IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARY ANN FLYNN, SEAN FLYNN, BRENDAN FLYNN, MEGAN FLYNN, and COLLEEN FLYNN,

Plaintiffs,

vs.

KONINKLIJKE PHILIPS N.V.,
Serve: Philips Center
Amstelplein 2
1096 BC Amsterdam
The Netherlands

AND

PHILIPS NORTH AMERICA, LLC, f/k/a Philips Electronics North America Corporation,
Serve: CSC-Lawyers Incorporating Service Co.
Registered Agent
221 Bolivar Street
Jefferson City, MO 65101

AND

PHILIPS HOLDING USA, INC.,
Serve: CSC-Lawyers Incorporating Service Co.
Registered Agent
221 Bolivar Street
Jefferson City, MO 65101

AND

PHILIPS RS NORTH AMERICA, LLC,
Serve: CSC-Lawyers Incorporating Service Co.
Registered Agent
221 Bolivar Street
Jefferson City, MO 65101

AND

JOHN DOEs 1-20,

Defendants.

Case No.

TRIAL BY JURY DEMANDED

COMPLAINT
(WRONGFUL DEATH)

Come now Plaintiffs Mary Ann Flynn, Sean Flynn, Brendan Flynn, Megan Flynn, and Colleen Flynn, by and through their attorney Robert J. Radice, and for their cause of action against Defendants Koninklijke Philips N.V. ("Philips NV"), Philips North America, LLC ("Philips NA"), Philips Holding USA, INC. ("Philips Holding"), Philips RS North America, LLC ("Philips RS"), and JOHN DOES 1-20 (collectively "Philips" or "Defendants"), state as follows:

INTRODUCTION

1. That Plaintiff Mary Ann Flynn is a resident and citizen of the State of Missouri, and at all times was the lawfully wedded spouse of Terrence P. Flynn who died on May 31, 2021 in St. Louis County, Missouri ("the decedent").

2. That Plaintiff Sean Flynn is a resident and citizen of the State of Missouri, and is the son of the decedent.

3. That Plaintiff Brendan Flynn is a resident and citizen of the State of Missouri, and is the son of the decedent.

4. That Plaintiff Megan Flynn is a resident and citizen of the State of Missouri, and is the daughter of the decedent.

5. That Plaintiff Colleen Flynn is a resident and citizen of the State of Missouri, and is the daughter of the decedent.

6. That Philips N.V. is a public limited liability company established under the laws of the Kingdom of the Netherlands, having its principal executive offices at Philips Center, Amstelplein 2, 1096 BC Amsterdam, Netherlands.

7. That Philips N.V. researches, develops, designs, manufactures, sells, distributes, and markets Continuous Positive Airway Pressure devices ("CPAPs"), including the recalled

device at issue.

8. That Philips NV is the parent company of Philips NA and Philips RS.

9. That Philips NA is a Delaware corporation with its principal place of business located at 222 Jacobs Street, Floor 3, Cambridge, Massachusetts 02141.

10. That Philips NA is a wholly-owned subsidiary of Philips NV.

11. That upon information and belief, Philips NA manages the operations of Philips NV's lines of business in North America, including Philips RS.

12. That Philips NA researches, develops, designs, manufactures, sells, distributes, and markets CPAPs, including the recalled device at issue.

13. That Philips Holding is a Delaware corporation with its principal place of business located at 222 Jacobs Street, Floor 3, Cambridge, Massachusetts 02141.

14. That Philips Holding is a holding company and the sole member of Philips NA.

15. That Philips Holding researches, develops, designs, manufactures, sells, distributes, and markets CPAPs, including the recalled device at issue.

16. That Philips RS is a Delaware corporation with its principal place of business located at 6501 Living Place, Pittsburgh, Pennsylvania 15206.

17. That prior to December 2020, Philips RS operated under the name Respironics, Inc.("Respironics"), which Philips NV acquired in 2008.

18. That Philips RS researches, develops, designs, manufactures, sells, distributes, and markets CPAPs, including the recalled device at issue.

19. That upon information and belief, Defendants John Does 1-20 (fictitious names) are entities or persons who are liable to Plaintiffs, but who have not yet been identified despite reasonable due diligence on the part of Plaintiffs.

20. That upon information and belief, Defendants John Does 1-20 research, develop, design, manufacture, sell, distribute, and market CPAPs, including the recalled device at issue.

21. That at all relevant times, Defendants were and are in the business of researching, developing, designing, manufacturing, selling, distributing, and marketing devices for the treatment of Obstructive Sleep Apnea ("OSA") and respiratory failure, including the recalled device at issue.

22. That at all relevant times, Defendants acted in concert in researching, developing, designing, manufacturing, selling, distributing, and marketing devices for the treatment of OSA and respiratory failure, including the recalled device at issue.

23. That at all relevant times, Defendants combined their property and labor in a joint undertaking for profit in the researching, developing, designing, manufacturing, selling, distributing, and marketing of devices for the treatment of OSA and respiratory failure, including the recalled device at issue, with rights of mutual control over each other.

24. That at all relevant times, Defendants operated as a single enterprise, equally controlled each other's business affairs, commingled their assets and funds, disregarded corporate formalities, and used each other as corporate shields.

25. That at all relevant times, Defendants were mere alter egos or instrumentalities of each other, and there is such a unity of interest and ownership between Defendants that the separate personalities of their respective entities ceased to exist.

26. That at all relevant times, Defendants acted in all respects as agents or apparent agents of one another and, as such, are jointly liable to Plaintiffs.

27. That Plaintiffs are bringing this wrongful death action pursuant to §537.080, *et seq.* of the Revised Statutes of Missouri.

28. That this Court has diversity subject matter jurisdiction under 28 U.S.C. §1332, because Plaintiffs and Defendants are citizens of different states and the amount in controversy exceeds $75,000.00.

29. That specifically, as alleged herein, Plaintiffs are citizens of Missouri, and Defendants are citizens of: the Kingdom of the Netherlands and the States of Delaware, Massachusetts, and Pennsylvania.

30. That additionally, the damages Plaintiffs have sustained as a result of Defendants' researching, developing, designing, manufacturing, selling, distributing, and marketing of the subject device, and failure to warn of its serious and life-threatening risks, substantially exceed $75,000.00.

31. That on June 14, 2021, Defendants announced a major recall of millions of Bilevel Positive Airway Pressure ("BiPAP") and CPAP devices and ventilators (collectively, "the recalled devices") and first notified the public of potential, serious health risks caused by polyester-based polyurethane sound abatement foam ("PE-PUR foam") used in the design and manufacture of the recalled devices.

32. That Defendants notified the public that the PE-PUR foam could degrade, break down, and release toxic particulates and volatile organic compounds ("VOCs") into the air pathway of the recalled devices, which a device user could inhale or ingest and suffer toxic or carcinogenic effects.

33. That on July 22, 2021, the United States Food and Drug Administration ("FDA") classified the subject recall as Class I, the most serious type of recall, which indicates that use of the recalled devices may cause serious injuries or death.

34. That Defendants knew or should have known about these potentially life-threatening health risks prior to the recall, but did nothing to warn patients or their physicians.

35. That the decedent Terrence P. Flynn was prescribed and purchased in November 2011 a Philips CPAP Remstar Plus PR Series, serial number P04355816ED6D ("the Device"), which was one of the devices included in the June 14, 2021 recall notice.

36. That the decedent continuously used the Device from November 2011 through May 2020.

37. That as a direct and proximate result of Defendants' wrongful conduct in researching, developing, designing, manufacturing, selling, distributing, and marketing the Device, and in failing to warn consumers such as the decedent and the medical community regarding its latent and foreseeable risk, the decedent developed esophageal cancer, resulting in his death on May 31, 2021.

38. That at all relevant times, including the times decedent was prescribed, purchased, and used the Device, the decedent was a United States citizen and a resident and citizen of the State of Missouri.

39. That the decedent was prescribed the Device in the State of Missouri in November 2011, and purchased the Device in the State of Missouri.

40. That the use of the Device by decedent occurred on a daily basis from 2011 through 2020 in the State of Missouri.

41. That at all relevant times, the decedent used the Device for the purpose for which it was researched, developed, designed, manufactured, sold, distributed, marketed and otherwise intended for by Philips.

42. That as a result of using the Device, the decedent was exposed to toxic and harmful substances and suffered severe personal injuries and death that would not have occurred but for the defective nature of the Device and Defendants' failure to warn the decedent or his physicians of the serious health risks associated with use of the Device.

43. The running of any statute of limitations has been equitably tolled by reason of Defendants' fraudulent concealment or omissions of critical safety information. Through its affirmative misrepresentations and omissions, Defendants actively concealed from the decedent and his physicians the true risks associated with the Device. As a result of Defendants' actions, the decedent was unaware and could not have reasonably known or learned through reasonable diligence, that he had been exposed to the risks and harms set forth and that those risks and harms were the direct and proximate result of Defendants' acts and omissions.

COUNT I
STRICT LIABILITY-FAILURE TO WARN

44. Plaintiffs repeat, reiterate, and re-allege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

45. At all relevant times, Defendants engaged in the business of researching, developing, designing, manufacturing, selling, distributing, and marketing the recalled devices, including the Device, which are defective and unreasonable dangerous to consumers, including the decedent, because they do not contain adequate warnings or instructions concerning their dangerous characteristics.

46. At the time Defendants researched, developed, designed, manufactured, sold, distributed, marketed, and otherwise released the Device into the stream of commerce, Philips knew or should have known that the recalled devices, including the Device, presented an unreasonable danger to users when used as intended and in a reasonably anticipated manner.

47. Specifically, at all relevant times, Defendants knew, or should have known, that the recalled devices, including the Device, pose a significant health risk in that the PE-PUR sound abatement foam incorporated in the devices may break down and release toxic particles or chemical emissions into a device's air pathway, which a person may ingest or inhale resulting in significant injuries.

48. At all relevant times, Defendants knew, or should have known, that the Device created significant risks of serious bodily harm to consumers, including the decedent, as alleged herein, and Defendants failed to adequately warn reasonably foreseeable users and their health care providers, such as the decedent, his physician, and health care providers, of the inherent risks of toxic exposure resulting in significant and life-threatening injuries, such as cancer, associated with use of the Device.

49. At all relevant times, Defendants had a duty to properly research, develop, design, manufacture, sell, distribute, and market the Device, which included providing proper warnings, and taking such steps as necessary to ensure the Device did not cause users, like the decedent, to suffer from unreasonable and dangerous risks.

50. Defendants, as a researcher, developer, designer, manufacturer, seller, distributor, and marketer of medical devices, are held to the knowledge of an expert in the

field, and had a continuing duty to warn users, including the decedent, of the risks associated with using the Device.

51. Defendants had a duty to warn the decedent and other consumers of the risks of harm resulting from exposure to degraded PE-PUR foam, its particulates and chemical emissions as a result of using the Device.

52. These risks are of such a latent nature that health care providers and users could not have recognized the potential harm without proper warnings provided by Defendants.

53. At all relevant times, Defendants could have provided proper warnings or instructions regarding the full and complete risks of the Device, because Defendants knew, or should have known, of the unreasonable risks of harm associated with the use of, or exposure to, the Device.

54. At all relevant times, Defendants failed and deliberately refused to investigate, study, test, promote the safety, or minimize the dangers to those would foreseeably use or be harmed by the Device, including the decedent.

55. The decedent used and was exposed to the Device without knowledge of its dangerous characteristics.

56. Despite Defendants' obligation to unilaterally strengthen the warnings, Defendants instead actively concealed knowledge of the true risks concerning use of the Device and degradation of the PE-PUR foam incorporated in the Device.

57. At all relevant times, the decedent used or was exposed to the Device while using it for its intended or reasonably foreseeable purpose, without knowledge of its dangerous characteristics.

58. The decedent could not have reasonably discovered the defects and risks associated with the Device prior to or at the time of using it, and relied upon the skill, superior knowledge, and judgment of Defendants to know about and disclose those serious health risks associated with using the Device.

59. Defendants knew or should have known that failing to disseminate warnings or instructions regarding the risk of exposure to degraded PE-PUR foam or the dangers of toxic exposure causing severe and life-threatening injuries, such as cancer, rendered the Device dangerous and unfit for its ordinary, intended, and reasonably foreseeable use.

60. The information Defendants did provide or communicate entirely failed to contain relevant or adequate warnings or precautions that would have enabled consumers, such as the decedent, to use the Device safely.

61. Instead, Defendants failed to disseminate any information regarding the true and complete risks and otherwise disseminated information that was inaccurate, incomplete, false, and misleading, and which failed to communicate accurately or adequately the risk of injury with use of the Device.

62. In fact, even after April 26, 2021, when Defendants first suggested to its shareholders that its CPAP devices and ventilators might contain a serious health hazard, it continued to sell those devices, without providing consumers with further or complete warnings, until the date of the eventual recall on June 14, 2021, and during that time, continued to promote its next generation devices that were not subject to the same health hazards.

63. Defendants knew or should have known of the unreasonable risks from use of the Device, and downplayed or otherwise suppressed any information or research about the risks and dangers of the Device.

64. Defendants were able, and in accordance with federal law, to disclose the known risks associated with the Device through public service announcements, promotions, advertisements, and other public information sources as it did in its communications to shareholders and ultimately has done since announcing the recall on June 14, 2021.

65. Defendants are liable to Plaintiff for injuries caused by its willful failure to provide adequate warnings, instructions, or relevant information and data regarding the risks associated with using the Device.

66. Had Defendants provided adequate warnings, instructions, or relevant information, and disseminated the risks associated with the Device, the decedent could have obtained or used alternative devices for the treatment of OSA and avoided the risk of the development and progression of cancer.

67. As a direct and proximate result of Defendants placing the Device which was defective into the stream of commerce, the decedent contracted esophageal cancer and died on May 31, 2021.

68. Plaintiff Mary Ann Flynn, the wife of the decedent, and Plaintiffs Sean Flynn, Brendan Flynn, Megan Flynn and Colleen Flynn, have lost the care, comfort, consortium, companionship, services, instruction, guidance, counsel, training, support and pecuniary support as a result of the death of their husband and father. The decedent suffered extreme pain and suffering, medical treatment and medical expenses from the date he contracted cancer until the date he died. Further, Plaintiff Mary Ann Flynn incurred funeral expenses for

the death of the decedent. All of these damages are due to the conduct of Defendants as set forth above.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, in an amount that is fair and reasonable but in excess of $75,000.00, for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and such other relief as this Court deems just and proper.

COUNT II
STRICT LIABILITY-DESIGN DEFECT

69. Plaintiffs repeat, reiterate, and re-allege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

70. The Device was inherently dangerous and defective, unfit and unsafe for its intended uses and reasonably foreseeable uses, and does not meet or perform to the expectations of patients and their health care providers.

71. The design of the Device, including, but not limited to, the design incorporating the use of PE-PUR foam and the placement of this foam within the air pathway of the Device, was unreasonably dangerous and defective, resulting in the ingestion and inhalation of degraded PE-PUR foam particulates and chemical emissions.

72. The ingestion and inhalation of these particulate and chemical emissions are known to cause headaches, irritation, inflammation, respiratory issues, and toxic and carcinogenic effects, including the development of cancer.

73. The Device used by the decedent was defective in design, in that its risk of harm exceeded any claimed benefits.

74. The Device did not perform as an ordinary consumer would expect.

75. The inherent risks, hazards, and dangers associated with the design of the Device, incorporating PE-PUR foam in such a manner that exposes the user, such as the decedent, to the ingestion or inhalation of degraded PE-PUR foam particulates or chemical emissions rendered the Device unreasonably dangerous.

76. Accordingly, the design of the Device rendered it not reasonably fit, suitable, or safe for its intended purpose.

77. Neither the decedent, nor his physicians or healthcare providers could have, by the exercise of reasonable care, discovered the defective condition of the Device or perceived its unreasonable dangers prior to the decedent using the Device.

78. There are other similar CPAP devices that incorporate PE-PUR foam for sound abatement purposes, but do not result in the ingestion or inhalation of toxic foam particulates or chemical emissions.

79. Furthermore, there are other similar CPAP devices that do not incorporate PE-PUR foam that is subject to degradation or result in exposure to the user of toxic particulates, chemical emissions, or other harmful compounds.

80. Safer, alternative devices from other manufacturers were available that did not suffer from the defects as set forth herein and that did not have an unreasonable risk of harm as with the Device and its unsafe incorporation of PE-PUR foam.

81. As a result of the foregoing design defects, Defendants created risks to the health and safety of its users, including decedent, that were far more significant and devastating than the risks posed by other products and procedures available to treat the corresponding medical conditions, and which far outweigh the utility of the Device.

82. The risk-benefit profile of the Device is unreasonable, and Defendants should have had stronger and clearer warnings, or should not have been sold in the market.

83. Defendants intentionally or recklessly designed the Device with wanton and willful disregard for the rights and health of the decedent and others, and with malice, placing their economic interests above the health and safety of the decedent and others.

84. As a proximate result of Defendants' defective design of the Device, the decedent contracted esophageal cancer and died on May 31, 2021.

85. Plaintiff Mary Ann Flynn, the wife of the decedent, and Plaintiffs Sean Flynn, Brendan Flynn, Megan Flynn and Colleen Flynn, have lost the care, comfort, consortium, companionship, services, instruction, guidance, counsel, training, support and pecuniary support as a result of the death of their husband and father. The decedent suffered extreme pain and suffering, medical treatment and medical expenses from the date he contracted cancer until the date he died. Further, Plaintiff Mary Ann Flynn incurred funeral expenses for the death of the decedent. All of these damages are due to the conduct of Defendants as set forth above.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, in an amount that is fair and reasonable but in excess of $75,000.00, for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and such other relief as this Court deems just and proper.

COUNT III
NEGLIGENT FAILURE TO WARN

86. Plaintiffs repeat, reiterate, and re-allege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

87. Defendants owed the decedent a duty of care to warn of any risks associated with the Device.

88. Defendants knew or should have known of the true risks associated with the Device, but failed to warn the decedent, his physician, and health care providers.

89. Defendants' negligent breach of their duty to warn caused the decedent to contract esophageal cancer and die on May 31, 2021.

90. The decedent would not have purchased, chosen, or paid for the Device if he knew of the defects and the risks associated with the use of the Device.

91. As a proximate result of the Defendants' negligent failure to warn of the risks associated with use of the Device, the decedent contracted esophageal cancer and died on May 31, 2021.

92. Plaintiff Mary Ann Flynn, the wife of the decedent, and Plaintiffs Sean Flynn, Brendan Flynn, Megan Flynn and Colleen Flynn, have lost the care, comfort, consortium, companionship, services, instruction, guidance, counsel, training, support and pecuniary support as a result of the death of their husband and father. The decedent suffered extreme pain and suffering, medical treatment and medical expenses from the date he contracted cancer until the date he died. Further, Plaintiff Mary Ann Flynn incurred funeral expenses for the death of the decedent. All of these damages are due to the conduct of Defendants as set forth above.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, in an amount that is fair and reasonable but in excess of $75,000.00, for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and such other relief as this Court deems just and proper.

COUNT IV
NEGLIGENT DESIGN DEFECT

93. Plaintiffs repeat, reiterate, and re-allege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

94. At all relevant times, Defendants researched, developed, designed, manufactured, sold, distributed, and promoted the Device in the regular course of business.

95. The Device was designed and intended to be used for the treatment of OSA.

96. Defendants knew or by the exercise of reasonable care, should have known, that use of the Device, as a result of their defective design, was dangerous, harmful and injurious when used by the decedent in a reasonably foreseeable manner.

97. Defendants had a duty to exercise reasonable care in designing the Device in such a manner that it was not dangerous, harmful, injurious or pose an unreasonable risk to consumers, such as the decedent.

98. Defendants breached its duty by failing to use reasonable care in the design of the Device by designing the device such that PE-PUR foam incorporated in the device could produce highly harmful particulates and chemical emissions that enter the device's air pathway, which a user, such as the decedent, may then ingest or inhale.

99. The Device contained and produced toxic particulates and chemical emission from degraded PE-PUR foam that can lead to short-term and long-term health risks, including, headaches; irritation of the skin, eye, and respiratory tract; respiratory distress; asthma; inflammation; nausea; vomiting; and cancer, all of which Defendants knew or should have known could result from use of the Device, thereby rendering the device not reasonably fit, suitable, or safe for its intended purpose.

100. Defendants breached its duty when it failed to use commercially feasible alternative designs to minimize the above-mentioned harms, including, but not limited to designing products that prevented exposure to particulates and chemical emissions from PE-PUR foam.

101. The dangers of the Device outweighed the benefits and rendered the device unreasonably dangerous.

102. There are other similar devices that do not incorporate PE-PUR foam in such a manner that is subject to degradation.

103. There are other similar devices that incorporate PE-PUR foam in such a manner that the user does not ingest or inhale degraded foam particulates or chemical emission.

104. Safer, alternative devices from other manufactures were available that did not have an unreasonable risk of harm as with the Device.

105. The risk-benefit profile of the Device was unreasonable, and should have had stronger and clearer warnings, or should not have been sold in the market.

106. As a proximate result of the Defendants' negligent design of the Device, the decedent contracted esophageal cancer and died on May 31, 2021.

107. Plaintiff Mary Ann Flynn, the wife of the decedent, and Plaintiffs Sean Flynn, Brendan Flynn, Megan Flynn and Colleen Flynn, have lost the care, comfort, consortium, companionship, services, instruction, guidance, counsel, training, support and pecuniary support as a result of the death of their husband and father. The decedent suffered extreme pain and suffering, medical treatment and medical expenses from the date he contracted cancer until the date he died. Further, Plaintiff Mary Ann Flynn incurred funeral expenses for

the death of the decedent. All of these damages are due to the conduct of Defendants as set forth above.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, in an amount that is fair and reasonable but in excess of $75,000.00, for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and such other relief as this Court deems just and proper.

COUNT V
BREACH OF EXPRESS WARRANTY

108. Plaintiffs repeat, reiterate, and re-allege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

109. At all relevant times, Defendants intended that the Device be used in the manner that the decedent in fact used it, and expressly warranted that it was safe and fit for use by the decedent, that it was of merchantable quality, that its risks were minimal and comparable to other comparable or substantially similar devices, and it was adequately tested and fit for its intended use.

110. At all relevant times, Defendants were aware that consumers, including the decedent, would use the Device, and as a result are in privity with Defendants.

111. The Device was expected to reach and did in fact reach the decedent without substantial change in the condition in which it was manufactured and sold by Defendants.

112. Defendants warranted the Device "shall be free from defects of workmanship and materials and will perform in accordance with the product specifications for a period of two (2)years from the date of sale."

113. Defendants breached this express warranty upon the sale and distribution of the Device.

114. At the point of sale, the Device while appearing normal—contained immediate latent defects as set forth herein, rendering it unsuitable and unsafe for personal use by humans.

115. In reliance upon Defendants' express warranty, the decedent used the Device as prescribed and directed, and therefore, in the foreseeable manner normally intended, recommended, promoted, and marketed by Defendants.

116. At the time of making such express warranties, Defendants knew or should have known that the Device was not safe and had numerous defects, many of which Defendants did not accurately warn about, thus making the Device unreasonably unsafe for its intended purpose.

117. Members of the medical community, including physicians and other health care providers, as well as the decedent, his physicians, and health care providers, relied upon the representations and warranties of Defendants in connection with the use, recommendation, description, or prescribing of the Device.

118. Had the decedent known the Device was unsafe for use, he would not have purchased or used it.

119. The decedent reasonably expected, at the time of purchase, that the Device was safe for its ordinary and intended use.

120. Defendants breached its express warranties to the decedent in that the Device was not of merchantable quality, safe, and fit for its intended uses, nor was it adequately tested.

121. Defendants breached its express warranties to the decedent in violation of applicable state statutes and common law, by manufacturing, marketing, and selling the Device to the decedent and causing damages as will be established at trial.

122. As a proximate result of the Defendants' breach of express warranty, the decedent contracted esophageal cancer and died on May 31, 2021.

123. Plaintiff Mary Ann Flynn, the wife of the decedent, and Plaintiffs Sean Flynn, Brendan Flynn, Megan Flynn and Colleen Flynn, have lost the care, comfort, consortium, companionship, services, instruction, guidance, counsel, training, support and pecuniary support as a result of the death of their husband and father. The decedent suffered extreme pain and suffering, medical treatment and medical expenses from the date he contracted cancer until the date he died. Further, Plaintiff Mary Ann Flynn incurred funeral expenses for the death of the decedent. All of these damages are due to the conduct of Defendants as set forth above.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, in an amount that is fair and reasonable but in excess of $75,000.00, for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and such other relief as this Court deems just and proper.

COUNT VI
BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

124. Plaintiffs repeat, reiterate, and re-allege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

125. Defendants knew of the intended use of the Device at the time it researched, developed, designed, manufactured, sold, distributed, and promoted the Device for use by

the decedent, and impliedly warranted the Device to be of merchantable quality and safe and fit for its ordinary and intended use.

126. The decedent, his physicians, and health care providers were, at all relevant times, in privity with Defendants.

127. The Device was expected to reach and did in fact reach consumers, including the decedent, without substantial change in its condition in which it was manufactured and sold by Defendants.

128. Defendants impliedly warranted that the Device was merchantable pursuant to UCC § 2-314 and suitable for the ordinary purpose for which it was intended to be used.

129. Defendants' representations and implied warranties were false, misleading, and inaccurate because the Device was defective, and not of merchantable quality.

130. Defendants breached the implied warranty of merchantability in connection with the sale and distribution of the Device.

131. At the point of sale, the Device, while appearing normal, contained defects as set forth herein, rendering it unsuitable and unsafe for personal use by humans.

132. At the time the Device was researched, developed, designed, manufactured, sold, distributed, and promoted by Defendants, Defendants knew of the use for which it was intended and impliedly warranted the Device to be of merchantable quality and safe and fit for such use.

133. The decedent reasonably expected, at the time of purchase, that the Device was safe for its ordinary and intended use.

134. Had the decedent known the Device was unsafe for use and not of merchantable quality, he would not have purchased or used it.

135. As a proximate result of the Defendants' breach of implied warranty, the decedent contracted esophageal cancer and died on May 31, 2021.

136. Plaintiff Mary Ann Flynn, the wife of the decedent, and Plaintiffs Sean Flynn, Brendan Flynn, Megan Flynn and Colleen Flynn, have lost the care, comfort, consortium, companionship, services, instruction, guidance, counsel, training, support and pecuniary support as a result of the death of their husband and father. The decedent suffered extreme pain and suffering, medical treatment and medical expenses from the date he contracted cancer until the date he died. Further, Plaintiff Mary Ann Flynn incurred funeral expenses for the death of the decedent. All of these damages are due to the conduct of Defendants as set forth above.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, in an amount that is fair and reasonable but in excess of $75,000.00, for compensatory and punitive damages, together with interest, costs herein incurred, attorneys' fees and such other relief as this Court deems just and proper.

COUNT VII
PUNITIVE DAMAGES

137. Plaintiffs repeat, reiterate, and re-allege each and every allegation contained in this Complaint with the same force and effect as if fully set forth herein.

138. Defendants knew or should have known that the Device was inherently dangerous with respect to the risk of PE-PUR foam degradation causing exposure to toxic particulates, chemical emissions, or other compounds resulting in harmful and carcinogenic effects, including cancer.

139. Defendants knew or should have known that the Device was inherently more dangerous with respect to the aforesaid risks than alternative devices on the market.

140. Defendants attempted to and did misrepresent facts concerning the risks and safety of the Device.

141. Defendants' misrepresentations included knowingly withholding material information concerning the safety of the Device from the medical community and patients, including the decedent, his physicians, and health care providers.

142. Defendants knew and recklessly disregarded the fact that use of the Device for its intended purposes could result in toxic exposure resulting in harmful and carcinogenic effects.

143. Notwithstanding the foregoing, Defendants marketed the Device without disclosing the aforesaid health and safety risks when there were safer alternative devices that did not pose the same or similar health and safety risks.

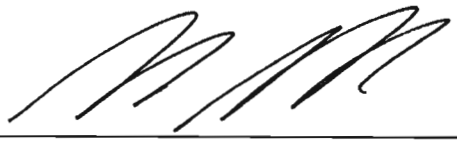
144. Defendants knew the defective and unreasonably dangerous nature of the Device, but continued to research, develop, design, manufacture, sell, distribute, and market the Device in conscious, reckless, or negligent disregard of the foreseeable harm in order to maximize sales and profits at the expense of the health and safety of patients, including the decedent.

145. Defendants' intentional, reckless, fraudulent, and malicious failure to disclose information regarding the health and safety risks of the Device deprived the decedent, his physicians, and health care providers the necessary information to enable them to weigh the true risks of using the Device against its benefits.

146. As a direct and proximate result of Defendants' conscious and deliberate disregard for the rights and safety of patients, the decedent contracted esophageal cancer and died on May 31, 2021.

147. The aforesaid conduct of Defendants was committed with knowing, conscious, and deliberate disregard for the rights and safety of patients, including the decedent, thereby entitling Plaintiffs to punitive damages in an amount appropriate to punish Defendants and deter them from similar conduct in the future.

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, in an amount that is fair and reasonable but in excess of $75,000.00, for punitive damages, together with interest, costs herein incurred, attorneys' fees and such other relief as this Court deems just and proper.



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