

Court File No. VLC-S-S-106362

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

B E T W E E N:

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,  
WOODBIDGE FOAM CORPORATION, FLEXIBLE FOAM PRODUCTS, INC.,  
SCOTTDEL INC., FOAMEX INNOVATIONS, INC. and FUTURE FOAM, INC.

Defendants

BROUGHT UNDER THE *CLASS PROCEEDINGS ACT*, R.S.B.C. 1996, c. 50

Court File No. VLC-S-S-106213

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

B E T W E E N:

TRILLIUM PROJECT MANAGEMENT LTD.

Plaintiff

AND:

HICKORY SPRINGS MANUFACTURING COMPANY,  
VALLE FOAM INDUSTRIES, INC., DOMFOAM INTERNATIONAL, INC.,  
CARPENTER CO., CARPENTER CANADA CO.,  
THE WOODBIDGE GROUP,  
FLEXIBLE FOAM PRODUCTS, INC., SCOTTDEL INC.,  
FOAMEX INNOVATIONS, INC.,  
FOAMEX INNOVATIONS CANADA, INC., FUTURE FOAM, INC.,  
VITAFOAM PRODUCTS CANADA LIMITED AND VITAFOAM, INC.

Defendants

BROUGHT UNDER THE *CLASS PROCEEDINGS ACT*, R.S.B.C. 1996, c. 50

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**NOTICE OF APPLICATION  
(CONTESTED CERTIFICATION)**

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**NAME OF APPLICANTS:** the plaintiffs, Majestic Mattress Mfg. Ltd. and Trillium Project Management Ltd.

**TO:** the Defendants

**AND TO:** their respective solicitors

TAKE NOTICE that an application will be made by the applicants to Mr. Justice Bowden at the courthouse at 800 Smithe Street, Vancouver, B.C. on ◆/ /2014, for the orders set out in Part 1 below.

### **PART 1: ORDERS SOUGHT**

1. An order as set out in **Schedules “A” and “B”** to this notice of application; and
2. Such further and other relief and directions as counsel may request and this Honourable Court deems just.

### **PART 2: FACTUAL BASIS**

3. For the purposes of this affidavit, the following definitions apply:
  - (a) “Flexible Foam Products” means flexible polyurethane foam and any and all products that contain flexible polyurethane foam;
  - (b) “Carpet Underlay” means the subset of Flexible Foam Products that are scrap polyurethane foam bonded together by various chemicals into a padding material, and products containing scrap polyurethane foam bonded together by various chemicals into a padding material; and
  - (c) “Flexible Polyurethane Foam Products” means the subset of Flexible Foam Products that are not Carpet Underlay.
4. The plaintiffs and others have commenced proposed class proceedings in British Columbia, Ontario (the “Ontario Actions”) and Quebec (the “Quebec Action”); together with these actions and the Ontario Actions, the “Foam Actions”), alleging that the defendants conspired to raise, fix, maintain or stabilize the price of Flexible Foam Products in Canada and/or to allocate markets and customers for the sale of Flexible Foam Products in Canada, contrary to Part VI of the *Competition Act*, R.S.C. 1985, c. C-34 and civil and common law (the “Alleged

Conspiracy”), during the period between January 1, 1999 and August 3, 2010 (the “Class Period”).

Affidavit #1 of Julie Facchin, made 28/Feb/2014 (Facchin #1) at paras 3-5, 11 and 16.

5. Further particulars of the Alleged Conspiracy and the allegations of the plaintiffs are set out in the amended notices of civil claim in the BC Actions.

Trillium’s Proposed Amended Notice of Civil Claim at paras 18-20 and 30-36;  
Majestic’s Proposed Amended Notice of Civil Claim at paras 30-32 and 39-41.

6. Counsel for the plaintiffs and the petitioners in the Foam Actions (“Class Counsel”) have formed a consortium and are working cooperatively to advance the claims of all plaintiffs, petitioners and class members in a coordinated and efficient manner.

Facchin #1, at para 19.

7. The subject matter of the Foam Actions has been the subject of investigations by various regulatory bodies around the world, including in Canada, the United States and Europe. Further, a number of other civil proceedings have been commenced in Canada and the United States in relation to the same subject matter and involving many of the same defendants.

Facchin #1, at para 20.

8. On January 10, 2012, the plaintiffs and petitioners in the Foam Actions entered into a settlement agreement (the “Settlement Agreement”) with Domfoam International, Inc. (“Domfoam”), Valle Foam Industries (1995) Inc. (“Valle Foam”) and A-Z Sponge & Foam Products Ltd. (“A-Z Sponge”; collectively with Domfoam and Valle Foam, the “Domfoam Defendants”); Dean Brayianis (together with the Domfoam Defendants, the “Settling Defendants”); and Bruce Bradley, Michael Cappuccino, Pietro (Peter) Foti, Duke Greenstein, John Howard, Dale Mcneill, James William Sproule, Robert Valle, Tony Vallecoccia and Fred Zickmantel (the

“Individual Settling Parties”; together with the Settling Defendants, the “Settling Parties”).

Facchin #1, at para 37.

9. On January 11, 2012, the Domfoam Defendants filed an application for protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 in the Ontario Superior Court of Justice (Toronto) (the "CCAA Proceeding"). As a result of the CCAA Proceeding, a monitor was appointed (the “Monitor”), certain assets of the Domfoam Defendants were sold, and a claims solicitation process was instituted to permit creditors to prove claims against the Domfoam Defendants and their current or former directors and officers. Any such claims had to be filed by August 31, 2012. Claims relating to the Foam Actions were made on behalf of the proposed classes in each of the Foam Actions (collectively, the “Class CCAA Claims”).

Facchin #1, at para 39.

10. The Monitor has disallowed the Class CCAA Claims, and the plaintiffs and petitioners in the Foam Actions are currently in negotiations with the Monitor with respect to this disallowance.

Facchin #1, at para 41.

11. The Foam Actions were certified/authorized on consent for settlement purposes only against the Settling Defendants, and the notice of the certification and the settlement hearings (the “Settlement Notice”) was approved:
  - (a) on July 18, 2013 by the Superior Court of Quebec (the “Quebec Court”) for the Quebec Action;
  - (b) on July 24, 2013 by the Ontario Superior Court of Justice (the “Ontario Court”) for the Ontario Actions; and

(c) on July 30, 2013 by the Supreme Court of British Columbia (the “BC Court”); together with the Quebec Court and the Ontario Court, the “Courts”) in the BC Actions.

Facchin #1, at para 45.

12. The Settlement Notice was disseminated on August 18, 2013 in accordance with the plan of dissemination approved by the Courts.

Facchin #1, at para 48.

13. Pursuant to the orders of the Courts, class members were provided with an opportunity to opt out of the Foam Actions by written election within 60 days of the first publication of the Settlement Notice. The orders provided that class members who did not validly opt out of the Foam Actions would not be afforded additional opportunities to opt out upon any subsequent certifications.

Facchin #1, at para 49.

14. As of the deadline for opting out or objecting to the approval of the Settlement Agreement, there were no objections to the Settlement Agreement. One class member mistakenly opted out of the Foam Actions, and the Quebec Court subsequently declared that the class member had not opted out of the Foam Actions.

Facchin #1, at para 50.

15. The Ontario and BC Courts held concurrent multijurisdictional hearings to consider the plaintiffs’ motions for approval of the Settlement Agreement, a distribution protocol to permit Class Counsel to hold the settlement funds in trust, the Ontario and BC retainer agreements and Class Counsel’s disbursements on October 25 and December 9, 2013. The Ontario Court issued reasons on February 11, 2014 granting these motions. A hearing before the BC Court is scheduled for March 10, 2014 with regard to whether the BC Court can adopt the Ontario Domfoam Reasons.

Facchin #1, at para 54.

16. On October 28, 2013, the Québec Court held its hearing for the parallel approval motions in Quebec. The Québec Court granted the motions by oral reasons on the same date.

Facchin #1, at para 55.

### ***Cause of Action***

17. The plaintiffs advance their claims against the defendants on the basis of the following well-established causes of action:

- (d) breach of Part VI of the *Competition Act*;
- (e) civil conspiracy;
- (f) tortious interference with economic interests;
- (g) unjust enrichment; and
- (h) waiver of tort.

Facchin #1, at para 7

18. Further particulars of the Alleged Conspiracy and the allegations of the plaintiffs are set out in the amended notices of civil claim in the BC Actions.

Trillium's Proposed Amended Notice of Civil Claim at paras 18-20 and 30-36;  
Majestic's Proposed Amended Notice of Civil Claim at paras 30-32 and 39-41.

### ***Identifiable class***

19. There are identifiable classes, namely the BC Classes consisting of the BC General Foam Class and the BC Carpet Underlay Class, which will be represented by Majestic Mattress Mfg. Ltd. ("Majestic") and Trillium Project Management Ltd. ("Trillium") respectively.

Facchin #1, at paras 59-62

20. In addition to the plaintiffs, there are many other persons or entities in Canada who have purchased Flexible Foam Products from the defendants during the Class Period.

Affidavit #4 of David Hamilton, made 21/Feb/2014 (“Hamilton #4”) at para 17

Affidavit #4 of William Peitsch, made 10/Mar/2014 (“Peitsch #4”) at para 18

21. Class Counsel has been in contact with at least 58 potential class members since the commencement of the Foam Actions.

Facchin #1, at paras 53 and 65

***One or more common issues***

22. The plaintiffs propose the common issues as set out in the draft orders attached at Schedules “A” and “B” to this notice of application.

Facchin #1, at para 66

***Preferable Procedure***

23. The plaintiffs are aware of the substantial costs that pursuing these proposed class actions as individual actions would entail.

Hamilton #4 at para 26

Peitsch #4 at para 27

24. The plaintiffs would not prosecute these actions as individual actions.

Hamilton #4 at para 26

Peitsch #4 at para 27

25. The plaintiffs have proposed a workable methodology for the determination of the claims advanced in these actions.

26. There are no other preferable means to resolve the claims of the members of the BC Classes.

***Representative plaintiff***

27. The proposed representative plaintiffs, Majestic and Trillium:
- (a) are prepared to, and will fairly represent the interests of the members of the BC Classes;
  - (b) have produced a litigation plan which sets out a workable method for the advancement of the proceeding on behalf of the BC Classes; and
  - (c) do not have, on the common issues, an interest that is in conflict with the interests of other members of the BC Classes, or the interests of the plaintiffs, petitioners and class members in the Ontario Actions or the Quebec Action.

Hamilton #4 at paras 23-25  
Peitsch #4 at paras 24-26

**PART 3: LEGAL BASIS**

28. The actions should be certified as class proceedings and the plaintiffs should be appointed representative plaintiffs because the requirements of s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA], are met. Specifically:
- (a) the pleadings disclose a cause of action;
  - (b) there is an identifiable class of two or more persons;
  - (c) the claims of the class raise common issues;
  - (d) a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues; and
  - (e) there are representative plaintiffs who:
    - (i) will fairly and adequately represent the interests of the class;



- (ii) have produced a plan for the proceedings that sets out a workable method of advancing the proceedings on behalf of the class and notifying class members of the proceedings; and
  - (iii) do not have a conflict of interest with the other class members with respect to the common issues.
29. The proposed notice program is a reasonable method of notifying putative members of the BC Classes of the certification of these actions having regard to the fact that the opt-out process has run out as a result of the consent certification for settlement purposes against the Settling Defendants.
30. Section 24 of the *CPA* permits the Court to make “any order it considers appropriate as to the costs of any notice.” In particular, the court may order a defendant to pay the cost of notice even though the obligation to give notice rests on the plaintiff because defendants are the “parties most likely to benefit from notice” and burdening the plaintiff with notice costs “undermin[es] the objectives” of the *CPA*.
- Boulanger v. Johnson & Johnson Corporation*, 2007 CanLII 27581 (Ont. S.C.J.) at para. 5; *Campbell v. Flexwatt Corp.*, 1997 CanLII 4111 (B.C.C.A.) at paras. 82-84.
31. Such further and other grounds as counsel may advise.

#### **PART 4: MATERIAL TO BE RELIED ON**

32. Affidavit #1 of Dr. Douglas West, made 10/Dec/2013 in the Majestic Action;
33. Affidavit #1 of Dr. Douglas West, made 30/Jan/2014 in the Trillium Action;
34. Affidavit #4 of David Hamilton, made 21/Feb/2014 in the Trillium Action;
35. Affidavit #1 of Julie Facchin, made 28/Feb/2014 in the BC Actions;
36. Affidavit #4 of William Peitsch, made 10/Mar/2014 in the Majestic Action; and

37. such further and other material as counsel may advise and the Honourable Court may permit.

The applicants estimate that the application will take 3 days.

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
  - (i) you intend to refer to at the hearing of this application, and
  - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicants 2 copies of the following, and on every other party of record one copy of the following:
  - (i) a copy of the filed application response;
  - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9). B.C. Reg. 241/2010, Sch. A, s. 3.

Date: ◆/ /2014

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Signature of lawyer for applicant  
Reidar Mogerman

*To be completed by the court only:*

order made

in the terms requested in paragraphs ..... of Part 1 of this notice of application

with the following variations and additional terms:  
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.....  
.....

Date: ..... Signature of  Judge  Master

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**APPENDIX**

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THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- other