

AUG 01 2012

S-125443



No. _____
Vancouver Registry

In the Supreme Court of British Columbia

Between

TRILLIUM PROJECT MANAGEMENT LTD.

Plaintiff

and

**VINCENZO BONADDIO, MICHAEL CALDERONI,
DOUGLAS DOLPHIN, ANTHONY DACOSTA, and
DONALD PHILLIPS**

Defendants

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

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) 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

- (c) 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

- (d) 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(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,
- (b) if you were served the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

PART 1: STATEMENT OF FACTS

DEFINED TERMS

1. The following definitions apply for the purpose of this Notice of Civil Claim:
 - (a) "Bonaddio" means the defendant Vincenzo Bonaddio;
 - (b) "Calderoni" means the defendant Michael Calderoni;
 - (c) "Carpet Underlay" means scrap Polyurethane Foam bonded together by various chemicals into a padding material that is placed beneath carpet;
 - (d) "CCB" means the Canadian Competition Bureau;

- (e) "Class Members" mean all persons in British Columbia who, during the Class Period, purchased Polyurethane Foam and/or Polyurethane Foam Products and/or Carpet Underlay manufactured in North America for pickup or delivery in British Columbia, except the Excluded Persons, or such other definition as is approved by the Court;
- (f) "Class Period" means the period from January 1, 1999 up to and including August 3, 2010;
- (g) "*Competition Act*" means the *Competition Act*, RSC 1985, c C-34, as amended;
- (h) "CPA" means the *Class Proceedings Act*, RSBC 1996, c 34;
- (i) "DaCosta" means the defendant Anthony DaCosta;
- (j) "Defendants" means Bonaddio, Calderoni, DaCosta, Dolphin, and Phillips;
- (k) "DOJ" means the United States Department of Justice;
- (l) "Dolphin" means the defendant Douglas Dolphin;
- (m) "Domfoam" means Domfoam International, Inc., a subsidiary of Valle Foam, with its headquarters located at 8785 Langelier Blvd., Montreal, Quebec, and another office at 4 West Drive, Brampton, Ontario;
- (n) "Excluded Persons" means the Defendants and competitors within the Polyurethane Foam industry, and their directors, officers, employees, subsidiaries, affiliates and any entities or ventures;
- (o) "Phillips" means the defendant Donald Phillips;
- (p) "Plaintiff" means Trillium;

- (q) "Polyurethane Foam" means polyurethane foam material produced by combining several chemicals, including polyol, diisocyanate, and water and, for greater certainty, includes Carpet Underlay;
- (r) "Polyurethane Foam Products" means bedding, furniture and insulation that contain Polyurethane Foam;
- (s) "Trillium" means the plaintiff Trillium Project Management Ltd., a corporation incorporated pursuant to the laws of British Columbia with an address for service c/o Camp Fiorante Matthews Mogerman, Suite 400, 856 Homer Street, Vancouver, British Columbia, V6B 2W5;
- (t) "Valle Foam" means Valle Foam Industries (1995), Inc., which has its headquarters located at 4 West Dr., Brampton, Ontario, and is a related company to Domfoam;
- (u) "Vitafoam" means Vitafoam Inc., located at 2215 Shore Street, High Point, North Carolina 27263, with facilities in Indiana, Texas, and Tennessee; and
- (v) "Vitafoam Canada" means Vitafoam Products Canada Limited, located at 150 Toro Road, North York, Ontario M3J 2A9, with facilities in British Columbia, Alberta, Manitoba, and Quebec.

BACKGROUND TO ACTION

2. This action concerns unlawful and anticompetitive agreements between the Defendants, their employers and other competitors in the Polyurethane Foam industry to fix, maintain, increase or control the price for, and the supply of, Polyurethane Foam in North America and to allocate customers.
3. The Plaintiff seeks to recover the Overcharge on behalf of itself and the Class Members.

4. Polyurethane Foam is found in commercial and home insulation products, bedding products (mattresses), industrial applications (filtration, acoustic applications, medical equipment, garments, etc.), packaging products, Carpet Underlay, furniture, and the automotive and transportation (seat cushions, arm-rests, etc.) industries.
5. During 2010, Vitafoam, Vitafoam Canada, or both applied for and received leniency from the CCB and DOJ for disclosing that it was or they were a member of a Polyurethane Cartel within the industry to fix the price of and allocate customers of Polyurethane Foam.
6. In July 2010, the CCB filed Information Statements in order to obtain search warrants for some of the Canadian offices of competitors within the Polyurethane Foam industry as well as the homes of senior level employees. The search warrants related to alleged price-fixing conduct within the Polyurethane Foam markets.
7. The CCB's Information Statements relied upon the cooperation of Vitafoam, Vitafoam Canada, four (4) of its or their senior level employees, and telephone transcripts obtained from these employees' conversations with some of the Defendants and competitors in the Polyurethane Foam industry and their employees. The Defendants agreed with competitors and their employees to adopt and adjust price increases of Polyurethane Foam and allocate customers in tandem, despite having different cost structures.
8. In July 2010, Canadian, European Union, and United States competition authorities raided the corporate offices of several Polyurethane Foam manufacturers located in Austria, Belgium, Canada, Germany, Spain, South Africa, Switzerland, the United Kingdom, and the United States.
9. On May 18, 2011, Foamex Innovations, Inc.'s Canadian facility located in Montreal was searched by agents of the CCB for materials relating to the polyurethane foam cartel.

10. On January 6, 2012, the CCB announced that Domfoam and Valle Foam had pleaded guilty to conspiracy under the *Competition Act*, admitting to having agreed with competitors to fix the price of polyurethane foam manufactured in their Canadian plants over an 11 year period.

THE PLAINTIFF

11. At all material times, Trillium carried on business as a construction management company. During the Class Period, Trillium purchased Polyurethane Foam for use in construction projects.
12. The Plaintiff brings this claim on its own behalf, and on behalf of the other Class Members, pursuant to the *CPA*.

THE DEFENDANTS AND THEIR EMPLOYERS

13. Foamex International, Inc. was a manufacturer and distributor of Polyurethane Foam with facilities throughout the United States and in Montreal, Quebec. During much of the Class Period, Foamex International, Inc. sold Polyurethane Foam throughout Canada and the United States.
14. Foamex Canada Inc. was a subsidiary of Foamex International, Inc. with premises located in Montreal, Quebec. During most of the Class Period, Foamex Canada Inc. sold Polyurethane Foam throughout Canada.
15. On or about June 12, 2009, Foamex International, Inc. was liquidated and its assets were acquired by outside investors doing business as Foamex Innovations, Inc. Many of the senior officers and employees who worked for Foamex International, Inc. prior to the liquidation, including the Defendants, continued to work for Foamex Innovations, Inc. and/or its subsidiaries.
16. Foamex International, Inc., Foamex Canada, Inc. and Foamex Innovations, Inc. manufacture and sell Polyurethane Foam in North American markets for the automotive and transportation, bedding, Carpet Underlay, furniture, industrial, and packaging industries.

17. Foamex International, Inc., Foamex Canada, Inc. and Foamex Innovations, Inc. and their employees, including the Defendants, are subjects of the CCB cartel investigation.
18. During the Class Period, Bonaddio was a senior level employee of Foamex International, Inc. or Foamex Canada Inc. and later at Foamex. Innovations, Inc. or its subsidiaries. During the Class Period, he communicated about future price increases of Polyurethane Foam with employees from competitors in the Polyurethane Foam industry both before and after June 2009.
19. During the Class Period, Calderoni was a senior level employee of Foamex International, Inc. or Foamex Canada Inc. and later at Foamex. Innovations, Inc. or its subsidiaries. During the Class Period, he communicated about future price increases of Polyurethane Foam with employees from competitors in the Polyurethane Foam industry both before and after June 2009.
20. During the Class Period, DaCosta was a senior level employee of Foamex International, Inc. or Foamex Canada Inc. and later at Foamex. Innovations, Inc. or its subsidiaries. During the Class Period, he communicated about future price increases of Polyurethane Foam with employees from competitors in the Polyurethane Foam industry both before and after June 2009.
21. During the Class Period, Dolphin was a senior level employee of Foamex International, Inc. or Foamex Canada Inc. and later at Foamex. Innovations, Inc. or its subsidiaries. During the Class Period, he communicated about future price increases of Polyurethane Foam with employees from competitors in the Polyurethane Foam industry both before and after June 2009.
22. During the Class Period, Phillips was a senior level employee of Foamex International, Inc. or Foamex Canada Inc. and later at Foamex. Innovations, Inc. or its subsidiaries. During the Class Period, he communicated about future price increases of Polyurethane Foam with employees from competitors in the Polyurethane Foam industry both before and after June 2009.

JOINT AND SEVERAL LIABILITY

23. The Plaintiff pleads that the Defendants are jointly and severally liable for the acts and omissions of each other and the competitors in the Polyurethane Foam industry who engaged in the conduct which is the subject matter of this proceeding.

THE CARTEL ACTIVITIES

24. The exact dates of the Polyurethane Foam cartel are unknown to the Plaintiff. The CCB investigation is focused on the 1979 to 2010 timeframe, while the DOJ investigation is focused on the 1999 to 2010 timeframe.
25. The CCB investigation relates to the breach of s. 45(1) of the *Competition Act* as it relates to the timing of price increases for Polyurethane Foam.
26. The senior level employees of the competitors in the Polyurethane Foam industry, including the Defendants, had a pattern and practice of communicating about their future price increases for Polyurethane Foam.
27. According to Vitafoam or Vitafoam Canada employees, the members of the Polyurethane Cartel agreed that coordination between the dates and amount of price increases for their Polyurethane Foam was necessary in order to avoid customers from switching suppliers.
28. In particular, CCB witnesses advised the CCB that Bonaddio, Calderoni, DaCosta, Dolphin, and Phillips:
- (a) had a practice of engaging in discussions with employees of competitors in the Polyurethane Foam industry for the purposes of coordinating the amount and timing of price increases of Polyurethane Foam;
 - (b) had a practice of calling employees of competitors in the Polyurethane Foam industry to advise that their employer was going to increase prices of Polyurethane Foam prior to the date of the actual price increases;

- (c) had a practice of providing copies of price increase letters from their employer to competitors in the Polyurethane Foam industry in advance of providing them to customers;
 - (d) had a practice of calling employees of competitors in the Polyurethane Foam industry to advise that certain competitors in the Polyurethane Foam industry were going to increase prices of Polyurethane Foam prior to the date of the actual price increases;
 - (e) discussed allocation of customers among competitors in the Polyurethane Foam industry;
 - (f) had a practice of discussing and agreeing with competitors in the Polyurethane Foam industry to the price at which Polyurethane Foam would be sold to customers with shared accounts;
 - (g) asked Vitafoam, Domfoam, and Valle Foam to increase prices of Polyurethane Foam in lockstep with their employer and other competitors in the Polyurethane Foam industry; and
 - (h) advised Vitafoam, Domfoam, and Valle Foam that their employer and other competitors in the Polyurethane Foam industry would be increasing prices of Polyurethane Foam at future dates and identified which competitor in the Polyurethane Foam industry would lead the price increases.
29. Vitafoam and/or Vitafoam Canada advised the CCB that during the Class Period it and the Polyurethane Cartel members provided false explanations for their price increases of Polyurethane Foam, such as increased prices from suppliers of the chemicals used to manufacture Polyurethane Foam and supply shortages.

THE CONSPIRACY AND TORTIOUS INTERFERENCE WITH ECONOMIC INTERESTS

30. During the Class Period, at various times and places, some of which are unknown to the Plaintiff, the Defendants illegally conspired and agreed between themselves and with competitors in the Polyurethane Foam industry and their employees to fix, maintain, increase or control the price of Polyurethane Foam.
31. In furtherance of the conspiracy, the following acts were done by and between the Defendants and with competitors in the Polyurethane Foam industry and their employees during the Class Period:
 - (a) agreed to, and did, fix, increase, control, and maintain prices for Polyurethane Foam at artificially high levels;
 - (b) agreed to coordinate increases in the prices for Polyurethane Foam;
 - (c) participated in meetings, conversations, and communications in Canada, the United States, and elsewhere to discuss the prices of Polyurethane Foam;
 - (d) agreed during such meetings, conversations, and communications on the amount to charge for Polyurethane Foam;
 - (e) engaged in meetings, conversations, and communications to monitor and enforce the agreed-upon amounts;
 - (f) agreed to not discuss publicly or otherwise reveal the existence, nature, and substance of the agreements;
 - (g) used their membership in various trade associations to exchange information about market conditions and the amount to charge for Polyurethane Foam;

- (h) gave false reasons for the pricing of Polyurethane Foam and for the increases in pricing during the Class Period by falsely describing the increases as being the result of external costs; and
- (i) took deliberate measures to conceal the acts and agreements from their customers, the authorities, and the public.

PART 2: RELIEF SOUGHT

32. The Plaintiffs, on their own behalf and on behalf of the other Class Members, claim against the Defendants:

- (a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing the Plaintiff as representative plaintiff for the Class Members;
- (b) restitution of, and an accounting for the amount illegally collected by the Defendants from the Class Members and an order directing the Defendants to disgorge the amount determined by accounting;
- (c) general damages and special damages against the Defendants for conspiracy, intentional interference with economic relations, and conduct that is contrary to Part VI of the *Competition Act*;
- (d) punitive damages against the Defendants;
- (e) pre- and post-judgment interest pursuant to the *Court Order Interest Act*;
- (f) costs of this action in an amount that provides full indemnity or an amount that provides a substantial indemnity plus the costs of the distribution of an award pursuant to the *CPA*, including costs of notice associate with the distribution and the fees payable to the person administering the distribution;
- (g) an order giving all other necessary direction; and

- (h) such further and other relief as this court deems just.

PART 3: LEGAL BASIS

BREACH OF *COMPETITION ACT* AND CONSPIRACY

33. The acts particularized above were unlawful because they breached Part VI of the *Competition Act*. Consequently, according to s. 36 of the *Competition Act*, the Defendants are jointly and severally liable to the Plaintiff and to the other Class Members for the damages which resulted pursuant to s. 36 of the *Competition Act*.
34. Further, or alternatively, the acts particularized above were unlawful acts directed towards the Plaintiff and the other Class Members, which unlawful acts the Defendants knew in the circumstances would likely cause injury to the Plaintiff and the other Class Members, and the Defendants are liable for the tort of civil conspiracy and to pay the resulting damages.
35. Further, or alternatively, the acts above were unlawful acts intended to cause the Plaintiff and the other Class Members economic loss and constituted tortious interference with the economic interests of the Plaintiff and the other Class Members, rendering the Defendants liable to pay the resulting damages.

UNJUST ENRICHMENT, WAIVER OF TORT, AND CONSTRUCTIVE TRUST

36. In the alternative, the Plaintiff waives the tort and pleads that they and the other Class Members are entitled to recover under restitutionary principles.
37. Each of the Defendants or the Corporate Action Defendants have each been unjustly enriched by the receipt of the Overcharges on the sale of Polyurethane Foam. The Plaintiffs and the other Class Members have suffered a deprivation in the amount of the Overcharges.
38. The Overcharges resulted from the Defendants' wrongful or unlawful acts, and as such there is and can be no juristic reason justifying the Defendants' or Corporate Action Defendants retention of any part of such Overcharges.

39. The Defendants are constituted as constructive trustees in favour of the Class members for all of the Overcharges, because, among other reasons:

- (a) they were unjustly enriched by their receipt of bonuses, dividends, or other forms of profits from Foamex and Foamex Canada due to the Overcharges;
- (b) the Class Members suffered a deprivation because they bought Polyurethane Foam at artificially inflated prices;
- (c) they engaged in inappropriate unlawful conduct and committed a wrongful act in conspiring to fix the price of the Corporate Action Defendants' Polyurethane Foam to their financial benefit;
- (d) the Overcharges were acquired in such circumstances that they may not in good conscience retain them;
- (e) equity and good conscience requires it;
- (f) the Defendants cannot profit from their wrongful and unlawful acts;
- (g) the integrity of the marketplace would be undermined if the court did not impose a trust; and
- (h) there is no juridical reason that would, in respect of the Overcharges, render the imposition of a trust unjust.

40. The Plaintiffs plead that equity and good conscience require the Defendants to hold in trust for the Plaintiffs and for the other Class Members all of the Overcharges, and to disgorge these Overcharges to the Plaintiffs and to the other Class Members.

DAMAGES

41. As a result of the breach of the *Competition Act*, conspiracy or tortious interference with economic relations particularized above, which had the effect of

raising, maintaining, fixing, and stabilizing prices for Polyurethane Foam at supracompetitive levels, the Plaintiff and the other Class Members have suffered loss and damages.

42. During the Class Period, the Plaintiff and other Class Members have directly or indirectly paid millions of dollars for Polyurethane Foam. By reason of the alleged violations of the *Competition Act* and the common law, the Plaintiffs and the other Class Members paid more for Polyurethane Foam than they would have paid in the absence of the Polyurethane Cartel. As a result, they have been injured and have suffered damages.
43. The Plaintiffs assert that their damages and the damages of other Class Members are capable of being quantified on an aggregate basis.

PUNITIVE DAMAGES

44. The Plaintiff asserts that the Defendants' conduct was high-handed, outrageous, reckless, wonton, entirely without care, deliberate, callous, disgraceful, wilful, motivated solely by economic considerations, and in contumelious disregard of the rights of the Plaintiffs and the rights of other Class Members, and as such renders the Defendants liable to pay aggravated, exemplary and punitive damages.

RELEVANT STATUTES

45. The Plaintiff pleads and rely on the *CPA*, the *Competition Act*, and the *Court Order Interest Act*, RSBC 1996, c 79.

Plaintiff's address for service:

CAMP FIORANTE MATTHEWS MOGERMAN

#400 – 856 Homer Street
Vancouver, BC V6B 2W5

Tel: (604) 689-7555

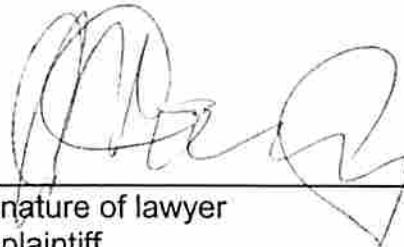
Fax: (604) 689-7554

Email: service@cfmlawyers.ca

Place of trial: Vancouver Law Courts

Address of the registry: 800 Smithe Street, Vancouver, BC V6Z 2E1

Date: 01/Aug/2012



Signature of lawyer
for plaintiff

J.J. Camp, Q.C.

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

The Plaintiff, Trillium Project Management 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 s 10(f) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28;
- b) This action concerns a tort committed in British Columbia, pursuant to s 10(g) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28; and
- c) This action concerns a business carried on in British Columbia, pursuant to s 10(h) of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28.

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.

APPENDIX

CONCISE SUMMARY OF NATURE OF CLAIM:

This is a class action claim against the defendants for recovery of damages due to price-fixing of polyurethane foam and products containing polyurethane foam.

THIS CLAIM ARISES FROM THE FOLLOWING:

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

THIS CLAIM INVOLVES:

- ☒ a class action
- ☐ maritime law
- ☐ aboriginal law
- ☐ constitutional law
- ☐ conflict of laws
- ☐ none of the above
- ☐ do not know

1. The *Class Proceedings Act*, RSBC 1996, c 34;
2. The *Competition Act*, RSC 1985, c C-34, as amended; and
3. The *Court Order Interest Act*, RSBC 1996, c 79.