

No. VLC-S-S-106362
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, Carpenter
Co., Carpenter Canada Co., Woodbridge Foam
Corporation, Flexible Foam Products, Inc., Scottdel Inc.,
Foamex Innovations, Inc., Foamex Innovations Canada,
Inc., Future Foam, Inc., Vincenzo Bonaddio, Michael
Calderoni, Donald Phillips,
Leggett & Platt Inc. and Future Foam, Inc.**

Defendants

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

**ORDER MADE AFTER APPLICATION
CONSENT CERTIFICATION AGAINST FXI DEFENDANTS**

BEFORE THE HONOURABLE MR. JUSTICE)
BOWDEN) 7/Apr/2015
)

ON THE APPLICATION of the plaintiff coming on for hearing at the Courthouse, 800 Smithe Street, Vancouver, BC, on 07/Apr/2015 and on hearing Reidar Mogerman and Julie Facchin for the plaintiff and H. David Edinger and Fiona Campbell for Foamex Innovations, Inc., Foamex Innovations Canada, Inc. Michael Calderoni, Donald Phillips, and Vincenzo Bonaddio;

THIS COURT ORDERS that:

1. For the purposes of the order, the following definitions apply:
 - (a) "Flexible Foam Products" means flexible polyurethane foam and any and all products that contain flexible polyurethane foam, except for Molded Foam Products and Technical Foam Products.

- (b) "Carpet Underlay Products" 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;
- (c) "Flexible Polyurethane Foam Products" means the subset of Flexible Foam Products that are not Carpet Underlay Products.
- (d) "Molded Foam Products" means flexible polyurethane foam products produced by mixing certain chemicals and pouring the mixture into a fixed shape mold (which is often a proprietary mold of an original equipment manufacturer ("OEM") or "Tier 1" supplier of an OEM). When the foam cures and is removed from the mold, it has unique surface contours that hold the shape of the mold cavity in which it was produced. The physical properties of the foam, including the foam's appearance, can be altered to meet customer specifications by changing the chemical formulation.
- (e) "Settled Defendants" means 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"); and Dean Brayiannis.
- (f) "Other Defendants" means Hickory Springs Manufacturing Company; Future Foam, Inc.; Leggett & Platt Inc.; Flexible Foam Products, Inc.; Carpenter Co.; Carpenter Canada Co.; Woodbridge Foam Corporation; Vitafoam, Inc.; Vitafoam Products Canada Limited; and Mohawk Industries Inc.
- (g) "Technical Foam Products" means highly engineered, specialty foam products that have different chemical formulations than the flexible foams used for bedding, furniture, packaging or carpet. The specifications typically go beyond just the density and indentation force deflection or hardness of the foam and include the pore size, air flow measured via pressure drop across the foam and/or the resistance of the foam to various medical or industrial fluids. The products themselves often have very precise physical properties and are used in a broad array of applications, such as gasketing, ink regulation in printer cartridges, sealing systems in automobiles, noise and vibration dampening in electronics. Consumer technical products include sponges, mops, paint brushes, and cosmetic applicators.
- (h) "FXI Defendants" means Foamex Innovations, Inc., Foamex Innovations Canada, Inc., Michael Calderoni, Donald Phillips, and Vincenzo Bonaddio.

2. This action is certified as against the FXI Defendants as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

3. The Class and Class Members are defined as:

3. The Class and Class Members are defined as:

All persons or entities in British Columbia who purchased Flexible Polyurethane Foam Products in Canada during the Class Period, excluding the Defendants and their present and former directors, officers, parents, subsidiaries and affiliates.

4. The Class Period is defined as the period between January 1, 1999 and August 3, 2010.

5. The deadline to opt out of this action has passed and no member of the Class may opt out in the future.

6. This Order is binding upon each Class Member including those persons who are minors or mentally incapable and the requirements of Rule 20-2 of the *Supreme Court Civil Rules* are dispensed with.

7. The Plaintiff, Majestic Mattress Mfg. Ltd., is appointed as the representative plaintiff for the Class.

8. The following questions are certified as common issues:

Breach of *Competition Act*, R.S.C. 1985, c. C-34

- (a) Did the FXI Defendants, or any of them, engage in conduct pertaining to Flexible Polyurethane Foam Products during the Class Period which is contrary to the applicable section 45 of the *Competition Act* in force at the time of such conduct?
- (b) What damages, if any, are payable by the FXI Defendants, or any of them, to the Class Members pursuant to section 36 of the *Competition Act*?
- (c) What costs, if any, of the investigation into this matter are payable by the FXI Defendants, or any of them, pursuant to section 36 of the *Competition Act*?

Conspiracy

- (d) Did the FXI Defendants, or any of them, conspire to harm the Class Members?
- (e) Did the FXI Defendants, or any of them, act in furtherance of the conspiracy?
- (f) Was the predominant purpose of the conspiracy to harm the Class Members?
- (g) Did the conspiracy involve unlawful acts?

- (h) Did the FXI Defendants, or any of them, conspire to coordinate the amount and/or timing of price increases during the Class Period?
- (i) Did the FXI Defendants, or any of them, conspire to enforce planned price increases during the Class Period?
- (j) Did the FXI Defendants, or any of them, conspire to allocate customers, markets, territories, or any of these things during the Class Period?
- (k) Did the FXI Defendants, or any of them, enter into unlawful agreements regarding price increases, customer allocation, and/or market allocation pertaining to Flexible Polyurethane Foam Products during the Class Period?
- (l) Did the FXI Defendants, or any of them, take unlawful or affirmative steps to conceal the acts found in the determination of Common Issues (h) through (k) (individually or collectively, the "Conspiracy Acts")?
- (m) Did the FXI Defendants, or any of them, know, or should they have known, that the Conspiracy Acts were, in the circumstances, likely to cause injury to the Class Members?
- (n) Did the Class Members suffer economic loss?
- (o) Are the FXI Defendants, or any of them, liable to the Class Members for the tort of civil conspiracy?

Unjust Enrichment and Waiver of Tort

- (p) Have the FXI Defendants, or any of them, been enriched during the Class Period by receipt of overcharges resulting from the alleged conspiracy, on the sale of Flexible Polyurethane Foam Products?
- (q) Have the Class Members suffered a corresponding deprivation relating to the sale of Flexible Polyurethane Foam Products?
- (r) Is there any juristic reason why the FXI Defendants, or any of them, should be entitled to retain the alleged overcharges on the sale of Flexible Polyurethane Foam Products?
- (s) Are the FXI Defendants, or any of them, liable to disgorge to or account to the Class Members for the alleged wrongful profits that they obtained on the sale of Flexible Polyurethane Foam Products to the Class Members based on the doctrine of waiver of tort?

Liability Among Defendants

- (t) To what extent, if any, and on what basis, other than on the basis of successor liability, are the FXI Defendants, or any of them, liable for any damages caused by or attributable to any of the other named defendants, **prior to the existence** of Foamex Innovations, Inc. and Foamex Innovations Canada, Inc.?
- (u) To what extent, if any, and on what basis, are the FXI Defendants, or any of them, liable for any damages caused by or attributable to any of the other named defendants, **after the creation** of Foamex Innovations, Inc. and Foamex Innovations Canada, Inc.?

Damages/Restitution

- (v) Was the price of Flexible Polyurethane Foam Products paid by Class Members during the Class Period set at a supracompetitive rate as a result of the alleged conspiracy? If so, what would the rate have been in a competitive environment?
- (w) What damages, if any, are payable by the FXI Defendants, or any of them, to the Class Members?
- (x) Can the amount of damages be determined on an aggregate basis pursuant to section 24(1) of the *Class Proceedings Act*, and if so, in what amount?
- (y) What restitution, if any, is payable by the FXI Defendants, or any of them, to the Class Members?
- (z) Can the amount of restitution be determined on an aggregate basis and if so, in what amount?
- (aa) Does the FXI Defendants' conduct entitle the Class Members to punitive damages?
- (bb) What is the liability, if any, of the FXI Defendants, or any of them, for court order interest?
- (cc) What is the appropriate distribution of damages and interest to the Class Members and who should pay for the cost of that distribution?

Limitations

- (dd) When did the causes of action set out above accrue?
- (ee) What is the applicable limitation period for each cause of action?

- (ff) Has the limitation period for any cause of action expired?
- (gg) Does discoverability apply to any of the limitation periods?
- (hh) Does the doctrine of equitable fraud apply to postpone the commencement or running of any limitation period?
- (ii) Do any other statutory provisions or doctrines of common law or equity apply to postpone the commencement or running of any limitation period?

9. The Litigation Plan attached as **Schedule "1"** to this order is approved as sufficient for the purposes of certification.

10. The notice of certification (the "Certification Notice") is approved substantially in the form attached to this order as **Schedule "2"**.

11. The plan of dissemination for the Certification Notice (the "Plan of Dissemination") is approved in the form attached as **Schedule "3"**.

12. The Certification Notice shall be disseminated in accordance with the Plan of Dissemination.

13. The Certification Notice and the Plan of Dissemination satisfy s. 19 of the *Class Proceedings Act*.

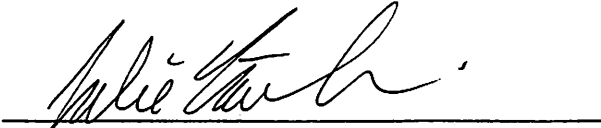
14. Either party may apply to vary this order pursuant to the *Class Proceedings Act* and/or following the release of the decision of the British Columbia Court of Appeal in *Watson v. Bank of America Corporation*, 2014 BCSC 532.

15. This order is without prejudice to the rights and defences of the Other Defendants in connection with this action. No person may cite or refer to all or any part of this order and any reasons given by the Court in connection with this order as against any of the Settling Defendants.

16. Nothing in this order shall amend, vary or alter any of the terms of the order of the Court dated March 19, 2014 relating to the approval of the Settlement Agreement with Valle Foam Industries (1995) Inc. (incorrectly named as Valle Foam Industries Inc. in the Trillium Action, and now know as 3113736 Canada Ltd.), Domfoam International Inc. (now known as 4362063 Canada Ltd.), A-Z Sponge & Foam Products Ltd. and other persons.

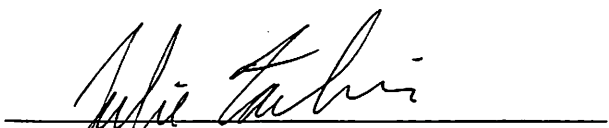
17. Endorsement of this order by the Other Defendants and the Settled Defendants is dispensed with.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:



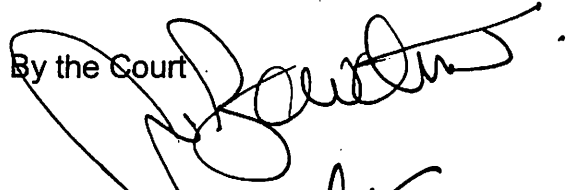
Signature of lawyer for the plaintiff

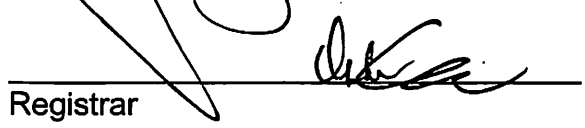
for Reidar Mogerman



Signature of lawyer for Foamex Innovations, Inc., Foamex Innovations Canada, Inc., Vincenzo Bonaddio, Michael Calderoni, Donald Phillips

for H. David Edinger

By the Court 

Registrar 

SCHEDULE "1"

PLAINTIFFS' PROPOSED LITIGATION PLAN

SECTION 1 – GENERAL

- 1.1 In this proposed litigation plan (the "Plan"), terms have the same meaning as given to them in the Notice of Application filed April 2, 2015 (the "Notice of Application") in support of the application for certification, unless otherwise provided herein.
- 1.2 The BC Actions will be litigated in a coordinated manner.
- 1.3 The "Main Proceeding" refers to *Main v. Cadbury Schweppes plc*, Supreme Court of British Columbia, Vancouver Registry No. S078807.

COMPOSITION OF THE CLASS

- 1.4 The BC Actions involve two separate classes, defined as:
 - a. All persons or entities in British Columbia who purchased Flexible Polyurethane Foam Products in Canada during the Class Period, excluding the defendants and their present and former directors, officers, parents, subsidiaries and affiliates (the "BC General Foam Class"); and
 - b. All persons or entities in British Columbia who purchased Carpet Underlay Products in Canada during the Class Period, excluding the defendants and their present and former directors, officers, parents, subsidiaries and affiliates (the "BC Carpet Underlay Class");
- 1.5 All persons who are BC General Foam Class members or BC Carpet Underlay Class members, or both, are collectively referred to as "Class Members".

REPORTING

- 1.6 Class Counsel will report regularly to the Class Members through the website they maintain for the Foam Actions, at www.foamclassaction.ca (the "Website"),

and through their respective firm websites (the "Firm Websites"). The information on the status of the Foam Actions will be updated regularly on the Website and the Firm Websites. Copies of key court documents and other information relating to the Foam Actions are or will be accessible on the Website and the Firm Websites.

- 1.7 The Website contains a "Contact Us" page, allowing the Class Members to submit inquiries to Class Counsel. Inquiries are forwarded to Class Counsel, who will provide a prompt response.
- 1.8 Each firm in the Class Counsel group will designate a person to manage communications with the Class Members.

SECTION 2 – CERTIFICATION APPLICATION

- 2.1 The application for certification for the BC Actions will be heard together.
- 2.2 The application for certification will proceed by consent against the FXI Defendants.

COMMON ISSUES

- 2.3 As part of the application for certification, the plaintiffs parties will jointly submit the common issues to be tried (the "Common Issues") in substantially the form set out in the draft order to which this Plan is attached.

NOTICE

- 2.4 As part of the application for certification, the plaintiffs will ask the BC Court to:
 - a. settle the form and content of the notice of certification (the "Notice of Certification"); and
 - b. settle the means by which the Notice of Certification will be given to the Class Members (the "Notice Program").

- 2.5 With respect to the Certification Notice, the parties will jointly submit to the Court that the notice requirement set out in Rule 19 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "CPA"), is satisfied by posting the Notice of Certification on the Website. In addition, the parties will jointly submit that the Notice of Certification be included as part of the Notice(s) of Settlement that will be provided in respect of the expected settlement approval process(es) with the Other Defendants.
- 2.6 The plaintiffs propose that the Notice of Certification be approved in substantially the form attached as Schedule "2" to the draft certification order to which this Plan is attached as Schedule "1".
- 2.7 The plaintiffs propose that the Notice of Certification be disseminated within 30 days from the making of the order to which this Plan is attached as Schedule "1", substantially in accordance with the Notice Program attached as Schedule "3" to the draft certification orders to which this Plan is attached as Schedule "1".
- 2.8 Pursuant to the orders of the Courts certifying the Foam Actions for settlement purposes only against the Settled Defendants, the class members in the Foam Actions were provided with an opportunity to opt out 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 would not be afforded additional opportunities to opt out of the Foam Actions upon any subsequent certification, including contested certification. As such, no opt-out procedure is required for the subsequent certification of the Foam Actions, including the certification of the BC Actions.

SECTION 3 – LITIGATION STEPS PRECEDING THE COMMON ISSUES TRIAL

CASE CONFERENCES

- 3.1 After disposition of the certification application, Class Counsel will ask the BC Court to schedule a case management conference to schedule the steps in the

BC Actions pending the common issues trial. The schedule will include the litigation steps set out below.

PLEADINGS

- 3.2 If the plaintiffs obtain orders approving the settlement agreements with the Other Defendants ("Settlement Approval Orders") which contain bar orders in a form substantially similar to the bar orders obtained in the Main Proceeding, the FXI Defendants will provide Responses to Civil Claim no later than 7 days following the date on which the Settlement Approval Orders with any and all of the Other Defendants have been approved by the courts in the relevant jurisdictions.
- 3.3 If the plaintiffs do not obtain Settlement Approval Orders which contain bar orders in a form substantially similar to the bar orders obtained in the Main Proceeding, the FXI Defendants will provide Responses to Civil Claim no later than 45 days following the date on which the Settlement Approval Orders with any and all of the Other Defendants have been approved by the courts in the relevant jurisdictions.

DOCUMENT EXCHANGE AND MANAGEMENT

- 3.4 Within 60 days of the making of the order to which this Plan is attached as Schedule "1", the parties will agree on and implement a discovery plan in accordance with the Sedona Conference Principles and a schedule to engage in meet and confers, subject to the BC Court's further orders. If there are areas of disagreement after 30 days, any party may seek direction from the BC Court.
- 3.5 Class Counsel anticipate and are able to handle the intake and organization of the large number of documents that will likely be produced by the FXI Defendants and the Other Defendants and will use data management systems to organize, code, and manage the documents.
- 3.6 The same data management systems will be used to organize and manage all relevant documents in the possession of the plaintiffs.

- 3.7 Prior to examinations for discovery, the plaintiffs will ask the BC Court for an order requiring the FXI Defendants to produce a copy of the transcripts from depositions and answers to interrogatories from the parallel class action in the United States on behalf of U.S. purchasers of polyurethane foam, entitled *In re Polyurethane Foam Antitrust Litigation*, if not already produced as part of the discovery plan.

EXAMINATIONS FOR DISCOVERY

- 3.8 The plaintiffs will conduct an examination for discovery of a representative from each of the FXI Defendants but cannot, until the production of documents has been completed, estimate the time required for each examination. Scheduling will also need to include time for receipt of responses to anticipated undertakings and refusals.
- 3.9 The FXI Defendants, so long as they continue to be represented by jointly retained counsel, will conduct one joint examination for discovery of a representative from Majestic Mattress Mfg. Ltd. and one joint examination for discovery of a representative from Trillium Project Management Ltd.
- 3.10 Any party may ask the BC Court for an order allowing examination of more than one representative of each party, if necessary.
- 3.11 Nothing in this Plan affects the rights of the FXI Defendants to seek documentary and/or oral discovery from the Other Defendants.
- 3.12 Within one year of receiving document production, the parties will complete examinations for discovery, including examinations of the other parties, including the Other Defendants.

EXPERT REPORTS

- 3.13 Class Counsel anticipate the exchange of detailed expert reports.

- 3.14 The plaintiffs propose that the plaintiffs' expert report be served within 75 days of the completion of examinations for discovery, and the FXI Defendants' expert report to be served 75 days thereafter, unless the BC Court orders otherwise.
- 3.15 Within 75 days of both expert reports being filed, cross-examinations on those reports will be completed.

APPLICATIONS

- 3.16 At any stage, any party may bring an application asking the BC Court to clarify or redefine the Common Issues, if required.
- 3.17 Although no applications other than those indicated in the Plan are currently anticipated by the plaintiffs, additional applications may be required and will be scheduled as the case progresses, by any party.

SECTION 4 – TRIAL OF THE COMMON ISSUES

- 4.1 The Common Issues in the BC Actions will be tried together.
- 4.2 The plaintiffs will ask the BC Court to schedule the Common Issues trial to take place on the first available block of 30 days which occurs after completion (actual or projected) of the post-certification steps outlined in sections 3.1 to 3.15 of the Plan, subject to counsel availability, acting reasonably.
- 4.3 The Common Issues trial will determine the existence and scope of the alleged conspiracy. The Common Issues trial may also determine on a class-wide basis whether the Class Members were injured, leading to a finding of liability and a determination of aggregate damages. If the Common Issues trial does not determine injury on a class-wide basis, liability and damages may be determined on an individual basis in a manageable process.
- 4.4 Specifically, the findings of fact and conclusions on the Common Issues will permit the judge at the Common Issues trial to give directions, pursuant to sections 27 and 29 of the CPA, to deal with the remaining individual issues,

including the distribution of any aggregate award, should the judge agree that one can be made.

- 4.5 Any party may seek early summary determination of certain Common Issues, in which case the plaintiffs may seek an earlier trial date.

SECTION 5 – LITIGATION STEPS FOLLOWING THE COMMON ISSUES TRIAL

- 5.1 Within 45 days of a decision in the Common Issues trial, and assuming success for the plaintiffs, the parties shall attend a case conference to set a schedule and to confirm the process to be followed in bringing the BC Actions to final resolution. The process which will be required is totally dependent on the nature of the BC Court's decisions at the Common Issues trial. Two examples of the process which the BC Court may direct are outlined below.

SUMMARY CLAIMS AND DISTRIBUTION OF DAMAGES PROCEDURE

Aggregate Damages

- 5.2 If liability and aggregate damages are determined at the Common Issues trial, a plan for distributing the aggregate damage award will be developed by the plaintiffs, in accordance with section 33 of the CPA, to provide fair compensation through an efficient, timely, and impartial distribution process.
- 5.3 The plaintiffs are aware of the potential need to accommodate varying interests among and potentially within various purchaser groups through independent representation to ensure that all Class Members are treated fairly. If necessary, the BC Court, or a referee appointed by the BC Court, may be asked to determine the division of Class Members into purchaser groups and to determine the division of the aggregate damage award among the purchaser groups, and, if necessary, appoint separate counsel for each purchaser group.
- 5.4 The BC Court, or a referee if one is appointed, may be asked to determine, based on expert evidence, the defendants' sales information, and other evidence which may be necessary to determine:
- a. the allocation of the aggregate damages recovery among the Class Members or purchaser groups;

- b. whether part of the award of aggregate damages should be allocated to the Class Members or to each purchaser group in proportion to the economic harm suffered; and
- c. whether the claims of Class Members should be assessed in a summary claims procedure or in some other manner reasonably expected to benefit the Class Members.

5.5 Once the division of the aggregate damage award between the Class Members and/or purchaser groups has been determined, and assuming claims may be assessed in a summary claims assessment procedure, the plaintiffs will ask that the BC Court implement and adopt a claims procedure pursuant to section 32 of the CPA, which may include the following steps:

- a. setting a claims deadline before which eligible Class Members will be required to file their claims for compensation;
- b. appointment of an administrator to implement the claims process, including the review and assessment of filed claims;
- c. appointment of a referee to review any issues as to eligibility or the value of claims determined by the administrator, if required;
- d. the right to appeal the referee's decision to the BC Court for a final and binding decision; and
- e. the creation of a report by the administrator at the conclusion of the claims procedure.

5.6 The plaintiffs will further propose that the claims assessment procedure, wherever practical, utilize:

- a. a paperless, web-based claims and claims management system;
- b. standardized claims forms and filing procedures;

- c. the defendants' sales records as presumptive proof of a Class Member's purchases, where the Class Member does not contest those records; and
 - d. declarations, affidavits or other summary methods for introducing evidence, if necessary.
- 5.7 As soon as practicable following the expiration of the claims deadline and, if necessary, after any reviews performed by the referee have been completed and appeals resolved, and the amount and number of eligible claims is known, the administrator shall report to the BC Court the name, address, and proposed distribution for each eligible Class Member, including his or her prorated share of any punitive damages award or pre and post-judgment interest award.
- 5.8 Pursuant to section 33 of the CPA, Class Counsel shall thereafter seek directions from the BC Court on a means of distributing Class Members' awards.

Cy-Pres Distribution

- 5.9 If the BC Court determines that a summary claims procedure is not suitable for all or some of the Class Members in certain purchaser groups, Class Counsel anticipate that the portion of the aggregate damage award allocated to those purchaser groups could be paid *cy-pres* to organizations in a manner reasonably expected to benefit the Class Members in those purchaser groups.
- 5.10 If the BC Court determines that a *cy-pres* distribution is the manner in which to compensate certain purchaser groups, the plaintiffs will put forward a *cy-pres* plan for the BC Court's approval.

INDIVIDUAL CLAIMS PROCEDURE: INDIVIDUAL CLASS MEMBERS' DAMAGES

- 5.11 If the BC Court determines certain Common Issues in favour of the Class Members but does not determine liability and award aggregate damages, the amount and distribution of damages will need to be determined in accordance with the provisions of the CPA.

- 5.12 The plaintiffs are aware of the potential need to accommodate varying interests among and potentially within various purchaser groups through independent representation to ensure that all Class Members are treated fairly. If necessary, the BC Court may be asked to determine the division of Class Members into purchaser groups and, if necessary, to appoint separate counsel for each purchaser group.
- 5.13 The plaintiffs anticipate that expert evidence will be led to prove the damages suffered by the Class Members within each purchaser group. Once the amount of damages to be awarded to each purchaser group is determined, Class Counsel anticipate that a process similar to that described in sections 5.4 to 5.7 could be used to determine the claims of each individual Class Member.
- 5.14 If the plaintiffs or their experts conclude that damages cannot be determined either in whole or in part using purchaser groups, expert evidence will be led to prove the damages for some or all Class Members individually. It is anticipated that such a process would be manageable and efficient for the direct purchasers who will be identified by the defendants' business records.
- 5.15 A procedure to allow the Class Members to establish the quantum of their individual entitlement in accordance with section 27 of the CPA could include:
- a. appointment of a referee;
 - b. implementation of a reference process to prove purchases and damages relative thereto; and
 - c. a deadline for the initiation of a reference.
- 5.16 If the BC Court at the Common Issues trial has determined the existence, timeframe, and effect on prices of the alleged conspiracy, proof of individual damages will be greatly simplified. For example, the Class Members who purchased directly from the defendants will in almost all cases be able to determine their presumptive damages by multiplying the overcharge rate

(whether determined on a monthly or annual basis, or averaged over the length of an established conspiracy period) by their purchases from the defendants during the relevant time period.

- 5.17 The plaintiffs anticipate that the FXI Defendants may argue that certain Class Members must account for any damages which they passed on in the course of their distribution channels down to indirect end-user purchasers (i.e. the consumers). Class Members may argue that they do not have to account for the pass-on to the FXI Defendants. The BC Court may have to decide this issue.
- 5.18 If the BC Court determines that pass-on is relevant to the determination of the damages for some or all Class Members, the plaintiffs or their experts will propose a methodology for having this issue determined for various purchaser groups.
- 5.19 Pass-on levels and the appropriate allocation of damages as between Class Members may also be resolved through mediation.

CLASS COUNSEL FEES AND ADMINISTRATION EXPENSES

- 5.20 The BC Court will be asked to fix the amount of Class Counsel fees, disbursements and applicable taxes. Class Counsel will ask the BC Court to direct the administrator and the defendants to pay the Class Counsel fees out of the monies recovered or owing as a first charge.
- 5.21 The BC Court will be asked to fix the costs of the persons appointed to implement and oversee the administration and to order payment of these costs as a second charge on any monies paid by the defendants.
- 5.22 At the case conference following the Common Issues trial, the parties will make submissions on the payment of all other administration costs, including the costs of the notice and the fees of the referees. Alternatively, the BC Court will order that those costs be paid out of the total recovery after payment of counsel fees,

disbursements, and taxes but before any distribution to the eligible Class Members.

FINAL REPORT

5.23 After the administrator makes the final distribution to the Class Members and/or to any *cy-pres* recipients, the administrator shall make its final report to the BC Court in such manner as the BC Court directs and the BC Court will then be asked to discharge the administrator.

SECTION 6 – AMENDMENTS OF THIS PLAN

6.1 This Plan may be amended from time to time by directions given at case management conferences, by further order of the BC Court, or by consent of the parties.

SCHEDULE "2"

NOTICE OF CERTIFICATION AGAINST FXI DEFENDANTS

The BC Court has certified the BC class actions against Foamex Innovations, Inc., Foamex Innovations Canada, Inc., Michael Calderoni, Donald Phillips, and Vincenzo Bonaddio (the "FXI Defendants"). There are no settlements with these defendants and so the actions will be continuing against them.

SCHEDULE "3"

PLAN OF DISSEMINATION

Notice of Certification against FXI Defendants in the Matter of BC Foam Products Class Action Litigation

The plaintiffs propose that the Notice of Certification shall be distributed in the following manner:

1. A copy of the Notice of Certification will be posted in electronic format in English and in French on the websites of Class Counsel, as well as on www.NationalClassActions.ca.

No. S106213
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, Carpenter
Co., Carpenter Canada Co., Woodbridge Foam
Corporation, Flexible Foam Products, Inc., Scottdel Inc.,
Foamex Innovations, Inc., Foamex Innovations Canada,
Inc., Future Foam, Inc., Vincenzo Bonaddio, Michael
Calderoni, Donald Phillips,
Leggett & Platt Inc. and Future Foam, Inc.**

Defendants

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

**ORDER MADE AFTER APPLICATION
CONSENT CERTIFICATION AGAINST FXI DEFENDANTS**

CAMP FIORANTE MATTHEWS MOGERMAN
Barristers & Solicitors
#400 – 856 Homer Street
Vancouver, BC V6B 2W5

Tel: (604) 689-7555
Fax: (604) 689-7554
Email: service@cfmlawyers.ca
Via Mike Bike