



Court File No. **VLC-S-S-106362**

No. _____
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MAJESTIC MATTRESS MFG. LTD.

PLAINTIFF

AND:

VITAFOAM PRODUCTS CANADA LIMITED, VITAFOAM, INCORPORATED, HICKORY SPRINGS MANUFACTURING COMPANY, VALLE FOAM INDUSTRIES (1995) INC., DOMFOAM INTERNATIONAL INC., A-Z SPONGE & FOAM PRODUCTS LTD., THE CARPENTER COMPANY, WOODBRIDGE FOAM CORPORATION, FLEXIBLE FOAM PRODUCTS, INC., SCOTDEL INC., FOAMEX INNOVATIONS, INC. and FUTURE FOAM, INC.

DEFENDANTS

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

NOTICE OF CIVIL CLAIM

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms]

This action has been started by the plaintiff for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

The Plaintiff

1. The plaintiff, Majestic Mattress Mfg. Ltd. ("Majestic"), is a company incorporated pursuant to the laws of the Province of British Columbia, with a registered office at 487 Cascia Drive, in Kelowna, British Columbia.
2. At all material times, Majestic carried on business as a manufacturer of bedding products, including mattresses for commercial and residential applications. From January 1, 1999 to the present (the "Class Period"), Majestic purchased

Polyurethane Foam, as defined below, directly from the defendants, Vitafoam Products Canada Limited ("Vitafoam Canada") and Carpenter Company ("Company").

The Defendants

3. The defendant, Vitafoam Products Canada Limited ("Vitafoam Canada") is a company incorporated pursuant to the laws of the Province of Ontario, with headquarters located at 150 Toro Road, Toronto, Ontario, and offices in various other Canadian cities, including Vancouver and Kelowna.
4. During the Class Period, Vitafoam Canada manufactured and sold Polyurethane Foam for use in furniture, bedding and automotive application throughout Canada and the United States.
5. The defendant, Vitafoam Incorporated ("Vitafoam Inc.") is a North Carolina corporation with headquarters located at 2222 Surrett Drive, High Point, North Carolina.
6. During the Class Period, Vitafoam Inc. sold in Canada and in the United States Polyurethane Foam it manufactured in plants located in the United Kingdom, Europe, United States, Canada, Africa, the Far East and Australia.
7. The defendant, Hickory Springs Manufacturing Company ("Hickory Springs") is a North Carolina corporation with headquarters located at 235 2nd Avenue, NW, in Hickory, North Carolina, U.S.A. Hickory Springs describes itself as *"one of the nation's largest integrated component manufacturers and suppliers for the furniture and bedding industry, with more than 60 operating facilities in the United States, and throughout the world"*. With more than 160 flexible polyurethane foam formulations, Hickory Springs is one of the U.S.A.'s largest producers of foam.
8. During the Class Period, Hickory Springs manufactured and sold Polyurethane Foam throughout Canada and the United States.

9. The defendant, Valle Foam Industries (1995) Inc. ("Valle"), is a privately owned and operated company incorporated pursuant to the laws of the Province of Ontario, with headquarters located at 4 West Dr., in Brampton, Ontario.
10. During the Class Period, Valle manufactured and sold slab stock Polyurethane Foam for the furniture, bedding, packaging, carpet and children's toy industries throughout Canada and the United States, either directly or through controlled affiliates.
11. The defendant, Domfoam International Inc. ("Domfoam") is a company incorporated pursuant to the laws of the Province of Quebec, with headquarters located at 8785 Langelier Blvd., Montreal, Quebec. Domfoam describes itself as *"Canada's largest polyurethane foam manufacturer"*.
12. During the Class Period, Domfoam manufactured and sold Polyurethane Foam in Canada and in the United States for various applications, including mattresses, sponge foam blocks, carpet cushion, pillows, bolsters, convolute, furniture foam, toppers, antistatic foam, anti-microbial foam, visco-elastic foam, camping foam and sporting goods.
13. The Defendant, A-Z Sponge & Foam Products Ltd. ("A-Z Sponge") is a British Columbia company with a registered and records office located at 200 – 13889 – 104th Avenue, Surrey, British Columbia. At all material times, A-Z Sponge carried on business as a manufacturer and wholesaler of sponge and Polyurethane Foam.
14. Domfoam and A-Z Sponge are part of the Valle corporate group.
15. The defendant, Carpenter Company ("Carpenter") is a privately owned and operated Virginia company with headquarters located at 5016 Monument Avenue, in Richmond, Virginia.
16. During the Class Period, Carpenter manufactured and sold a wide variety of Polyurethane Foam in Canada and in the United States from approximately 30

locations in the United States, Canada and Europe, including one location in Surrey, British Columbia.

17. The defendant, Woodbridge Foam Corporation, also known as "Woodbridge Group", is a company incorporated pursuant to the laws of the Province of Ontario, with headquarters located at 4240 Sherwoodtowne Blvd., in Mississauga, Ontario.
18. During the Class Period, manufactured and sold Polyurethane Foam for a number of markets throughout Canada and the United States.
19. The defendant, Flexible Foam Products, Inc. ("Flexible Foam") is a privately owned and operated Ohio company, with headquarters located in Spencerville, Ohio. Flexible Foam describes itself as a *"leading manufacturer...of polyurethane foam"*.
20. During the Class Period, Flexible Foam manufactured and sold Polyurethane Foam to customers in over 15 countries, including Canada and the United States.
21. The defendant, Scottdel Inc. ("Scottdel") is a privately held Ohio company with headquarters located at 400 Church Street, in Swanton, Ohio.
22. During the Class Period, Scottdel manufactured and sold polyurethane foam in Canada and in the United States.
23. The defendant, Foamex Innovations, Inc. ("Foamex") is a privately owned and operated Pennsylvania company with headquarters located at 1400 Providence Road, Suite 2000, Media, Pennsylvania.
24. During the Class Period, Foamex manufactured Polyurethane Foam in plants located in Canada, the United States and China, and sold such foam in Canada and in the United States.

25. The defendant, Future Foam, Inc. ("Future Foam") is a privately owned and operated Iowa company with headquarters located at 1610 Avenue N., Council Bluffs, Iowa.
26. During the Class Period, Future Foam manufactured and sold Polyurethane Foam throughout the United States.

Background

27. "Polyurethane Foam" refers to a number of different types of foam consisting of polymers made of molecular chains bound together by urethane links. It can be flexible or rigid, but generally has a low density, with a broad range of load bearing capability and resiliency, offering comfort and protective shock absorption performance. Given these properties, Polyurethane Foam is used in a vast array of applications, including bedding, upholstery, carpet underlay, automotive interiors, packaging, insulation and shock absorption.
28. During the Class Period, in British Columbia, Ontario and in various other locations in Canada and the United States, as well as in places unknown, the Defendants conspired and agreed together, the one with the other and others, to:
 - a. Fix, maintain, increase or control the prices for the supply of Polyurethane Foam in British Columbia; and
 - b. Refrain from pursuing each other's customers, thereby lessening competition and maintaining their respective customers for the supply of Polyurethane Foam.

(collectively, the "Conspiracy")

29. The Conspiracy was directed towards Majestic and other Class members, and the Defendants knew or ought to have known in the circumstances that injury to Majestic and to the other Class members was likely to, and in fact, did result.

30. In furtherance of the Conspiracy, during the Class Period, the following acts were done by the Defendants and their respective executive, officers, employees servants and agents:
- a. At various times during the Class Period, they reached agreements to collectively support price increases for Polyurethane Foam sold in British Columbia (collectively, the "Overcharges");
 - b. they secretly exchanged pricing information about Polyurethane Foam;
 - c. they had in-person, telephone and email discussions about the Overcharges, the dates of the Overcharges, and how the co-conspirators would announce the Overcharges;
 - d. they shared draft copies of their price increase letters;
 - e. they fixed, increased and/or maintained at artificially high levels the price of Polyurethane Foam;
 - f. they agreed to avoid co-conspirators' customers and to refrain from taking business or market share from one another,;
 - g. they provided false reasons for the Overcharges by describing such increases as the result of external cost increases;
 - h. they took steps to prevent identification in written correspondence, such as not using full names or sending the correspondence from public fax machines, and destroyed documents that evidenced the conspiracy;
 - i. they took steps to disguise meetings in which they discussed the Conspiracy, such as purporting to share technological and operational advances;
 - j. they instructed members of the Conspiracy not to divulge the existence of the Conspiracy;
 - k. they engaged in monitoring activities to ensure that others were implementing the Overcharges;
 - l. they threatened to take retaliatory measures against any corporation which failed to implement the Overcharges, such as to aggressively pursue that corporation's customers; and
 - m. they disciplined any corporation which failed to implement the Overcharges.

31. The Defendants were motivated to conspire and their predominant purposes and predominant concerns were:
 - a. to harm Majestic and other Class members by requiring them to pay artificially high prices for Polyurethane Foam;
 - b. to illegally increase their profits on the sale of Polyurethane Foam; and
 - c. to maintain their respective customers for the sale of Polyurethane Foam.
32. The acts alleged in this Notice of Civil Claim to have been done by each corporate Defendant were authorized, ordered and done by each corporate Defendant's officers, directors, agents, employees or representatives while engaged in the management, direction, control or transaction of its business affairs.

The Plaintiff's Purchases of Polyurethane Foam

33. During the Class Period, Majestic purchased Polyurethane Foam, as defined below, directly from the defendants, Foamex, A-Z Foam, Carpenter and Vitafoam Canada.
34. During the Class Period, and following a price increase that Majestic felt was too high, Majestic approached a representative of Carpenter and requested a competing quote. At the time, Majestic was purchasing a substantial amount of Polyurethane Foam from Vitafoam Canada.
35. Given the volume of Polyurethane Foam that Majestic was purchasing, Majestic expected Carpenter to respond to its inquiries for a quote. However, Majestic did not receive any response.
36. In a follow-up call placed by Majestic, the representative of Carpenter seemed disinterested in the request for a competing quote and the prospects of supplying

a substantial amount of Polyurethane Foam to Majestic. Carpenter never provided a competing quote to Majestic.

Representative Capacity (Proposed Class Action)

37. Majestic brings this claim on its own behalf, and on behalf of a class of all persons or entities in British Columbia who purchased Polyurethane Foam or Polyurethane Foam products directly from one or more of the defendants during the Class Period (collectively, the "Class"), pursuant to the provisions of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

Part 2: RELIEF SOUGHT

Majestic, on his own behalf and on behalf of the other members of the Class, claims against the Defendants:

1. an order certifying this action as a class proceeding and appointing the Plaintiff as representative plaintiff for the Class;
2. a declaration that some or all of the Defendants have conspired, amongst themselves, to charge Overcharges in connection with the sale of Polyurethane Foam in British Columbia during the Class Period;
3. alternative, a declaration that some or all of the Defendants have been unjustly enriched by receipt of the Overcharges, or a portion thereof;
4. damages, in the aggregate, for conspiracy, tortious interference with economic interests and conduct that is contrary to the *Competition Act*, R.S., 1985, c. C-34;
5. costs of investigation pursuant to section 36 of the *Competition Act*, R.S.C. 1985, c. 19;
6. alternatively, damages, in the aggregate, for unjust enrichment, payable to the Plaintiff and the other Class members in an amount equal to the Overcharges which were paid to the Defendants in connection with the sale of Polyurethane Foam in British Columbia during the Class Period;
7. alternatively, a declaration that the Defendants hold the Overcharges, or portions thereof, in a constructive trust for the benefit of the Plaintiff and the other Class members, and an accounting or restitution to the Plaintiff and the other Class

members of all Overcharges received by the Defendants in connection with the sale of Polyurethane Foam in British Columbia;

8. an injunction enjoining the Defendants from further unlawful conduct;
9. punitive and exemplary damages;
10. pre-judgment and post-judgment interest pursuant to the *Court Order Interest Act*, R.S.C.B. 1996, c. 79 as may be allowed;
11. costs of this action; and
12. such further and other relief as this Honourable Court may deem fit.

Part 3: LEGAL BASIS

Breach of *Competition Act* and Conspiracy

1. The acts particularized in paragraphs 28 through 31 of this Notice of Civil Claim were in breach of section 45 of the *Competition Act*, R.S. 1985, c. C-34. Consequently, according to section 36 of the *Competition Act*, the Defendants are jointly and severally liable to Majestic and to the other Class members for their damages in respect of all purchases of Polyurethane Foam in British Columbia supplied by the Defendants. Further, Majestic and the other Class members are entitled to their costs of investigation into this matter.
2. Further, or alternatively, the acts particularized in paragraphs 28 through 31 of this Notice of Civil Claim were unlawful acts directed towards Majestic and the other Class members, which the defendants knew in the circumstances would likely cause injury to the Plaintiff and the other Class members. Consequently, pursuant to the law of civil conspiracy, the Defendants are jointly and severally liable to the plaintiff and the other Class Members for their damages in respect of all purchases of Polyurethane Foam manufactured and/or supplied by the Defendants.

Unjust Enrichment, Waiver of Tort and Constructive Trust

3. In the alternative, Majestic waives the tort and pleads that it and the other Class members are entitled to recover under restitutionary principles.
4. Each of the Defendants have each been unjustly enriched by the receipt of the Overcharges on the sale of Polyurethane Foam. Majestic and the other Class members have suffered a deprivation in the amount of the Overcharges paid in relation to the Defendants' sale of Polyurethane Foam in British Columbia.
5. The Overcharges resulted from the Defendants' wrongful or unlawful acts, and as such there is and can be no juristic reason justifying the Defendants' retention of any part of such Overcharges.
6. The Defendants are constituted as constructive trustees in favour of the Class members for all of the Overcharges relating to the sale of Polyurethane Foam in British Columbia, because, among other reasons:
 - (a) the Defendants were unjustly enriched by the Overcharges;
 - (b) the Class members suffered a deprivation because of Overcharges;
 - (c) the Defendants engaged in inappropriate conduct and committed a wrongful act in conspiring to fix the prices of Polyurethane Foam;
 - (d) the Overcharges were acquired in such circumstances that the Defendants may not in good conscience retain it;
 - (e) justice and good conscience require the imposition of a constructive trust;
 - (f) the integrity of the marketplace would be undermined if the Court did not impose a constructive trust;
 - (g) there are no factors that would, in respect of the Overcharges, render the imposition of a constructive trust unjust.

7. Majestic pleads that equity and good conscience requires the Defendants to hold in trust for Majestic and for the other Class members all of the Overcharges relating to the sale of Polyurethane Foam in British Columbia, and to disgorge these Overcharges to Majestic and to the other Class members.

Damages

8. As a result of the conspiracy particularized above, Majestic and the other Class members have suffered loss and damages.
9. Majestic asserts that its damages and the damages of other Class members are capable of being quantified on an aggregate basis.
10. Majestic asserts that the Defendants' conduct was high-handed, outrageous, reckless, wonton, entirely without care, deliberate, callous, disgraceful, wilful, in contumelious disregard of the rights of Majestic and the rights of other Class members, and as such renders the Defendants liable to pay aggravated, exemplary and punitive damages.
11. The damages of Majestic and of the other Class members have been suffered in the Province of British Columbia.

Relevant Statutes

12. Majestic pleads and relies on the *Class Proceedings Act*, R.S.B.C., c. 50 and the *Competition Act*, R.S., 1985, c. C-34, and all amendments thereto.

Plaintiff's address for service:

BRANCH MACMASTER LLP
Suite 1410 - 777 Hornby Street
Vancouver, British Columbia
V6Z 1S4
Telephone: (604) 654-2999
(File No.: X01-024)

Attention: Luciana P. Brasil

Fax number address for service (if any): (604) 684-3429

E-mail address for service (if any): lbrasil@branmac.com

Place of trial: Vancouver, British Columbia

The address of the registry is: 800 Smithe Street
Vancouver, British Columbia
V6Z 2E1

DATED: September 24, 2010



Signature of

plaintiff

lawyer for plaintiff

Luciana P. Brasil

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.
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APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

This is a price-fixing and unjust enrichment claim brought in relation to an alleged conspiracy to fix prices of Polyurethane Foam and to maintain customers.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

[Check one box below for the case type that best describes this case.]

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
 - construction defects
 - real property (real estate)
 - personal property
 - the provision of goods or services or other general commercial matters
 - investment losses
 - the lending of money
 - an employment relationship
 - a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[check all boxes below that apply to this case]

- a class action

- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

[If an enactment is being relied on, specify. Do not list more than 3 enactments.]

1. The *Competition Act*, R.S., 1985, c. C-34
2. The *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR
SERVICE OUTSIDE BRITISH COLUMBIA**

The Plaintiff, Majestic Mattress Manufacturing Ltd., claims the right to serve this pleading on the Defendants outside British Columbia on the following grounds:

- a) This action concerns restitutionary obligations that, to a substantial extent, arose in British Columbia, pursuant to section 10(f) of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28;
- b) This action concerns a tort committed in British Columbia, pursuant to section 10(g) of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; and
- c) This action concerns a business carried on in British Columbia, pursuant to section 10(h) of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28.