S 216008

ACTION NO. _____
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

JOHN MOREL

PLAINTIFF

AND

KONINKLIJKE PHILIPS N.V., PHILIPS ELECTRONICS LTD., PHILIPS CANADA LTD. AND RESPIRONICS INC.

DEFENDANTS

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

NOTICE OF CIVIL CLAIM

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

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

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

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

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

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

Time for response to civil claim

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

(a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,

(b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or

(d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFF

Part 1: STATEMENT OF FACTS

1. This action concerns sleep and respiratory care devices designed, researched, tested, developed, manufactured, assembled, licensed, marketed, distributed, imported and sold by the Defendants, particularly Philips Respironics branded Continuous Positive Airway Pressure (CPAP), Bi-Level Positive Airway Pressure (BIPAP), and Mechanical Ventilators. Such devices are manufactured with a Polyester-Based Polyurethane (PE-PUR) sound abatement foam, which degrades over time and under certain conditions into toxic particles which may be inhaled or ingested by the user (the "Defect").

2. Exposure to or ingestion of the said toxic particles results in the following non-exhaustive list of health consequences:

   a. toxic carcinogenic (cancer causing) effects;

   b. respiratory damage;

   c. inflammatory response;

   d. nausea;

   e. vomiting;

   f. hypersensitivity;

   g. irritation;

   h. headache; and

   i. adverse effects to other organs,

   (collectively, the "Health Risks").

3. The Defendants are related companies. The Defendants designed, researched, tested, developed, manufactured, assembled, licensed, marketed, distributed, imported and sold a variety of sleep and respiratory care devices, including the following:

   - REMSTAR AUTO WITH SD CARD, A-FLEX, CANADA
   - REMSTAR AUTO WITH HUMIDIFIER, WITH SD CARD, A-FLEX, CANADA

- RESTAR PLUS WITH SD CARD, C-FLEX, CANADA
- RESTAR PLUS WITH HUMIDIFIER, WITH SD CARD, C-FLEX, CANADA
- RESTAR PRO WITH SD CARD, C-FLEX +, CANADA
- RESTAR PRO WITH HUMIDIFIER, WITH SD CARD, C-FLEX +, CANADA
- BIPAP AUTO BI-FLEX, WITH HUMIIFIER, WITH SMARTCARD, CANADA
- BIPAP AUTO BI-FLEX, WITH SMARTCARD, CANADA
- BIPAP PRO BI-FLEX, WITH HUMIDIFIER, WITH SMARTCARD, CANADA
- BIPAP PRO BI-FLEX, WITH SMARTCARD, CANADA
- RESTART, WITH HUMIDIFIER, WITH SMARTCARD, CANADA
- RESTAR, WITH SMARTCARD, CANADA
- BIPAP AVAPS, C SERIES VENTILATORY SUPPORT SYSTEM-DOMESTIC
- BIPAP AVAPS, C SERIES VENTILAROTY SUPPORT SYSTEM-CORE PKG, DOMESTIC
- BIPAP ST, C SERIES VENTILATORY SUPPORT SYSTEM-CANADA
- BIPAP ST, C SERIES VENTILATORY SUPPORT SYSTEM-CORE PKG,DOMESTIC
- BIPAP ST, C SERIES VENTILATORY SUPPORT SYSTEM, CORE PKG, CANADA
- OMNILAB ADVANCED, DOMESTIC
- OMNILAB ADVANCED, DOMESTIC CORE
- BIPAP AUTOSV ADVANCED SYSTEM ONE
- DREAMSTATION CPAP
- DREAMSTATION AUTO BIPAP
- DREAMSTATIN BIPAP PRO
- DREAMSTATION CPAP PRO
- DREAMSTATION AUTO CPAP
- DREAMSTATION BIPAP AUTOSV, CA
- DREAMSTATION BIPAP AUTOSV, W/HUMIDIFIER, CA

- DREAMSTATION BIPAP AUTO SV W/HUMID/HEATED TUBE, CA
- BIPAP AVAPS VENTILATORY SUPPORT SYSTEM-CANADA
- BIPAP AVAPS VENTILATORY SUPPORT SYSTEM-CORE PKG, CANADA
- DREAMSTATION GO CPAP
- DREAMSTATION GO AUTO CPAP
- DREAMSTATION EXPERT
- DREAMSTATION GO CPAP WITH HUMIDIFIER, CANADA
- DREAMSTATION GO AUTO CPAP WITH HUMIDIFIER, CANADA

(collectively, the "Respiratory Devices").

4. The Plaintiff, John Morel (the "Plaintiff"), has an address for delivery of 820 – 980 Howe Street, in the City of Vancouver, in the Province of British Columbia. The Plaintiff brings this action on his own behalf and on behalf of a proposed class of similarly situated persons who have purchased the Respiratory Devices and/or other devices designed, researched, tested, developed, manufactured, assembled, licensed, marketed, distributed, imported and sold by the Defendants which are affected by the Defect in Canada (the "Class Members"), to be further defined in the Plaintiff's application for class certification.

5. The Defendant Koninklijke Philips N.V. ("Royal Philips") is a corporation duly incorporated pursuant to the laws of the Netherlands with head offices in Amsterdam, the Netherlands. Royal Philips holds itself out as a health technology corporation improving people's health and well-being. At all material times, Philips controlled the design, research, testing, development, manufacture, assembly, licensing, marketing, distribution, importation and sale of the Respiratory Devices.

6. The Defendant, Philips Electronics Ltd. and Philips Canada Ltd. (collectively, "Philips") are corporations duly incorporated pursuant to the laws of Ontario. Philips holds itself out as a health technology corporation improving people's health and well-being. At all material times, Philips controlled the design, research, testing, development, manufacture, assembly, licensing, marketing, distribution, importation and sale of the Respiratory Devices in Canada.

7. The Defendant, Respironics Inc., is a corporation duly incorporated pursuant to the laws of Pennsylvania with a head office in Murraysville, Pennsylvania, in the United States of America. Respironics Inc. manufacturers medical devices. At all material times, Respironics controlled the design, research, testing, development, manufacture, assembly, licensing, marketing, distribution, importation and sale of the Respiratory Devices.

8. At all material times, each of the Defendants hereinabove was the agent, servant, employee, partner, alter ego, aider and abettor, co-conspirator and/or joint venturer of each of the remaining Defendants named herein and were at all times operating and acting within the purpose and scope of said agency, service, employment, partnership, conspiracy, and/or joint venture, and each Defendants has ratified and approved the acts of each of the remaining Defendants.

9. The business of each of the Defendants is inextricably interwoven with that of the other and each is the agent of the other for the purpose of the design, research, testing, development, manufacture, assembly, licensing, marketing, distribution, importation and sale of the Respiratory Devices.

The Respiratory Devices

10. At all material times, the Defendants designed, researched, tested, developed, manufactured, assembled, licensed, marketed, distributed, imported and sold the Respiratory Devices in Canada.

11. The Defendants obtained a license from Health Canada to sell the Respiratory Devices as medical devices under the *Food and Drugs Act*, RSC 1985, c. F-27.

12. The Defendants marketed the Respiratory Devices as safe and effective, and highlighted the Respiratory Device's superiority in reducing sound levels resulting from use of a similar product and allowing for quiet, comfortable sleep.

13. The PE-PUR sound abatement foam used in the Respiratory Devices to achieve the low noise levels represented by the Defendants is the source of the Defect.

14. The Defendants have represented in their communications to consumers that their Respiratory Devices are safe and effective. Misleading and/or deceptive statements, express and implied, made by the Defendants include the following:

- That the Defendants were a "health technology company improving people's health and well-being through meaningful innovation";
- That the Defendants were a "global leader in the sleep and respiratory markets [...] providing solutions that lead to healthier patients";
- That the Defendants' 30 years of innovation in continuous positive airway pressure (CPAP) systems provided the expertise necessary to produce a safe and effective product;
- That the Defendants provided patients "the very best" with their products;
- That the Respiratory Devices had been "thoroughly tested";
- That the Respiratory Devices provided "safe, effective therapy";

- The Respiratory Devices were "patient driven" and "guided by nearly 700 interview and surveys" of patients in order to produce a high quality product;

- That the Respiratory Devices "are designed to be as comfortable and easy to experience as sleep is intended to be. Connecting patients and care teams, [Respiratory Devices] empower users to embrace their care with confidence, and enable care teams to practice efficient and effective patient management"; and

- Such further and other misrepresentations as may be proven at trial.

(collectively, the "Misrepresentations").

15. In addition, the advertising, manuals, and disclosure provided by Defendants do not warn of the potential for the PE-PUR foam in the Respiratory Device to degrade into a toxic substance capable of being inhaled or ingested or of any of the Health Risks resulting from exposure to the toxic substance (collectively, the "Omissions").

16. The user manual for the Respiratory Devices provides a warranty that the Respiratory Devices shall be free from defects of workmanship and materials and perform in accordance with the product specifications for a period of two (2) years from sale. Respiratory Devices sold in breach of the warranty would be repaired or replaced at the Defendants' option.

17. It is an implied condition of the warranty that the repair or replacement occur in a reasonable time.

18. The Plaintiff brings this action against the Defendants, and each of them, based on their negligent design, research, testing, development, manufacturing, assembly, licensing, marketing, distribution, import, and/or sale of the Respiratory Devices, their Misrepresentations and Omissions about the safety and efficacy of the Respiratory Devices, their disregard to the risks of using the Respiratory Devices, and their failure to adequately warn consumers of the risks associated with the Respiratory Devices.

The Defect and Recall

19. The Defendants were aware of the Defect and the Health Risks by at least April 26, 2021. The Defendants updated investors on April 26, 2021 that user reports and testing indicated possible risks to users related to the sound abatement foam (the PE-PUR foam) in the Respiratory Devices.

20. Notwithstanding this knowledge, the Defendants continued to sell the Respiratory Devices.

21. On or about June 14, 2021, the Defendants issued a recall notice for the Respiratory Devices in the United States only, stating that the recall was intended to mitigate potential health risks resulting from the Defect.

22. The Defendants' recall notice issued on June 14, 2021 advised patients and customers using Respiratory Devices that are not life-sustained mechanical ventilator devices to discontinue use.

23. On or about June 23, 2021, Health Canada recalled all of the Defendants' Respiratory Devices in Canada (the "Recall"). The Recall stated as follows:

> Philips has become aware of two (2) issues that may pose a risk for patients or users of Philips Respironics branded Continuous Positive Airway Pressure (CPAP), Bi-Level Positive Airway Pressure (BIPAP), and Mechanical Ventilators:
>
> Philips has determined from user reports and testing that the Polyester-Based Polyurethane (PE-PUR) sound abatement foam used in Philips continuous and non-continuous ventilators may degrade under certain circumstances, and the degraded particles could potentially enter the air pathway of the device. This issue affects Philips Respironics branded CPAP's, Bi-Levels, and Mechanical Ventilators.
>
> The results of testing performed by Philips indicate that the PE-PUR sound abatement foam used in these devices may emit certain chemicals. Our investigation to date indicates that this emission occurs during initial operation and may possibly continue throughout the device's useful life.
>
> These issues impact all device product platforms manufactured with Polyester Polyurethane (PE-PUR) sound abatement foam. There is no specific population of device serial numbers which are impacted.

24. Prior to the Recall, the Defendants had sold millions of Respiratory Devices manufactured with the PE-PUR foam which is the subject of the Defect.

The Plaintiff

25. In or about early 2019, the Plaintiff purchased a Respironics branded Philips DreamStation CPAP from a retailer, Sleeptech, located in Courtenay, British Columbia.

26. The Plaintiff viewed and relied on the Misrepresentations and Omissions made in the public domain that the Respiratory Device was safe and effective.

27. The Plaintiff used the Respiratory Device as directed in the user manual which accompanied the Respiratory Device at purchase.

28. In June, 2021, the Plaintiff learned through the Defendant Royal Philips' website that the Respiratory Device contained the Defect and imposed the Health Risks. Several days later, he became aware of the Recall and confirmed that the Respiratory Device he purchased was included in the Recall.

29. The Plaintiff would not have purchased the Respiratory Device had he been provided with accurate information and/or warnings with respect to the Defect and Health Risks

resulting from use of the Respiratory Device. The Plaintiff was misled by the statements made by the Defendants with respect to the safety and efficacy of their products.

30. Since learning of the Health Risks the Respiratory Device posed, the Plaintiff has suffered mental distress and anxiety. Further, he has lost the use of the Respiratory Device and, as a result, has lost the benefit of treatment for the medical condition for which he purchased the Respiratory Device.

Part 2: RELIEF SOUGHT

31. The Plaintiff claims, on his own behalf, and on behalf of a class of similarly situated persons residing in Canada, as follows:

a. An order certifying this action as a class proceeding and appointing the Plaintiff as the representative Plaintiff under the *Class Proceedings Act*;

b. An order that the Respiratory Devices are defective;

c. A declaration that the Defendants provide an accounting and disgorge, for the benefit of the Plaintiff and Class Members, all or part of the profits the Defendants received for the sale of the Respiratory Devices, or to make full restitution to the Plaintiff and Class Members;

d. General damages;

e. Special damages for out-of-pocket expenses including:

i. the cost of purchasing the Respiratory Devices and/or replacements that are safer and more efficacious; and

ii. costs of medical monitoring and medical tests resulting from the exposure to the toxins released by the Defect,

f. Punitive damages;

g. Relief pursuant to the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and comparable legislation in the other provinces and territories;

h. Relief pursuant to the *Competition Act*, RSC c. C-34;

i. Costs;

j. Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79; and

k. Such further and other relief this Honourable Court may deem just.

Part 3: LEGAL BASIS

Negligence and Failure to Warn

32. As the designers, researchers, testers, developers, manufacturers, assemblers, licensors, marketers, distributors, importers and/or sellers of the Respiratory Devices, the Defendants

were in such a close and proximate relationship to the Plaintiff, and other Class Members, as to owe them a duty of care. They caused the Respiratory Devices to be introduced into the stream of commerce in Canada, and they knew that any damages or adverse effects related to the Respiratory Devices would cause foreseeable injury to the Plaintiff and Class Members.

33. The Defendants, and each of them, owed a duty to the Plaintiff and Class Members to exercise reasonable care when designing, researching, testing, developing, manufacturing, assembling, licensing, marketing, distributing, importing and selling the Respiratory Devices.

34. The Defendants, and each of them, owed a duty to the Plaintiff and Class Members to properly, adequately, timely and fairly warn the Plaintiff and Class Members of the Defect and the associated Health Risks with the use of the Respiratory Devices.

35. The Defendants, and each of them, owed a duty of care to the Plaintiff and Class Members to ensure that Respiratory Devices were safe and effective for their intended use. Particulars of the Defendants' negligence include:

a. Placing the Respiratory Devices on the market when they knew or ought to have known that the products had potential risks that outweighed their potential benefits;

b. Manufacturing and/or marketing a product that they know, or ought to have known, had an unreasonably high risk of harm to its users;

c. Failing to ensure the Respiratory Devices did not pose dangers to the Plaintiff and Class Members during the course of their use that were not warned of and that they were not of merchantable quality;

d. Failing to conduct any or any adequate follow up and studies on the efficacy and safety of the Respiratory Devices;

e. Failing to conduct any or any adequate long-term studies of the risks of the Respiratory Devices;

f. Failing to warn, or appropriately warn, of the risk associated with the Respiratory Devices;

g. Failing to implement a timely recall of the Respiratory Devices once the Defect was known to them;

h. Designing a product that was not fit for the purpose for which it was intended;

i. Manufacturing and/or marketing a product that was not fit for the purpose for which it was intended;

j. Failing to manufacture and/or market a product in a good and workmanlike manner and in accordance with generally accepted standards; and

k. Such further and other particulars of negligence as will be alleged at trial.

Unjust Enrichment

36. Further, and in the alternative, the Plaintiff pleads that he and the Class Members are entitled to claim and recover based on equitable and restitutionary principles.

37. As an expected and intended result of their unlawful conduct, the Defendants have profited and benefited from purchases of their Respiratory Devices which would not have been made but for the unlawful conduct.

38. By illegally and deceptively promoting Respiratory Devices, directly, through their control of third parties, and by acting in concert with third parties, the Defendants have been unjustly enriched by the receipt of the revenue from the sale of the Respiratory Devices:

    a. Revenue was acquired in a manner in which the Defendants cannot in good conscience retain;

    b. The integrity of the medical device regulations and marketplace would be undermined if the court did not require an accounting;

    c. Absent the Defendants' tortious conduct, the Respiratory Devices could not have been marketed nor would the Defendants have received any revenue from its sale in Canada; and

    d. The Defendants engaged in wrongful conduct by putting into the marketplace a medical device which causes or has the potential to cause serious risk of injury.

39. The Defendants must disgorge their unjustly acquired profits and other monetary benefits resulting from its unlawful conduct and provide restitution to the Plaintiff and the Class Members.

Breach of Warranty

40. As an express and implied warrantor of the Respiratory Devices, the Defendants had certain obligations to conform the Respiratory Devices to their warranties.

41. The Defendants marketed, distributed and/or sold the Respiratory Devices as safe and effective medical devices through independent retail dealers. The Defendants also marketed, distributed and/or sold the Respiratory Devices as superior to competing products due to reduced noise levels during use. Such representations formed the basis of the bargain in the Plaintiff's and Class Members' decisions to purchase the Respiratory Devices.

42. In connection with the purchase of the Respiratory Devices, the Defendants provided warranty coverage for the Respiratory Devices for 2 years, requiring the Defendants to repair or replace any part of the Respiratory Devices that is defective with regular use.

43. It was an implied term of the warranty that the repair or replacement would occur within a reasonable time.

44. The Defendants' warranty formed a basis of the bargain that was reached when the Plaintiff and Class Members purchased their Respiratory Devices.

45. The Plaintiff and Class Members owned and used Respiratory Devices with the Defect within the two year warranty period but had no knowledge of the Defect and therefore no ability to receive the benefit of the warranty. The Defect was known and concealed by the Defendants.

46. Despite the existence of the warranty, the Defendants failed to inform the Plaintiff and Class Members that the Respiratory Devices contained the Defect during the warranty period and thus wrongfully transferred the costs of repair or replacement to the Plaintiff and Class Members.

47. The Defendants breached the warranty promising to repair or replace any part of the Respiratory Devices that was defective with regular use. The Defendants knew about the Defect in the Respiratory Devices, allowing them to cure their breach of warranty if they chose.

48. However, the Defendants concealed the Defect and have neglected, failed and/or refused to repair or replace those portions or all of the Respiratory Devices affected by the Defect outside of the warranty period despite the Defect's existence at the time of sale of the Respiratory Devices.

49. Any attempt by the Defendants to disclaim or limit recovery to the terms of the warranty is unconscionable and unenforceable. Specifically, the Defendants' warranty limitation of 2 years is unenforceable because they knew or ought to have known that they were selling a defective product without informing the Plaintiff or Class Members about the Defect in the Respiratory Devices. Alternatively, the Defendants did not know about the Defect at the time of sale of the respiratory Devices but failed to give the Plaintiff and Class Members notice of the Defect once it was discovered by the Defendants during the warranty period.

50. The time limits contained in the Defendants' warranty are also unconscionable and inadequate to protect the Plaintiff and Class Members. Among other things, the Plaintiff and Class Members had no meaningful choice in determining these time limitations, the terms of which unreasonably favoured the Defendants. A gross disparity in bargaining power existed between the Defendants and the Plaintiff or Class Members and the Defendants knew or should have known the Defect existed at the time of sale of the Respiratory Products. Alternatively, the Defendants did not know about the Defect at the time of sale of the respiratory Devices but failed to give the Plaintiff and Class Members notice of the Defect once it was discovered by the Defendants during the warranty period.

51. Further, the limited warranty promising to repair or replace the part or whole of the respiratory Devices affected by the Defect fails in its essential purpose because the contractual remedy is insufficient to make the Plaintiff or Class Members whole because the source of the Defect in the Respiratory Devices, the PE-PUR foam, provided the sound proof quality of the Respiratory Devices which was the differentiating factor

between the Respiratory Devices and other products on the market. Affording the Defendants a reasonable opportunity to cure the breach of written warranties, therefore, would be unnecessary and futile.

Business Practices and Consumer Protection Act

52. The Defendants' solicitations, offers, advertisements, promotions, sales and supply of Respiratory Devices to the Plaintiff and by Class Members were "consumer transactions" within the meaning of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"). With respect to those transactions, the Plaintiff and Class Members who purchased Respiratory Devices are "consumers" and the Defendants were "suppliers" within the meaning of the *BPCPA*.

53. The Defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of Respiratory Devices had the capability, tendency or effect of deceiving or misleading consumers regarding the safety and efficacy of Respiratory Devices. The Defendants' conduct in their solicitations, offers, advertisements, promotions, sales and supply of Respiratory Devices were deceptive acts and practices contrary to s. 4 of the *BPCPA*. The Defendants' deceptive acts and practices included the Misrepresentations and Omissions, as described above.

54. As a result of the Defendants' deceptive acts and practices, the Plaintiff and Class Members have suffered loss and damages. The Plaintiff seeks injunctive relief and declaratory relief and damages and statutory compensation pursuant to ss. 171 and 172 of the *BPCPA* on his own behalf and on behalf of Class Members who purchased Respiratory Devices. Such relief includes the disgorgement of the profits or revenues received by the Defendants from the sale of Respiratory Devices in Canada.

55. The declaratory and injunctive relief sought by the Plaintiff in this case includes an order under s. 172 of the *BPCPA* that the Defendants advertise any judgment against them and that they properly inform consumers and their retailers of the risks of Respiratory Devices.

56. The Plaintiff further pleads and relies on the comparable legislation from the other provinces and territories:

    a. *Consumer Protection Act*, R.S.Q. c. P-40.1, as amended, including ss. 219 and 272;

    b. *Fair Trading Act*, R.S.A. 2000, c. F-2, as amended, including ss. 6, 7, and 13;

    c. *The Consumer Protection Act*, S.S. 1996, c. C-30.1, as amended, including ss. 5-8, 14, 16, 48, and 65;

    d. *The Business Practices Act*, S.M. 1990-91, c. 6, as amended, including ss. 2 and 23;

    e. *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A. as amended, including ss. 8, 11, and 14;

    f. *The Competition Act*, R.S. 1985, c. C-34, as amended, including ss. 36 and 52;

g. *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1, including ss. 4, 10, 12, 14-18, 23, and 27;

h. *Consumer Protection Act*, R.S.N.S. 1989, c. 92, including ss. 26 and 28A;

i. *Business Practices Act*, R.S.P.E.I. 1998, c. B-7, as amended, including ss. 2-4; and

j. *Trade Practices Act*, R.S.N.L. 1990, c. T-71, as amended, including ss. 5, 6, and 14.

Breaches of the Competition Act

57. As a result of the Misrepresentations and Omissions, the Defendants breached section 52 of the *Competition Act*, RSC c C-34 (the "*Competition Act*") and committed an unlawful act because their representations and omissions:

a. were made for the purpose of promoting, directly or indirectly, the use of the Respiratory Devices;

b. were made for the purpose of promoting indirect or directly, any business interests of the Defendants;

c. were made to the public;

d. were made knowingly and recklessly; and

e. were false and misleading in a material respect.

58. The Plaintiffs and the Class Members suffered damages as a result of the Defendants' unlawful breach of section 52 of the *Competition Act*. Those damages include

a. purchasing and using the Respiratory Devices when they would not have otherwise done so;

b. the cost of purchasing the Respiratory Devices;

c. the cost of purchasing replacement Respiratory Devices;

d. diminished quality of life as a consequence of being deprived of the intended therapy of the Respiratory Devices after having to discontinue use as a result of the Defect;

e. the cost of medical monitoring and medical tests resulting from the exposure to the toxins released by the Defect; and

f. other losses as may be proven at trial.

59. The Plaintiffs and Class Members also seek their costs of investigation, pursuant to section 36 of the *Competition Act*.

Causation and Damages

60. As a result of the Defendants' negligence, breach of contract, and the Defendants' breach of the *BPCPA*, the Plaintiff and Class Members have suffered and will continue to

suffer loss and damage. Such loss and damage was foreseeable by the Defendants. Particulars of the loss and damage suffered by the Plaintiff and Class Members which were caused or materially contributed to by the aforementioned acts of the Defendants include:

a. personal injury including:

   i. mental distress attendant on discovering that the Respiratory Devices exposed users to toxins; and

   ii. diminished quality of life as a consequence of being deprived of the intended therapy of the Respiratory Devices after having to discontinue use as a result of the Defect;

b. special damages for out-of-pocket expenses including:

   i. purchasing the Respiratory Devices and/or replacements that are safer and more efficacious; and

   ii. costs of medical monitoring and medical tests resulting from the exposure to the toxins released by the Defect; and

c. cost of future care; and

d. loss of both past and prospective income.

61. The conduct of the Defendants warrants a claim for punitive damages. They have conducted themselves in a high-handed, wanton, and reckless manner, and without regard to public safety.

62. This case raises issues of general deterrence. A punitive damage award in this case is necessary to express society's condemnation of conduct such as the Defendants', to advance public safety and to achieve the goal of both specific and general deterrence.

Health Care Cost Recovery

63. The Plaintiff relies upon health and hospital insurance legislation in British Columbia and similar legislation elsewhere and claims health care costs incurred by himself and Class Members and paid by provincial and territorial governments as a result of the wrongdoing of the Defendants:

a. On behalf of Her Majesty the Queen in right of the Province of New Brunswick, the Plaintiffs claim the cost of "entitled services" under *Health Services Act*, SNB 2014, c 112, ss 1 and 3 and *General Regulation*, NB Reg 84-115, s 2 and Schedule II.

b. On behalf of the government of British Columbia, the Plaintiffs claim the past and future cost of providing "health care services" under *Health Care Costs Recovery Act*, SBC 2008, c 27, ss 1-3 and 7 and *Health Care Costs Recovery Regulation*, BC Reg 397/2008, s 3.

c. On behalf of Her Majesty in right of Alberta and the Minister of Health of Saskatchewan, the Plaintiffs claim the direct and indirect costs of past and future "health services" under *Crown's Right of Recovery Act*, SA 2009, c C-35, ss 1 and 38 and *Crown's Right of Recovery Regulation*, Alta Reg 87/2012, s 3; and *The Health Administration Act*, RSS 1978, c H-0.0001, s 19.

d. On behalf of the Minister of Health of Manitoba, the Plaintiffs claim the past and future cost of "insured hospital, medical, and other services under *The Health Services Insurance Act*, RSM 1987, c H35, ss 2, 97 and *The Medical Services Insurance Regulation*, Man Reg 49/93, s 1.

e. On behalf of Her Majesty in right of the Province of Nova Scotia, the Plaintiffs claim the past and future cost of "insured hospital services", and other care, services, and benefits under *Health Services and Insurance Act*, RSNS 1989, c 197, ss 2 and 18.

f. On behalf of the Government of Yukon, and the Ministers of Health of the Northwest Territories and Nunavut, the Plaintiffs claim the cost of providing "insured services", including in-patient and out-patient services under *Hospital Insurance Services Act*, RSY 2002, c 112, ss 1 and 10-11 and *Yukon Hospital Insurance Services Regulations*, YCO 1960/35, s 2; *Hospital Insurance and Health and Social Services Administration Act*, RSNWT 1988, c T-3, ss 1 and 19-20 and *Hospital Insurance Regulations*, RRNWT 1990, c T-12, s 1; *Hospital Insurance and Health and Social Services Administration Act*, RSNWT (Nu) 1988, c T-3, ss 1 and 19-20 and *Hospital Insurance and Health and Social Services Administration Act*, RSNWT (Nu) 1988, c T-3, s 1.

g. On behalf of the Ontario Health Insurance Plan, the province of Quebec, the Minister of Health and Wellness of Prince Edward Island, and the Crown in right of Newfoundland and Labrador, the Plaintiffs claim the cost of "insured services" under *Health Insurance Act*, RSO 1990, c H.6, ss 1, 11.2, and 30-31 and *General*, RRO 1990, Reg 552; *Hospital Insurance Act*, CQLR c A-28, ss 1 and 1 O and *Regulation* respecting the application of the *Hospital Insurance Act*, CQLR c A-28, r 1, s 3 and *Health Insurance Act*, CQLR A-29, ss 1, 3, and 18; *Hospital and Diagnostic Services Insurance Act*, RSPEI 1988, c H-8, ss 1 and 14 and *General Regulations, PEI* Reg EC539/63, s 1; and *Hospital Insurance Agreement Act*, RSNL 1990, c H-7, s 5 and *Hospital Insurance Regulations*, CNLR 742/96, s 2 and Schedule.

Jurisdiction

64. The Plaintiff relies on ss. 13, 7, and 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 and pleads that there is a real and substantial connection between the subject matter of this action and the Province of British Columbia for the following reasons:

a. The Defendants marketed and sold the Respiratory Devices in Canada;

b. The Plaintiff resides in British Columbia; and

c. The Plaintiff's damages were sustained in British Columbia.

ENDORSEMENT ON ORIGINATING PLEADING OR PETITION

FOR SERVICE OUTSIDE BRITISH COLUMBIA

The Plaintiff claims the right to serve this pleading/petition on the Defendants outside British Columbia on the ground that:

The Plaintiff has at all material times been a resident of British Columbia and has suffered loss in British Columbia. The Supreme Court of British Columbia has jurisdiction with respect to this matter and the Plaintiff pleads the *Court Jurisdiction and Proceedings Transfer Act*, 2003, SBC Chapter 28 and amendments thereto.

Plaintiff's address for service:	**RICE HARBUT ELLIOTT LLP** Barristers and Solicitors 820 - 980 Howe Street Vancouver, BC V6Z 0C8 **THOMSON ROGERS** Barristers and Solicitors 390 Bay Street, Suite 3100 Toronto, Ontario M5H 1W2
Fax number address for service (if any):	(604) 682-0587
E-mail address for service (if any):	Nil
Place of trial:	Vancouver
The address of the registry is:	800 Smithe Street, Vancouver

Date: 24/June/2021

Signature of ☐ plaintiff
☒ lawyer for plaintiff
Anthony Leoni
LSBC #505576
Stephen Birman
LSO #55164F

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

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

Appendix

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

A claim for negligence and breach of consumer protection legislation with loss and damages to the Plaintiff and a class of similarly situated persons resident in Canada.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- ☐ a motor vehicle accident
- ☐ medical malpractice
- ☒ another cause

A dispute concerning:

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

Part 3: THIS CLAIM INVOLVES:

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

Part 4:

1. *Class Proceedings Act*, R.S.B.C. 1996, c. 50;
2. *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2;
3. *Competition Act*,