' orthopedic surgeons of the significant problems being experienced with the DePuy ASR Hip.

103. Defendant KELLY failed to warn the Plaintiffs or their orthopedic surgeons of the significant problems being experienced with the DePuy ASR Hip and as a result the DePuy ASR Hip was implanted in the bodies of both Plaintiffs where each failed catastrophically.

104. Defendant KELLY exercised substantial control over the content of the warning and instruction that accompanied the product; the warning and instruction was inadequate; and the Plaintiffs' harm resulted from the inadequacy of the warning or instruction.

105. Defendant KELLY made express factual representations about the DePuy ASR Hip, including that it was less prone to the generation of excessive metal debris; the representation was incorrect; the Plaintiffs relied on the representation in obtaining and using the DePuy ASR Hip; and if the DePuy ASR Hip had been as represented, the Plaintiffs would not have been harmed by the product or would not have suffered the same degree of harm.

106. As the servicer of the DePuy ASR Hip, following the sale of the DePuy ASR Hip, Defendant KELLY owed a duty to Plaintiffs to inform Plaintiffs' orthopedic surgeons of the excessive rate of failure of the DePuy ASR Hip.

107. The failure of Defendant KELLY to provide accurate information to Plaintiff's orthopedic surgeons regarding the excessive rate of failure of the DePuy ASR Hip resulted in the Plaintiffs' DePuy ASR Hips going undiagnosed for greatly extended periods of time, resulting in the Plaintiffs experiencing unnecessary pain, weakness, and destruction of the bones comprising their hip joints.

108. Defendant KELLY in breach of the duties described above, negligently and carelessly promoted, distributed, sold, and serviced the DePuy ASR Hip implanted in Plaintiffs.

109. As a direct and proximate result of the conduct of Defendant KELLY, Plaintiffs experienced unnecessary pain, weakness, and destruction of the bones comprising their hip joints.

110. As a direct and proximate result of this breach, Plaintiffs suffered severe physical distress and injury; emotional distress and injury; incurred medical and other expenses; suffered shame, humiliation and the inability to lead a normal life; and have suffered loss of enjoyment of

life. The injuries and losses of Plaintiffs are permanent in nature and Plaintiffs will continue to suffer such losses in the future.

EIGHTH CLAIM FOR RELIEF:  
NEGLIGENT UNDERTAKING OF KELLY ORTHOPAEDIC SALES, LP

111. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully stated herein.

112. Defendant KELLY, as the distributor and servicer of the DePuy ASR Hip, following the implantation of the DePuy ASR Hips in Plaintiffs, undertook the task of advising Plaintiffs' orthopedic surgeons regarding the safety and efficacy of the DePuy ASR Hip.

113. Defendant KELLY undertook the service of advising Plaintiffs' orthopedic surgeons knowing that such service was necessary for the Plaintiffs' protection.

114. Defendant KELLY failed to exercise reasonable care in performing these services.

115. Immediately following the implantation of the DePuy ASR Hips in Plaintiffs, Defendant KELLY was aware that the DePuy ASR Hip was failing at an excessive rate, but instead provided information to the contrary to Plaintiffs' orthopedic surgeons.

116. Plaintiffs and their orthopedic surgeons relied upon the incorrect information provided by Defendant KELLY.

117. As a result of Plaintiffs and their orthopedic surgeons relying upon the incorrect information provided by Defendant KELLY, the diagnosis that the DePuy ASR Hips implanted in Plaintiffs had failed was greatly delayed.

118. As a result of the delay in the diagnosis that the DePuy ASR Hips implanted in Plaintiffs had failed, Plaintiffs needlessly suffered additional pain, weakness, and bone destruction.

119. As a direct and proximate result of this breach, Plaintiffs suffered severe physical distress and injury; emotional distress and injury; incurred medical and other expenses; suffered

shame, humiliation and the inability to lead a normal life; and have suffered loss of enjoyment of life. The injuries and losses of Plaintiffs are permanent in nature and Plaintiffs will continue to suffer such losses in the future.

NINTH CLAIM FOR RELIEF:  
DECEPTIVE TRADE PRACTICE ACT VIOLATION OF KELLY ORTHOPAEDICS  
SALES, LP

120. Plaintiffs re-allege and incorporate by reference all paragraphs above as if fully stated herein.

121. The actions of Defendant KELLY, as described herein, violate the following provisions of *Tex. Bus. & Comm. Code* §17.41, et seq., known as the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”):

- A. §17.46(b)(5), (7), and (24) and 17.50 in that Defendant KELLY represented that the goods, that is, the DePuy ASR Hip, was of a particular standard, quality, or grade, when it was of another. Specifically, as the DePuy ASR Hip was defectively designed so that it was prone to the creation of excessive metal debris and failure to achieve bony ingrowth.
- B. Defendant KELLY failed to disclose information concerning the defective nature of the design of the DePuy ASR Hip to Plaintiffs, which Defendant KELLY knew was defective at the time of the sales of the DePuy ASR Hips; Defendant KELLY intended that its misrepresentation and/or concealment would induce Plaintiffs into the purchase of their product, and Plaintiffs relied on Defendant KELLY’S false representations and concealment of material information. Plaintiffs would not have entered into the transaction had the information been disclosed.
- C. In addition, Defendant KELLY engaged in an unconscionable action or course of action in violation of §17.50(a)(3), in that Defendant KELLY proceeded with actual knowledge of the defective nature of the products at issue. Plaintiffs never would have entered into such a transaction had they known of the truly defective nature of the products at issue. Despite Defendant KELLY’s actual knowledge and Plaintiffs’ lack of

knowledge, Defendant KELLY nevertheless proceeded with a conscious indifference as to the rights, safety and welfare of Plaintiffs.

122. Defendant KELLY's violations of the DTPA were committed knowingly, and therefore Plaintiffs' claim damages for mental anguish, extra damages, and exemplary damages as permitted pursuant to Sec. 17.50(b)(1) of the DTPA.

123. These violations of the DTPA were a producing cause of Plaintiffs' damages as alleged herein below.

TENTH CLAIM FOR RELIEF:  
GROSS NEGLIGENCE/NEGLECT AND/OR MALICE AS TO DEFENDANT KELLY

124. All prior allegations are incorporated herein by this reference.

125. Plaintiffs further plead that the acts and/or omissions of Defendant KELLY as set out above constitutes such an entire want of care as to indicate that the acts and/or omissions in question were the result of conscious indifference to the rights, welfare or safety of Plaintiffs, and/or constituted gross negligence/neglect and/or malice, which was the proximate cause of physical injury and mental anguish to Plaintiffs.

126. Plaintiffs are entitled to pre-judgment interest and post-judgment interest on the damages described above.

ELEVENTH CLAIM FOR RELIEF:  
LIABILITY OF KOS MANAGEMENT COMPANY, LLC

127. All prior allegations are incorporated herein by this reference.

128. Plaintiffs allege that as the general partner of Defendant KELLY, a limited partnership, KOS MANAGEMENT COMPANY, LLC, as the general partner of the limited partnership, is liable for the debts of Defendant KELLY.

## DEMAND FOR JURY TRIAL

129. Plaintiffs respectfully request that a jury be impaneled to hear this cause of action and to award such damages as the jury finds to be fair and reasonable under the circumstances.

## DISCOVERY

130. Under the authority of Texas Rule of Civil Procedure 194, Plaintiffs request DEPUY ORTHOPAEDICS, INC., KELLY ORTHOPAEDIC SALES, LP, and KOS MANAGEMENT COMPANY, LLC disclose, within 50 days of the service of this petition and request, the information or material described in Rule 194.2(a)-(l).

131. Pursuant to the Texas Rules of Civil Procedure, attached find the following discovery requests:


- (1) Plaintiffs' First Set of Request for Production to Defendant DEPUY ORTHOPAEDICS, INC.;
- (2) Plaintiffs' First Set of Interrogatories to Defendant DEPUY ORTHOPAEDICS, INC.;
- (3) Plaintiffs' First Set of Request for Production to Defendant KELLY ORTHOPAEDIC SALES, LP.;
- (4) Plaintiffs' First Set of Interrogatories to Defendant KELLY ORTHOPAEDIC SALES, LP.;
- (5) Plaintiffs' First Set of Request for Production to Defendant KOS MANAGEMENT COMPANY, LLC.; and
- (6) Plaintiffs' First Set of Interrogatories to Defendant KOS MANAGEMENT COMPANY, LLC.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be duly cited to appear and answer this Petition and that, upon final trial, Plaintiffs recover judgment against Defendants for their actual damages alleged herein, in an amount in excess of the minimal limits of the Court against the named Defendants, that Plaintiffs recover damages for gross negligence as alleged by the Plaintiffs against Defendants, that Plaintiffs recover exemplary

damages from Defendants pursuant to Sec. 17.50 (b)(1) of the DTPA, that Plaintiffs recover reasonable and necessary attorney's fees from Defendants, as well as other cost and expenses, pursuant to §17.50 of the DTPA, that Plaintiffs recover costs of court and fees necessary for the preparation of this case for trial, that Plaintiffs recover both pre-judgment and post-judgment interest at the highest lawful rate and to the maximum extent allowed by law and such other and further relief, at law or in equity, to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

**THE ASHMORE LAW FIRM, P.C.**



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