



Court File No. VLC-S-S-106362

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,
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

BETWEEN:

TRILLIUM PROJECT MANAGEMENT LTD.

Plaintiff

AND:

HICKORY SPRINGS MANUFACTURING COMPANY,
VALLE FOAM INDUSTRIES, INC., DOMFOAM INTERNATIONAL, INC.,
CARPENTER CO., CARPENTER CANADA CO.,
THE WOODBRIDGE 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

AMENDED NOTICE OF APPLICATION
(CONTESTED-CERTIFICATION AGAINST FXI DEFENDANTS)

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 07/Apr/2015, for the orders set out in Part 1 below.

PART 1: ORDERS SOUGHT

1. ~~An order~~Orders 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. The FXI Defendants have consented to certification on the basis of the orders attached as Schedules "A" and "B" to this Notice of Application.

3.4. 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; except for Molded Foam Products and Technical Foam Products.
- (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.
- (d) "FXI Defendants" means Foamex Innovations, Inc., Foamex Innovations, Canada, Inc., Michael Calderoni, Donald Phillips, and Vincenzo Bonaddio.

- (e) “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.
- (f) “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 Brayannis.
- (g) “Settling 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.
- (h) “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.

4.5. 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.

5.6. 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.

6.7. 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.

7.8. 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.

9. On January 10, 2012, the plaintiffs and petitioners in the Foam Actions entered into a settlement agreement (the "Settlement Agreement") with Domfoam International, Inc. the Settled Defendants and certain related individuals.

~~8. ("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 Brayiannis (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.

9-10. 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.

10-11. 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.

11-12. The Foam Actions were certified/authorized on consent for settlement purposes only against the Settling~~Settled~~ 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.

~~42.13.~~ 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.

~~43.14.~~ 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.

~~44.15.~~ 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.

~~45.16.~~ 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~~The BC Court issued reasons adopting the Ontario reasons on April 24, 2014.

Facchin #1, at para 54.

~~16-17.~~ 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.

18. In January 2015 the plaintiffs and petitioners in the Foam Actions entered into agreements in principle to settle the Foam Actions with the Settling Defendants. These settlements total over \$30 million. If those settlements are approved, the FXI Defendants will be the sole remaining defendants.

Affidavit #1 of Julie Facchin, made 29/Jan/2015 (Facchin #2) at para 4.

Cause of Action

~~17-19.~~ The plaintiffs advance their claims against the defendants on the basis of the following well-established causes of action:

~~(d)~~(a) breach of Part VI of the *Competition Act*;

~~(e)~~(b) civil conspiracy;

~~(f)~~(c) tortious interference with economic interests;

~~(g)~~(d) unjust enrichment; and

~~(h)~~(e) waiver of tort.

Facchin #1, at para 7

18-20. 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

19-21. 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

20-22. 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

21-23. 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

22-24. 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

23-25. 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

24-26. The plaintiffs would not prosecute these actions as individual actions.

Hamilton #4 at para 26
Peitsch #4 at para 27

25-27. The plaintiffs have proposed a workable methodology for the determination of the claims advanced in these actions.

26-28. There are no other preferable means to resolve the claims of the members of the BC Classes.

Representative plaintiff

27-29. 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.~~30. 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.

Fairhurst v. Anglo American PLC, 2014 BCSC 2270.

~~29.~~31. 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~~Settled 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.~~

~~31-32.~~ 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;

~~34-33.~~ Affidavit #4 of David Hamilton, made 21/Feb/2014 in the Trillium Action;

~~35-34.~~ Affidavit #1 of Julie Facchin, made 28/Feb/2014 in the BC Actions;

~~36-35.~~ Affidavit #4 of William Peitsch, made 10/Mar/2014 in the Majestic Action; and

36. Affidavit #2 of Julie Facchin, made 29/Jan/2015 in the BC Actions; 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~~ 2 hours.

This matter is within the jurisdiction of a master.

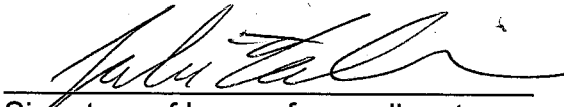
This matter is not within the jurisdiction of a master.

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: ~~11/June/2014~~2/Apr/2015



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:

.....

.....

.....

Date:

Signature of Judge Master

APPENDIX

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

Schedule A

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 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) "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 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 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) "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.
 - (f) "FXI Defendants" means Foamex Innovations, Inc. and Foamex Innovations Canada, Inc. Michael Calderoni, Donald Phillips, and Vincenzo Bonaddio.
2. This action is certified 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:
- 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 some 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 some 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 Defendants, or some 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 some of them, conspire to coordinate the amount and/or timing of price increases during the Class Period?
- (i) Did the FXI Defendants, or some of them, conspire to enforce planned price increases during the Class Period?
- (j) Did the FXI Defendants, or some of them, conspire to allocate customers, markets, territories, or any of these things during the Class Period?

- (k) Did the FXI Defendants, or some 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 some 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 some 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 Defendants, or any of them, should be entitled to retain the alleged overcharges on the sale of Flexible Polyurethane Foam Products?
- (s) Are the 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 Defendants, or some 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 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 Defendants' conduct entitle the Class Members to punitive damages?
- (bb) What is the liability, if any, of the 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.

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

Reidar Mogerman

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

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 Settling 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 Settling 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 Settling 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 Settling 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 Settling 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 Settling 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 Settling 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. and 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

Schedule B

No. S106213
Vancouver Registry

In the Supreme Court of British Columbia

Between

Trillium Project Management Ltd.

Plaintiff

and

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., Vitafoam Products Canada Limited, Vitafoam Incorporated, Vincenzo Bonaddio, Michael Calderoni, Donald Phillips, Leggett & Platt Inc., and Mohawk Industries Inc.

Defendants

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

ORDER MADE AFTER APPLICATION CONTESTED CERTIFICATION

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 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) "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 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 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) "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.
- (f) "FXI Defendants" means Foamex Innovations, Inc. and Foamex Innovations Canada, Inc. Michael Calderoni, Donald Phillips, and Vincenzo Bonaddio.

2. This action is certified 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:

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.

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, Trillium Project Management 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 some of them, engage in conduct pertaining to Carpet Underlay 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 some 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 Defendants, or some 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 some of them, conspire to coordinate the amount and/or timing of price increases during the Class Period?
- (i) Did the FXI Defendants, or some of them, conspire to enforce planned price increases during the Class Period?
- (j) Did the FXI Defendants, or some of them, conspire to allocate customers, markets, territories, or any of these things during the Class Period?

- (k) Did the FXI Defendants, or some of them, enter into unlawful agreements regarding price increases, customer allocation, and/or market allocation pertaining to Carpet Underlay 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 some 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 some 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 Carpet Underlay Products?
- (q) Have the Class Members suffered a corresponding deprivation relating to the sale of Carpet Underlay Products?
- (r) Is there any juristic reason why the Defendants, or any of them, should be entitled to retain the alleged overcharges on the sale of Carpet Underlay Products?
- (s) Are the 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 Carpet Underlay 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 Carpet Underlay 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 Defendants, or some 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 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 Defendants' conduct entitle the Class Members to punitive damages?
- (bb) What is the liability, if any, of the 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.

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

Reidar Mogerman

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

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 Settling 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 Settling 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 Settling 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 Settling 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 Settling 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 Settling 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 Settling 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. and 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

Trillium Project Management Ltd.

Plaintiff

and

**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., Vitafoam Products Canada
Limited, Vitafoam Incorporated, Vincenzo Bonaddio,
Michael Calderoni, Donald Phillips, Leggett & Platt Inc.,
and Mohawk Industries Inc.**

Defendants

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

**ORDER MADE AFTER APPLICATION
CONTESTED CERTIFICATION**

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