SCHEDULE “A”

Amended pursuant to Rule 6-2(7) and (8) and the Order of the Honourable Justice Ker pronounced on _____, 2022.

Original Notice of Civil Claim filed on June 24, 2021.

ACTION NO. S216008
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

JOHN MOREL

PLAINTIFF

AND

KONINKLIJKE PHILIPS N.V., PHILIPS ELECTRONICS LTD., ~~PHILIPS CANADA LTD.~~ PHILIPS NORTH AMERICA LLC, PHILIPS RS NORTH AMERICA LLC, and RESPIRONICS INC.

DEFENDANTS

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

SECOND AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the plaintiffs 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 Philips. Such devices contain a polyester-based polyurethane sound abatement foam ("**PE-PUR Foam**") that degrades into toxic particles that can be inhaled or ingested by patients ("**Degradation**"). The process of Degradation also emits toxic chemicals that can be inhaled or ingested by patients ("**Off-Gassing**"). Philips' machines not only contain this dangerous foam, but also are designed in such a manner that the heat from the motor accelerates Degradation and then air is blown through the foam and directly into patients' respiratory tracts. Collectively, the choice to use this foam and the design features that exacerbate its effects are the "**Defects**".

A. Defined Terms

2. In this Notice of Civil Claim, the following terms have the following meanings:

(a) "**Class**" or "**Class Members**" means all persons in Canada who purchased and/or used one of the Recalled Products, plus Estate Subclass Members and Family Subclass Members, but not including Excluded Persons;

(i) "**Estate Subclass**" or "**Estate Subclass Members**" means both of the following:

(1) The heirs of persons in Québec who died because they used the Recalled Products; and

(2) The estates of person in the rest of Canada who died because they used the Recalled Products.

(ii) "**Family Subclass**" or "**Family Subclass Members**" means all of the following:

(1) The adult interdependent partners, parents, children, brothers, and sisters of persons in Alberta who died because they used the Recalled Products;

(2) The spouses, parents, and children of persons in British Columbia who died because they used the Recalled Products;

(3) The spouses, common-law partners, support recipients, parents, children, brothers, and sisters of persons in Manitoba who died because they used the Recalled Products;

(4) The spouses, parents, children, brothers, and sisters of persons in New Brunswick who died because they used the Recalled Products;

(5) The spouses, partners, parents, and children of persons in Newfoundland and Labrador who died because they used the Recalled Products;

(6) The spouses, parents, and children of persons in the Northwest Territories who died because they used the Recalled Products;

(7) The spouses, common-law partners, parents, and children of persons in Nova Scotia who died because they used the Recalled Products;

(8) The spouses, parents, and children of persons in Nunavut who died because they used the Recalled Products;

(9) The spouses, children, grandchildren, parents, grandparents, brothers, and sisters of persons in Ontario who died or suffered injuries because they used the Recalled Products;

(10) The dependants of persons in Prince Edward Island who died because they used the Recalled Products;

(11) The heirs and children of persons in Québec who died because they used the Recalled Products;

(12) The spouses, parents, and children of persons in Saskatchewan who died because they used the Recalled Products; and

(13) The spouses, parents, and children of persons in the Yukon who died because they used the Recalled Products;

(b) "**CPAP**" device means a Continuous Positive Airway Pressure device;

(c) "**BiPAP**" device means a Bi-Level Positive Airway Pressure device;

(d) "***Competition Act***" means the *Competition Act*, RSC 1985, c C-34;

(e) "**Consumer Protection Acts**" means all of the following:

(i) The *Consumer Protection Act*, R.S.A. 2000, c. C-26.3 (the "**AB Consumer Protection Act**");

(ii) The *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "**BC Consumer Protection Act**");

(iii) *The Business Practices Act*, C.C.S.M. c. B120 (the "**MB Consumer Protection Act**");

(iv) The *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1 (the "**NL Consumer Protection Act**");

(v) The *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A (the "**ON Consumer Protection Act**");

(vi) The *Business Practices Act*, R.S.P.E.I. 1988, c. B-7 (the "**PEI Consumer Protection Act**");

(vii) The *Consumer Protection Act*, C.Q.L.R. c. P-40.1 (the "**QC Consumer Protection Act**"); and

(viii) *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2 (the "**SK Consumer Protection Act**");

(f) "***CPA***" means the *Class Proceedings Act*, R.S.B.C. 1996, c. 50;

(g) "**Excluded Persons**" means:

(i) Philips and their officers and directors; and

(ii) The heirs, successors, and assigns of the persons described in subparagraph (i) above;

(h) "**Fatal Accidents Acts**" means all of the following:

(i) The *Fatal Accidents Act*, R.S.A. 2000, c. F-8 (the "**AB Fatal Accidents Act**");

(ii) The *Family Compensation Act*, R.S.B.C. 1996, c. 126 (the "**BC Fatal Accidents Act**");

(iii) *The Fatal Accidents Act*, C.C.S.M. c. F50 (the "**MB Fatal Accidents Act**");

(iv) The *Fatal Accidents Act*, R.S.N.B. 2012, c. 104 (the "**NB Fatal Accidents Act**");

(v) The *Fatal Accidents Act*, R.S.N.L. 1990, c. F-6 (the "**NL Fatal Accidents Act**");

(vi) The *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3 (the "**NWT Fatal Accidents Act**");

(vii) The *Fatal Injuries Act*, R.S.N.S. 1989, c. 163 (the "**NS Fatal Accidents Act**");

(viii) The *Fatal Accidents Act*, R.S.N.W.T. (Nu) 1988, c. F-3 (the "**NU Fatal Accidents Act**");

(ix) The *Family Law Act*, R.S.O. 1990, c. F.3 (the "**ON Fatal Accidents Act**");

(x) The *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5 (the "**PEI Fatal Accidents Act**");

(xi) *The Fatal Accidents Act*, R.S.S. 1978, c. F-11 (the "**SK Fatal Accidents Act**"); and

(xii) The *Fatal Accidents Act*, R.S.Y. 2002, c. 86 (the "**YK Fatal Accidents Act**");

(i) "**Healthcare Acts**" means all of the following:

(i) The *Crown's Right of Recovery Act*, S.A. 2009, c. C-35 (the "**AB Healthcare Act**");

(ii) The *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 (the "**BC Healthcare Act**");

(iii) The *Health Services Act*, R.S.N.B. 2014, c. 112 (the "**NB Healthcare Act**");

(iv) The *Health Services and Insurance Act*, R.S.NS. 1989, c. 197 (the "**NS Healthcare Act**"); and

(v) The *Hospital and Diagnostic Services Insurance Act*, R.S.P.E.I. 1998, c. H-8 (the "**PEI Healthcare Act**");

(j) "**Health Risks**" means all adverse effects that can result from exposure to PE-PUR Foam or by-products of Degradation and Off-Gassing, including but not limited to:

(i) Carcinogenic (cancer causing) effects;

(ii) Respiratory damage and asthma;

(iii) Irritation of the eyes and throat;

(iv) Nausea and vomiting;

(v) Headache and dizziness; and

(vi) Adverse effects to other organs;

(k) "**Philips**" means the defendants, jointly and severally;

(l) "**Plaintiff**" means John Morel;

(m) "**Recalled Products**" means:

(i) The A-Series BiPAP A30;

(ii) The A-Series BiPAP A40;

(iii) The A-Series BiPAP V30 Auto;

(iv) The A-Series Hybrid A30;

(v) The BiPAP Auto Bi-Flex, with Humidifier, with Smartcard, Canada;

(vi) The BiPAP Auto Bi-Flex, with Smartcard, Canada;

(vii) The BiPAP Auto SV Advanced system One;

(viii) The BiPAP AVAPS, C Series Ventilatory Support System-Domestic;

(ix) The BiPAP AVAPS, C Series Ventilatory Support System-Core PKG, Domestic;

(x) The BiPAP AVAPS Ventilatory Support System-Canada;

(xi) The BiPAP AVAPS Ventilatory Support System-Core PKG, Canada;

(xii) The BiPAP Pro Bi-Flex, with Humidifier, with Smartcard, Canada;

(xiii) The BiPAP Pro Bi-Flex, with Smartcard, Canada;

(xiv) The BiPAP ST, C Series Ventilatory Support System-Canada;

(xv) The BiPAP ST, C Series Ventilatory Support System, Core PKG, Canada;

(xvi) The BiPAP ST, C Series Ventilatory Support System-Core PKG, Domestic;

(xvii) The C Series ASV;

(xviii) The C Series AVAPS;

(xix) The C Series S/T;

(xx) The Dorma 400;

(xxi) The Dorma 500;

(xxii) The DreamStation ASV;

(xxiii) The DreamStation Auto BiPAP;

(xxiv) The DreamStation Auto CPAP;

(xxv) The DreamStation AVAPS;

(xxvi) The DreamStation BiPAP;

(xxvii) The DreamStation BiPAP Auto SV, CA;

(xxviii) The DreamStation BiPAP Auto SV, w/Humidifier, CA;

(xxix) The DreamStation BiPAP Auto SV, w/Humidifier/Heated Tube, CA;

(xxx) The DreamStation BiPAP Pro;

(xxxi) The DreamStation CPAP;

(xxxii) The DreamStation CPAP Pro;

(xxxiii) The DreamStation Expert;

(xxxiv) The DreamStation GO;

(xxxv) The DreamStation GO Auto CPAP;

(xxxvi) The DreamStation GO Auto CPAP with Humidifier, Canada;

(xxxvii) The DreamStation GO CPAP;

(xxxviii) The DreamStation GO CPAP with Humidifier, Canada;

(xxxix) The DreamStation ST;

(xl) The E30;

(xli) The Garbin Aeris;

(xlii) The Garbin LifeVent;

(xliii) The Garbin Plus;

(xliv) The OmniLab Advanced, Domestic;

(xlv) The OmniLab Advanced, Domestic Core;

(xlvi) The OmniLab Advanced Plus;

(xlvii) The REMStar Auto with Humidifier, with SD Card, A-Flex, Canada;

(xlviii) The REMStar Auto with SD Card, A-Flex, Canada;

(xlix) The REMStar SE;

(l) The REMStar SE Auto;

(li) The Restar Plus with Humidifier, with SD Card, C-Flex, Canada;

(lii) The Restar Plus with SD Card, C-Flex, Canada;

(liii) The Restar Pro with Humidifier, with SD Card, C-Flex+, Canada;

(liv) The Restar Pro with SD Card, C-Flex+, Canada;

(lv) The Restar, with Smartcard, Canada;

(lvi) The Restart, with Humidifier, with Smartcard, Canada;

(lvii) The SystemOne;

(lviii) The Trilogy 100; and

(lix) The Trilogy 200;

(n) "**Representations**" means the representations and omissions described below at paragraphs 13-17 and 75; and

(o) "**Survival of Actions Acts**" means all of the following:

(i) *The Survival of Actions Act*, S.A. 1978, c. 35 (the "**AB Survival of Actions Act**");

(ii) The *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 (the "**BC Survival of Actions Act**");

(iii) *The Trustee Act*, C.C.S.M. c. T160 (the "**MB Survival of Actions Act**");

(iv) The *Survival of Actions Act*, R.S.N.B. 2011, c. 227 (the "**NB Survival of Actions Act**");

(v) The *Survival of Actions Act*, R.S.N.L. 1990, c. S-32 (the "**NL Survival of Actions Act**");

(vi) The *Trustee Act*, R.S.N.W.T. 1988, c. T-8 (the "**NWT Survival of Actions Act**");

(vii) The *Survival of Actions Act*, R.S.N.S. 1989, c. 453 (the "**NS Survival of Actions Act**");

(viii) The *Trustee Act*, R.S.N.W.T. (Nu) 1988, c. T-8 (the "**NU Survival of Actions Act**");

(ix) The *Trustee Act*, R.S.O. 1990, c. T.23 ("**ON Survival of Actions Act**");

(x) The *Survival of Actions Act*, R.S.P.E.I. 1988, c. S-11 ("**PEI Survival of Actions Act**");

(xi) *The Survival of Actions Act*, S.S. 1990-91, c. S-66.1 (the "**SK Survival of Actions Act**"); and

(xii) The *Survival of Actions Act*, R.S.Y. 2002, c. 212 (the "**YK Survival of Actions Act**").

B. The Parties

3. The Plaintiff, John Morel, 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 the Class.

4. The defendants are related corporations (collectively "**Philips**").

(a) Koninklijke Philips N.V. is the parent holding corporation. It is incorporated under the laws of the Netherlands and its head office is in Amsterdam.

(b) Philips North America LLC is the subsidiary that oversees Philips' operations in North America. It is incorporated under the laws of Delaware and its head office is in Cambridge, Massachusetts.

(c) Philips RS North America LLC is the manufacturing subsidiary for respiratory and sleep products to be sold in North America. It is incorporated under the laws of Delaware and its head office is in Pittsburgh, Pennsylvania.

(d) Philips Electronics Ltd. is the subsidiary that imports, distributes, and sells the Recalled Products in Canada. It is incorporated under the *Canada Business Corporations Act* and its head office is in Markham, Ontario.

(e) 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.

5. 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.

6. 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 Recalled Products.

C. The Purpose of the Recalled Products

7. Sleep apnea is a sleeping disorder that temporarily disturbs breathing during sleep. Breathing may stop or become very shallow. This can cause fatigue, daytime sleepiness, interrupted sleep, or snoring, among other symptoms. Serious cases can cause hypertension, heart attack, or stroke, among other medical ailments.

8. CPAP and BiPAP machines are commonly used to treat sleep apnea. In CPAP therapy, a machine delivers a flow of air through a mask over the nose or mouth, which increases air pressure in the throat so that the airway does not collapse during inhalation. BiPAP therapy is similar, but the machine provides two different pressure settings, one for inhalation and one for exhalation.

9. Patients who use CPAP or BiPAP machines typically use them every night when they sleep. Symptoms may return quickly if therapy is discontinued.

10. Respiratory failure is a potentially fatal condition in which a patient has difficulty breathing or getting enough oxygen into the blood.

11. Ventilators are commonly used to treat respiratory failure. Ventilators push air into and out of the patient's lungs like a bellows. Ventilators can also be used in other circumstances, such as during surgery when general anesthesia may interrupt normal breathing. The COVID-19 crisis has led to a significant increase in the demand for ventilators in Canada and worldwide.

D. The Recalled Products

12. At all material times, Philips designed, researched, tested, developed, manufactured, assembled, imported, licensed, marketed, distributed, imported and sold CPAP machines, BiPAP machines, and ventilators, including the Recalled Products. Philips manufactured and either distributed or sold approximately 15,000,000 of the Recalled Products worldwide and more than 100,000 in Canada.

E. Marketing of the Recalled Products

13. The Defendants marketed the Recalled Products as safe and effective, and highlighted the Recalled Products' superiority in reducing sound levels resulting from use of a similar product and allowing for quiet, comfortable sleep. On its websites, Philips states:

    (a) "Philips is a health technology company", a "leader in health technology", and in particular "a global leader in the sleep and respiratory markets";

(b) Philips is “passionate about providing solutions that lead to healthier patients”; and

(c) “There is nothing we take more seriously than providing patients with high quality products that are safe and reliable.”

14. Philips has an extensive line of respiratory products, in two broad categories.

(a) The first category is “Hospital ventilation solutions”. It includes products “designed to treat respiratory insufficiency in the hospital environment” and to “reduce hospital readmissions”. Philips represents that these products are safe, even in a hospital – an environment characterized by the presence of immunocompromised people.

(b) The second category is “Home ventilation solutions”. It includes products designed to allow “care teams helping clinicians and homecare providers extend their clinical reach to the home environment”. Philips represents that these products are safe, even for patients sick enough to need home care.

15. Philips represented in their communications to consumers that the Recalled Products are safe and effective. Misleading and/or deceptive statements, express and implied, made by the Philips include the following:

(a) Philips’ 30 years of innovation in continuous positive airway pressure (CPAP) systems provided the expertise necessary to produce a safe and effective product;

(b) Philips provided patients “the very best” with their products;

(c) The Recalled Products had been “thoroughly tested”;

(d) The Recalled Products provided “safe, effective therapy”;

(e) The Recalled Products were “patient driven” and “guided by nearly 700 interview and surveys” of patients in order to produce a high quality product;

(f) The Recalled Products "are designed to be as comfortable and easy to experience as sleep is intended to be. Connecting patients and care teams, [Recalled Products] empower users to embrace their care with confidence, and enable care teams to practice efficient and effective patient management"; and

(g) Such further and other misrepresentations as may be proven at trial.

16. Philips also markets some of the same products as sleep products. Those products promise to give users "peace of mind", help falling asleep, and "a restful night's sleep". Philips represents that these products will allow users to stop worrying about sleep. Implicit in that representation is that users will not have to worry that the products are causing them harm while they sleep.

17. In addition, the advertising, manuals, and disclosure provided by Philips do not warn of the Defects, including the risks of Degradation of PE-PUR Foam and resulting Off-Gassing in the Recalled Products. Nor do they warn about any of the Health Risks.

F. The Contractual Warranty

18. The user manual for the Recalled Products provides a warranty that the Recalled Products 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. Recalled Products sold in breach of the warranty would be repaired or replaced at the Philips' option.

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

G. Philips Received and Ignored Complaints about the Recalled Products

20. Since January 1, 2008, Philips has received more than 220,000 complaints about the Recalled Products. Most of them complained about black particles in their machines.

21. According to an inspection issued by the Food and Drugs Administration on November 9, 2021 (the "**FDA Inspection**"), Philips did not investigate. Specifically, the FDA Inspection came to the following conclusions.

    (a) In October 2015, Philips received two complaints of Degradation in the Trilogy 100. On April 1, 2016, Philips analyzed field samples that confirmed that PE-PUR Foam had base polymer cleavage and embrittlement. Nevertheless, Philips did not perform a risk analysis, make any design changes, or take any corrective action.

    (b) On November 25, 2015, one of Philips' affiliates began a preventative maintenance servicing procedure to prevent Degradation and Off-Gassing. Philips was aware of this program. Nevertheless, Philips did not conduct any further investigation, health hazard evaluation, risk analysis, or design review.

    (c) In 2015, Philips received two more complaints of Degradation in the Trilogy 200. On August 30, 2016, Philips analyzed field samples that confirmed that PE-PUR Foams "show bad resistance against high humidity in combination with high temperature". Nevertheless, Philips did not perform a risk analysis, make any design changes, or take any corrective action.

    (d) On November 25, 2016, a Philips follow-up study concluded that there was a better foam available that showed "far better resistance against humidity at high humidity at high temperature", compared with PE-PUR Foam. Nevertheless, Philips did not perform a risk analysis, replace PE-PUR Foam with this better foam, or take any corrective action.

    (e) In 2016, Philips received more complaints of Degradation in Trilogy ventilators. On December 12, 2018, Philips concluded that the problem was caused by PE-PUR Foam. Nevertheless, Philips did not perform a risk analysis, make any design changes, or take any corrective action.

    (f) Despite hundreds of thousands of complaints, Philips did not conduct any formal investigation or risk analysis until April 12, 2018. After that date, all of

its investigations had methodological errors. Among other problems, they all understated the number of complaints by multiple orders of magnitude.

(g) On May 22, 2019, a Philips follow-up study confirmed that the problem was caused by PE-PUR Foam. Nevertheless, Philips did not make any design changes or take any corrective action.

(h) Between January 18, 2019 and February 1, 2019, Philips tested two DreamStation 1 devices. On January 30, 2020, Philips produced two reports, each of which concluded that the DreamStation 1 devices had succumbed to Off-Gassing. It gave off levels of VOCs and formaldehydes above tolerable levels. Nevertheless, Philips did not make any design changes or take any corrective action.

(i) In May 2019, four Philips CPAP devices were returned due to Degradation. In response, on July 2, 2020, Philips produced a biological risk assessment on PE-PUR Foam. The assessment concluded that PE-PUR Foam has "potential for carcinogenicity, mutagenicity, and systemic toxicity" and "the severity of harm is crucial". Nevertheless, Philips did not make any design changes or take any corrective action.

(j) On December 10, 2020, Philips produced a biological risk assessment that concluded:

> "The cytotoxicity and positive genotoxicity results observed from degraded PE-PUR foam samples indicate a potential patient risk. Potential cytotoxicity and genotoxicity leading to carcinogenicity are possible outcomes from degraded PE-PUR foam exposure. Overall, … the degraded PE-PUR foam is not considered biocompatible and presents a significant biological risk to those patient populations who are exposed to degraded PE-PUR foam."

This result was confirmed in a Philips report on January 11, 2021, and another one on January 22, 2021. Nevertheless, Philips did not make any design changes or take any corrective action.

(k) On January 13, 2021, Philips produced two separate reports which concluded that PE-PUR Foam is mutagenic, and a third that concluded that it has “cytotoxic potential”. Nevertheless, Philips did not make any design changes or take any corrective action.

(l) Overall, Philips failed to establish adequate procedures for testing fitness for purpose, ensuring quality control, design changes, and corrective actions.

22. Thus, Philips ought to have identified the Defects and the Health Risks by 2008. Philips had actual knowledge of the Defects and the Health Risks by at least November 25, 2015. Philips had actual knowledge that there was a safer and economically feasible alternative foam available by at least November 26, 2016.

23. Notwithstanding this knowledge, the Defendants continued to sell the Recalled Products. Philips did not take any remedial steps or inform patients until 2021, shortly after it launched the DreamStation 2, its next generation of the Recalled Products. The purpose of this delay was to encourage users of the Recalled Products to purchase a new machine from Philips, rather than one from a competing manufacturer.

H. Philips Informed Its Investors First

24. On April 26, 2021, two weeks after the official launch of DreamStation 2, Philips issued its Q1 results to investors, without any corresponding disclosure to customers or distributors. The press release identified the risk of some of the Recalled Products, while at the same time, touting its latest device as a safer alternative:

> “Philips has determined from user reports and testing that there are possible risks to users related to the sound abatement foam used in certain of Philips' sleep and respiratory care devices currently in use. … The majority of the affected devices are in the first-generation DreamStation product family. Philips ’ recently launched next-generation CPAP platform, DreamStation 2, is not affected. … Given the estimated scope of the intended precautionary actions on the installed base, Philips has taken a provision of EUR 250 million.”

25. Philips waited a further seven weeks to issue a recall.

I. The American Recall

26. On June 14, 2021, Philips issued a recall notice for 24 of the Recalled Products in the United States only. In its letter to customers accompanying the recall, Philips admitted that the Recalled Products succumb to Degradation and Off-Gassing. Philips further admitted that these issues can cause serious, indeed life-threatening injuries:

> "These issues can result in serious injury which can be life-threatening, cause permanent impairment, and/or require medical intervention to preclude permanent impairment. … The potential risks of particulate exposure include: Irritation (skin, eye, and respiratory tract), inflammatory response, headache, asthma, adverse effects to other organs (*e.g.*, kidneys and liver) and toxic carcinogenic affects. The potential risks of chemical exposure due to off-gassing include: headache/dizziness, irritation (eyes, nose, respiratory tract, skin), hypersensitivity, nausea/vomiting, toxic and carcinogenic effects. There have been no reports of death as a result of these issues."

27. On the same day, Philips provided additional information in an announcement entitled "Clinical information for physicians, " which explained that the foam breakdown "may lead to patient harm and impact clinical care." It further stated:

> "While there have been limited reports of headache, upper airway irritation, cough, chest pressure and sinus infection that may have been associated with the foam, based on lab testing and evaluations, it may be possible that these potential health risks could result in a wide range of potential patient impact, from transient potential injuries, symptoms and complications, as well as possibly serious injury which can be life-threatening or cause permanent impairment, or require medical intervention to preclude permanent impairment."

28. The announcement by Philips detailed two types of hazards from the PE-PUR Foam in the devices. First, the announcement described dangers caused by Degradation:

> "**Potential Hazard:** Philips has determined from user reports and lab testing that under certain circumstances the foam may degrade into particles which may enter the device's air pathway and be ingested or inhaled by the user of its Continuous Positive Airway Pressure (CPAP), BiLevel Positive Airway Pressure (BiLevel PAP) and Mechanical Ventilator devices. The foam degradation may be exacerbated by

> environmental conditions of higher temperatures and humidity in certain regions. Unauthorized cleaning methods such as ozone may accelerate potential degradation.
> The absence of visible particles does not mean that foam breakdown has not already begun. Lab analysis of the degraded foam reveals the presence of potentially harmful chemicals including:
> - Toluene Diamine
> - Toluene Diisocyanate
> - Diethylene glycol"

29. Second, Philips announced dangers caused by Off-Gassing:

> "**Potential Hazard:** Lab testing performed for and by Philips has also identified the presence of VOCs which may be emitted from the sound abatement foam component of affected device(s). VOCs are emitted as gases from the foam included in the CPAP, BiLevel PAP and MV devices and may have short- and long- term adverse health effects.
> Standard testing identified two compounds of concern (COC) may be emitted from the foam that are outside of safety thresholds. The compounds identified are the following:
> - Dimethyl Diazine
> - Phenol, 2,6-bis (1,1-dimethylethyl)-4-(1-methylpropyl)-"

30. Philips admitted that the risks of these VOCs include that they "may cause irritation and airway inflammation, and this may be particularly important for patients with underlying lung diseases or reduced cardiopulmonary reserve" and may lead to "headache/dizziness, irritation (eyes, nose, respiratory tract, skin), hypersensitivity, nausea/vomiting, toxic and carcinogenic effects," as well as "adverse effects to other organs such as kidney and liver."

31. Despite all of these proven dangers, Philips was not ready to repair or replace the Recalled Products. In the meantime, Philips recommended:

> "**For patients using life-sustaining mechanical ventilator devices:**
> Do not stop or alter your prescribed therapy until you have talked to your physician. Philips recognizes that alternate ventilator options for therapy may not exist or may be severely limited for patients who require a ventilator for life-sustaining therapy, or in cases where therapy disruption is unacceptable. In these situations, and at the discretion of the treating clinical team, the benefit of continued usage of these ventilator devices may outweigh the risks.

> If your physician determines that you must continue using this device, use an inline bacterial filter. Consult your Instructions for Use for guidance on installation.
> **For patients using BiLevel PAP and CPAP devices:**
> Discontinue use of your device and work with your physician or Durable Medical Equipment (DME) provider to determine the most appropriate options for continued treatment."

32. In other words, Philip's solution is for users of the recalled ventilators to continue to expose themselves to the risk of serious health complications for an unspecified period and users of the recalled CPAP and BiPAP machines to either go without necessary treatment or buy a new device (preferably a Philips device), if one can be found.

33. Those persons who discontinue their use of the recalled CPAP and BiPAP machines will likely suffer the re-emergence of the effects of their sleep apnea, namely excessive daytime drowsiness and associated complications, including worsening sleep quality, quality of life, motor vehicle crash risk, and potentially worsening cardiovascular risk or respiratory failure.

J. The Canadian Recall

34. On June 23, 2021, Health Canada recalled 14 of the Recalled Products, which was expanded to 49 of the Recalled Products on July 30, 2021. The first recall notice 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.

K. Philips Has No Remediation Plans for Canada

35. On September 1, 2021, Philips announced that it would begin repairing and replacing the Recalled Products in the United States. It projected that it would take 12 months to cover all of the repairs and replacements. Philips acknowledged “that the timeframe for remediation of the affected devices places patients in a difficult situation”.

36. In the same update, Philips announced that it was “initiating a repair and replacement programs in other countries and expects to have these underway in the majority of its markets by the end of September 2021.”

37. However, as of December 2021, Philips has yet to announce any remediation plans for the Recalled Products in Canada. Thousands of Class Members have contacted Philips, or Philips dealers, asking for a timeline for remediation. Philips has not answered.

L. The Plaintiff’s Experience

38. In the 1990s, the Plaintiff experienced symptoms of interrupted sleep, fatigue, irritability, and low mood. His doctor, Dr. Jeremy Road, diagnosed him with sleep apnea and prescribed him a CPAP machine.

39. In 2014, the Plaintiff purchased a REMStar SE for approximately $2,000 from SleepTech Sleep Apnea Treatment Centre (now VitalAire Healthcare). This was a Recalled Product

40. In early 2019, the Plaintiff purchased a Respironics branded Philips DreamStation CPAP from Sleeptech, located in Courtenay, British Columbia. This was a Recalled Product. The purchase price was approximately $2,000, of which 80% was covered by the Plaintiff’s health care plan and 20% was paid out of pocket.

41. In both cases, the Plaintiff viewed and relied on the Representations. He understood that the Recalled Products were safe and effective.

42. The Plaintiff used the one of the Recalled Products every night between purchasing the RemStar SE in 2014 and June 18, 2021. At all times, he used the Recalled Products in the manner directed in the user manual which accompanied the Recalled Products at purchase.

43. On June 18, 2021, a respiratory therapist at VitalAire Healthcare in Nanaimo, British Columbia informed the Plaintiff about the recall in the United States. The Plaintiff followed the registration process on Philips' website and confirmed that his DreamStation was on the recall list in the United States.

44. Plaintiff planned to use the older, REMStar SE device instead of the DreamStation. However, REMStar SE was also on the recall list. When he discovered that, he immediately booked an appointment with his doctor.

45. On June 30, 2021, Dr. Richard Cone advised the Plaintiff to stop using the Recalled Products immediately and purchase a new device. Dr. Cone provided a prescription for a new CPAP.

46. Unfortunately, the Plaintiff cannot afford a new device. He is 79 years old and retired. His only sources of income are payments from the Canada Pension Plan, Old Age Security, and a $400 monthly pension from a former employer. His health plan only covers replacement CPAP machines once every 5 years, so he has another 3 years to wait.

47. For six weeks, the Plaintiff did not use any CPAP machine. As a result, he suffered from interrupted sleep, fatigue, irritability, and low mood. This prevented him from effectively caring for his wife, who was recently diagnosed with vascular dementia, and for whom the Plaintiff is the primary caregiver. Finally, seeing no other way to ensure his wife was cared for, the Plaintiff went back to using the DreamStation.

48. The Plaintiff would not have purchased the Recalled Product had he been provided with accurate information and/or warnings with respect to the Defects and

Health Risks resulting from use of the Recalled Product. The Plaintiff was misled by the statements made by the Defendants with respect to the safety and efficacy of their products.

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

Part 2: RELIEF SOUGHT

50. The Plaintiff claims, on his own behalf and on behalf of the Class:

(a) An order certifying this action as a class proceeding and appointing the Plaintiff as the representative Plaintiff under the *CPA*;

(b) For negligence, breach of contractual warranty, and breach of statutory warranty:

(i) General damages for negligence breach of contractual warranty, and breach of statutory warranty, in an amount to be determined by the court; and

(ii) Special damages for negligence breach of contractual warranty, and breach of statutory warranty, in an amount to be determined by the court;

(c) For unjust enrichment:

(i) Restitution in an amount equal to the purchase price of the Recalled Products;

(d) For Class Members residing in Alberta:

(i) A declaration that Philips engaged in an “unfair practice” as defined in the AB Consumer Protection Act;

(ii) A declaration that it is not in the interests of justice to require that notice be given pursuant to section 7.2(3) of the AB Consumer Protection Act; and

(iii) Restitution in an amount equal to the purchase price of the Recalled Products, or in the alternative damages, plus punitive damages, under sections 7, 7.2, and 13 of the AB Consumer Protection Act;

(e) For Class Members residing in British Columbia:

(i) A declaration that Philips engaged in a “deceptive act or practice” or an “unconscionable act or practice” as defined in the BC Consumer Protection Act; and

(ii) Restoration to Class Members of the purchase price paid for the Recalled Products, or in the alternative damages, under sections 171-172 of the BC Consumer Protection Act;

(f) For Class Members residing in Manitoba:

(i) A declaration that Philips engaged in an “unfair business practice” as defined in the MB Consumer Protection Act; and

(ii) Repayment to Class Members of the purchase price paid for the Recalled Products, or in the alternative damages, under section 23 of the MB Consumer Protection Act;

(g) For Class Members residing in Newfoundland and Labrador:

(i) A declaration that Philips engaged in an “unfair business practice” or an “unconscionable act” as defined in the NL Consumer Protection Act; and

(ii) Repayment to Class Members of the purchase price paid for the Recalled Products, or in the alternative damages, under section 10 of the NL Consumer Protection Act;

(h) For Class Members residing in Ontario:

(i) A declaration that Philips engaged in an “unfair practice” as defined in the ON Consumer Protection Act;

(ii) A declaration that it is not in the interests of justice to require that notice be given pursuant to section 18(15) of the ON Consumer Protection Act; and

(iii) Rescission and repayment to Class Members of the purchase price paid for the Recalled Products, or in the alternative damages, under section 18 of the ON Consumer Protection Act;

(i) For Class Members residing in Prince Edward Island:

(i) A declaration that Philips engaged in an “unfair practice” as defined in the PEI Consumer Protection Act; and

(ii) Rescission and repayment to Class Members of the purchase price paid for the Recalled Products, or in the alternative damages, under section 4 of the PEI Consumer Protection Act;

(j) For Class Members residing in Québec:

(i) A declaration that Philips failed to fulfil an obligation imposed by the QC Consumer Protection Act; and

(ii) Rescission and repayment to Class Members of the purchase price paid for the Recalled Products, compensatory damages, and punitive damages under section 272 of the QC Consumer Protection Act;

(k) For Class Members residing in Saskatchewan:

(i) A declaration that Philips engaged in an “unfair practice” as defined in the SK Consumer Protection Act; and

(ii) Restitution in an amount equal to the purchase price of the Recalled Products, or in the alternative damages, plus punitive damages, under section 93 of the SK Consumer Protection Act;

(l) For breach of the *Competition Act*:

(i) A declaration that Philips breached Part VI of the *Competition Act*;

(ii) Damages and investigation costs under section 36 of the *Competition Act*;

(m) Under the Healthcare Acts, recovery of:

(i) The Crown's cost of health services as defined in the AB Healthcare Act;

(ii) The past cost of health care services and the future cost of health care services as defined in the BC Healthcare Act; and

(iii) the cost incurred for past insured services and the cost that will probably be incurred for future insured services as defined in the ON Healthcare Act,

all in an amount to be determined by this court;

(n) Aggravated, exemplary, and/or punitive damages in an amount to be determined by this court;

(o) A reference to decide any issues not decided at the trial of the common issues;

(p) Costs of notice pursuant to section 24(1) of the *CPA*;

(q) Costs of distribution pursuant to section 33(6)(a) of the *CPA*;

(r) Costs of this action on a full or substantial indemnity basis;

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

(t) Such further and other relief this Honourable Court may deem just.

Part 3: LEGAL BASIS

A. Negligence

51. As the designers, researchers, testers, developers, manufacturers, assemblers, licensors, marketers, distributors, importers, and/or sellers of the Recalled Products, Philips was 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 Recalled Products to be introduced into the stream of commerce in Canada, and they knew that any damages or adverse effects related to the Recalled Products would cause foreseeable injury to the Plaintiff and Class Members.

52. Philips owed a duty to Class Members to design the Recalled Products in a manner that is fit for their intended use.

53. Philips owed a duty of care to Class Members in designing the Recalled Products to avoid safety risks and to make the product reasonably safe for its intended purposes. This included:

(a) A duty not to design the Recalled Products to use PE-PUR Foam when it knew, or ought to have known that PE-PUR Foam could cause the Health Risks, or could make the Recalled Products unfit for their intended purposes;

(b) A duty not to design the Recalled Products such that the motor is so close to the PE-PUR Foam that it heats that foam and makes it degrade, and pressurized air is sent through the PE-PUR Foam before being sent into the breathing tube;

(c) A duty to test the design features in (a)-(b) to determine whether they are safe prior to selling them;

(d) A duty to investigate all complaints resulting from the design features in (a)-(b), and then modifying the design to address those concerns; and

(e) A duty to conduct adequate follow up studies on the safety of the Recalled Products after testing returned devices and finding that PE-PUR Foam was the problem; and

(f) A duty to conduct adequate long-term studies of the risks of the Recalled Products.

54. Philips owed a duty of care to Class Members to ensure there were no defects in manufacture that were likely to give rise to injury in the ordinary course of use. This included:

(a) A duty not to use a material in the Recalled Products that is prone to Degradation or Off-Gassing, forcing toxic chemicals into patients' bodies.

55. Philips owed a duty of care to Class Members to warn consumers of dangers inherent in the use of the product of which the manufacturer has knowledge or ought to have knowledge. This included:

(a) A duty to warn customers and patients of the possibility of Health Risks associated with the Recalled Products once it began receiving a significant number of complaints about the Recalled Products;

(b) A duty to warn customers and patients about the Health Risks once it investigated complaints and found that PE-PUR Foam was dangerous;

(c) A duty to immediately implement a recall of the Recalled Products once it investigated the complaints and found that PE-PUR Foam was dangerous;

56. Philips owed a duty to Class Members to compensate consumers for the cost of repairing a dangerous product that presents a real and substantial danger. This included:

(a) A duty to promptly compensate customers once it investigated the complaints and found that Recalled Products were dangerous;

(b) A duty to promptly repair and replace the Recalled Products once it issued the recall;

(c) A duty to promptly compensate customers who were forced to purchase a new CPAP, BiPAP, or ventilator while waiting for the repair or replacement of their Recalled Products; and

(d) A duty to compensate customers for their losses as a result of the Recalled Products being dangerous.

57. Philips breached all of these duties, causing damages to the Class. Thus, Philips is liable to Class Members residing outside Québec under the common law tort of negligence and to Class members residing in Québec under articles 1457-1458 of the *Civil Code of Québec*, CQLR c CCQ-1991.

B. Unjust Enrichment

58. The Class paid for the Recalled Products. Under those contracts, Philips was enriched and the Class suffered a corresponding deprivation.

59. Those contracts were void for illegality. They breached sections 19 and 20 of the *Food and Drugs Act*, RSC c F-27.

60. Class Members residing outside Québec are entitled to equitable and restitutionary relief for this unjust enrichment. Class Members residing in Québec are entitled to statutory damages under article 1493 of the *Civil Code of Québec*, CQLR, c CCQ-1991.

C. Breach of Warranty

61. As an express and implied warrantor of the Recalled Products, Philips had certain obligations to conform the Recalled Products to their warranties.

62. Philips marketed, distributed, and/or sold the Recalled Products as safe and effective medical devices through independent retail dealers. The Defendants also marketed, distributed, and/or sold the Recalled Products 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 Recalled Products.

63. In connection with the purchase of the Recalled Products, Philips provided warranty coverage for the Recalled Products for 2 years, requiring Philips to repair or replace any part of the Recalled Products that is defective with regular use.

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

65. Philips' warranty formed a basis of the bargain that was reached when the Plaintiff and Class Members purchased their Recalled Products.

66. The Plaintiff and Class Members owned and used Recalled Products with the Defects 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 Defects were known and concealed by Philips.

67. Despite the existence of the warranty, Philips failed to inform the Plaintiff and Class Members that the Recalled Products contained the Defects during the warranty period and thus wrongfully transferred the costs of repair or replacement to the Plaintiff and Class Members.

68. Philips breached the warranty promising to repair or replace any part of the Recalled Products that was defective with regular use. The Defendants knew about the Defects in the Recalled Products, allowing them to cure their breach of warranty if they chose.

69. However, Philips concealed the Defects and have neglected, failed and/or refused to repair or replace those portions or all of the Recalled Products affected by the Defects outside of the warranty period despite the Defects' existence at the time of sale of the Recalled Products.

70. Any attempt by Philips to disclaim or limit recovery to the terms of the warranty is unconscionable and unenforceable. Specifically, Philips' 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 Defects in the Recalled Products. Alternatively, Philips did not know about the Defects at the time of sale of the Recalled Products but failed to give the Plaintiff and Class Members notice of the Defects once they were discovered by Philips during the warranty period.

71. The time limits contained in Philips' 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 Philips. A gross disparity in bargaining power existed between Philips and the Plaintiff or Class Members and Philips knew or should have known the Defects existed at the time of sale of the Recalled Products. Alternatively, Philips did not know about the Defects at the time of sale of the Recalled Products but failed to give the Plaintiff and Class Members notice of the Defects once it was discovered by Philips during the warranty period.

72. Further, the limited warranty promising to repair or replace the part or whole of the Recalled Products affected by the Defects 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 Recalled Products, the PE-PUR foam, provided the sound proof quality of the Recalled Products which was the differentiating factor between the Respiratory Devices and other products on the market. Affording Philips a reasonable opportunity to cure the breach of written warranties, therefore, would be unnecessary and futile.

D. Breach of the Consumer Protection Acts

73. Philips is a "manufacturer" and a "merchant", as defined in the QC Consumer Protection Act. Philips is a "supplier", as defined in all of the other Consumer Protection Acts.

74. Class Members are "consumers", as defined in the Consumer Protection Acts.

75. In addition to the representations described above at paragraphs 13-17, Philips made the following improper representations:

    (a) Philips represented that the Recalled Products were safe – a benefit or quality that they did not have, and one which was not supported by independent testing.

    (b) Philips represented that the Recalled Products would give customers peace of mind and allow them to not worry about what the Recalled Products were doing to them as they slept – benefits or qualities that they did not have.

    (c) Philips failed to state the material fact that the Recalled Products could cause adverse health effects – an omission that deceived or tended to deceive the Class.

    (d) Philips misrepresented or exaggerated the health benefits of the Recalled Products by failing to advert to the fact that they could cause adverse health effects.

    (e) The terms of the consumer transactions in which Class Members purchased the Recalled Products were so one-sided as to be inequitable because the Recalled Products were purchased to improve respiratory health but can do the opposite.

    (f) Philips opined that the Recalled Products were safe – a misleading statement on which the Class was likely to rely to their detriment.

76. In making the Representations, Philips breached the Consumer Protection Acts, including:

    (a) Sections 6 and 7.3 of the AB Consumer Protection Act;

    (b) Sections 4-5 and 8-9 of the BC Consumer Protection Act;

    (c) Sections 2-3 and 5 of the MB Consumer Protection Act;

    (d) Sections 7-9 of the NL Consumer Protection Act;

(e) Sections 14-15, 17 of the ON Consumer Protection Act;

(f) Sections 2-3 of the PEI Consumer Protection Act;

(g) Articles 219-221 and 228 of the QC Consumer Protection Act; and

(h) Sections 6-8 of the SK Consumer Protection Act.

77. Thus, some Class Members have a right to rescission, damages, or equitable relief under the Consumer Protection Acts, including under:

(a) Sections 7, 7.2, and 13 of the AB Consumer Protection Act;

(b) Sections 10 and 171-172 of the BC Consumer Protection Act;

(c) Section 23 of the MB Consumer Protection Act;

(d) Section 10 of the NL Consumer Protection Act;

(e) Section 18 of the ON Consumer Protection Act;

(f) Section 4 of the PEI Consumer Protection Act;

(g) Section 272 of the QC Consumer Protection Act; and

(h) Sections 93 of the SK Consumer Protection Act.

E. Breach of the *Competition Act*

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

(a) were made for the purpose of promoting, directly or indirectly, the use of the Recalled Products;

(b) were made for the purpose of promoting indirect or directly, any business interests of Philips;

(c) were made to the public;

(d) were made knowingly and recklessly; and

(e) were false and misleading in a material respect.

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

(a) purchasing and using the Recalled Products when they would not have otherwise done so;

(b) the cost of purchasing the Recalled Products;

(c) the cost of purchasing replacement Recalled Products;

(d) diminished quality of life as a consequence of being deprived of the intended therapy of the Recalled Products after having to discontinue use as a result of the Defects;

(e) the cost of medical monitoring and medical tests resulting from the exposure to the toxins released by the Defects; and

(f) other losses as may be proven at trial.

80. As a result, the Class suffered loss and damage, and has a right to damages under section 36 of the *Competition Act*.

F. Causation and Damages

81. As a result of Philips' wrongdoing, described above, the Plaintiff and Class Members have suffered and will continue to suffer loss and damage.

82. General damages suffered by Class Members which were caused or materially contributed to by Philips' conduct include, without limitation:

(a) Personal injury in the form of the Health Risks, and resultant pain and suffering, from using the Recalled Products;

(b) Psychological injury and mental anguish from knowing that they have been inhaling and ingesting toxic chemicals while they sleep for years, or even decades. ;

(c) Personal injury in the form of the Health Risks and psychological injury and mental anguish from not having access to safe treatment while waiting for their Recalled Products to be repaired or replaced;

83. Special damages suffered by Class Members which were caused or materially contributed to by Philips' conduct include, without limitation:

(a) The cost of replacing the Recalled Products;

(b) Health care costs incurred or that will be incurred in the screening, diagnosis, and treatment of adverse health effects associated with using the Recalled Products;

(c) Health care costs incurred or that will be incurred in the screening, diagnosis, and treatment of adverse health effects associated with pausing treatment while waiting for the Recalled Products to be repaired or replaced; and

(d) Loss of past and prospective income due to the injuries described in paragraph 82.

84. Class Members have suffered and continue to suffer significant mental distress. Products they purchased to improve their respiration caused additional respiratory problems. Products they purchased to treat their sleep disorders inserted dangerous chemicals into their bodies as they slept. This warrants aggravated damages.

85. Class Members have suffered and continue to suffer other forms of compensatory damages, of a nature and amount to be particularized prior to trial.

86. For years, Philips knew that customers and patients had made hundreds of thousands of complaints about the Defects, but it chose not to investigate and not to act on the results of investigations. It knew that the Recalled Products were

dangerous, that its vulnerable customers would be breathing in dangerous chemicals every night, and that it could stop the harm. Instead, it chose not to inform its customers of the danger but instead waited until there was an opportunity to use the recall to push another product. This conduct was wilful and deliberate. It warrants exemplary and punitive damages.

G. Health Care Cost Recovery

87. Under the AB Healthcare Act:

(a) Philips is a wrongdoer due to the misconduct discussed above;

(b) Class Members residing in Alberta are recipients;

(c) As a result of Philips' wrongdoing, some Class Members residing in Alberta have received or are likely to receive health services; and

(d) Thus, pursuant to section 38(1), those Class Members have a right to recover the cost of their health care services from Philips.

88. Under the BC Healthcare Act:

(a) Philips is a wrongdoer due to the misconduct discussed above;

(b) Class Members residing in British Columbia are beneficiaries;

(c) As a result of Philips' wrongdoing, some Class Members residing in British Columbia have received or are likely to receive health care services; and

(d) Thus, pursuant to section 2, those Class Members have a right to recover the past cost of their health care services and the future cost of their health care services from Philips.

89. Under the NB Healthcare Act:

(a) Philips committed negligence or wrongful act due to the misconduct listed above;

(b) As a result of the negligence or wrongful act of Philips, some Class Members in New Brunswick suffered personal injuries for which they received entitled services; and

(c) Thus, pursuant to section 3(1), those Class Members have a right to recover the cost of entitled services from Philips as if they had been required to pay for those services.

90. Under the NS Healthcare Act:

(a) Philips committed negligence or wrongful act or omission due to the misconduct listed above;

(b) As a result of the negligence or wrongful act of Philips, some Class Members residing in Nova Scotia suffered personal injuries for which they received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services, home-care services, care for a person in a home for special care or child-care facility, insured professional services, or any other care, services or benefits designated by regulation, including the future costs of any such care, services or benefits; and

(c) Thus, pursuant to section 18(1)(a), those Class Members have a right to recover the sum paid for the care, services or benefits from Philips.

91. Under the PEI Healthcare Act:

(a) Philips committed negligent or wrongful act due to the misconduct listed above;

(b) Thus, Class Members resident in Prince Edward Island are injured persons;

(c) Thus, pursuant to section 14(2), those Class Members have a right to claim the cost of their insured services from Philips as if they had been required to pay for those services.

H. Claims of Estate Subclass

92. Philips' misconduct, described above, has caused and will cause the death of persons in Québec. The claims of those deceased persons survive and can be asserted by their heirs pursuant to article 625 of the *Civil Code of Québec*, CQLR c CCQ-1991.

93. Philips' misconduct, described above, has also caused and will cause the death of Canadians outside Québec. The claims of those deceased persons survive and can be asserted by their estates, pursuant to the Survival of Actions Acts, and in particular:

(a) Sections 2 and 4 of the AB Survival of Actions Act;

(b) Sections 150-151 of the BC Survival of Actions Act;

(c) Section 53 of the MB Survival of Actions Act;

(d) Sections 3 and 5 of the NB Survival of Actions Act;

(e) Section 2 of the NL Survival of Actions Act;

(f) Section 31 of the NWT Survival of Actions Act;

(g) Sections 2-3 of the NS Survival of Actions Act;

(h) Section 31 of the NU Survival of Actions Act;

(i) Section 38 of the ON Survival of Actions Act;

(j) Section 4 of the PEI Survival of Actions Act;

(k) Sections 3 and 5 of the SK Survival of Actions Act; and

(l) Sections 2 and 4 of the YK Survival of Actions Act.

I. Claims of Family Subclass

94. Philips' misconduct, described above, has caused and will cause the death of persons in Québec. As a result, the Family Subclass Members in Québec suffered damages. The heirs of those deceased persons are entitled to *solatium doloris* and compensation for moral and material prejudice and pursuant to articles 1 and 49 of the *Charter of Human Rights and Freedoms*, CQLR c C-12 and articles 625 and 1457 of the *Civil Code of Québec*, CQLR c CCQ-1991. The children of those deceased people are entitled to compensation for loss of protection, security, and attention pursuant to article 39 of the *Charter of Human Rights and Freedoms*, CQLR c C-12.

95. Philips' misconduct, described above, has caused and will cause the death of Canadians outside Québec. As a result, the Family Subclass Members outside Québec suffered damages. They are entitled to damages under the Fatal Accidents Acts, including under:

(a) Sections 2, 3, 7, and 8 of the AB Fatal Accidents Act;

(b) Sections 2 and 3 of the BC Fatal Accidents Act;

(c) Sections 2, 3, 3.1, and 6 of the MB Fatal Accidents Act;

(d) Sections 3, 8, 9, and 10 of the NB Fatal Accidents Act;

(e) Sections 2, 3, 6, 7, and 9 of the NL Fatal Accidents Act;

(f) Sections 2, 3, and 4 of the NWT Fatal Accidents Act;

(g) Sections 3 and 5 of the NS Fatal Accidents Act;

(h) Sections 2, 3, and 4 of the NU Fatal Accidents Act;

(i) Section 61 and 63 of the ON Fatal Accidents Act;

(j) Sections 2, 6, and 7 of the PEI Fatal Accidents Act;

(k) Sections 3, 4, and 4.1 of the SK Fatal Accidents Act; and

(l) Sections 2, 3, 3.01, and 7 of the YK Fatal Accidents Act.

96. Philips' misconduct, described above, caused Class Members in Ontario to suffer injuries. As a result, Family Subclass Members in Ontario suffered damages. They are entitled to damages under sections 61 and 63 of the ON Fatal Accidents Act.

J. Jurisdiction

97. The Plaintiff relies on ss. 7(c) and 10(f)-(h) 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) Philips committed the torts described above in British Columbia;

(b) This claim pleads breaches of the BC Consumer Protection Act and the BC Sale of Goods Act, and makes claims under the BC Healthcare Act;

(c) Philips imported the Recalled Products into British Columbia;

(d) Philips marketed and sold the Recalled Products in British Columbia;;

(e) The Plaintiff and many Class Members reside in British Columbia; and

(f) The Plaintiff's damages were sustained in British Columbia.

Form 11 (Rule4-5(2))

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** 820 - 980 Howe Street Vancouver, BC V6Z 0C8 **SOTOS LLP** 180 Dundas Street West, Suite 1200 Toronto, ON M5G 1Z8 **THOMSON ROGERS** 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: ___/January/2022

_____

Signature of ☐ plaintiff
☒ lawyer for plaintiff
Anthony Leoni
LSBC #505576
Stephen Birman
LSO #55164F
Louis Sokolov
LSO #34483L

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. *Business Practices Act*, R.S.P.E.I. 1988, c. B-7
2. *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2

3. *Class Proceedings Act*, R.S.B.C. 1996, c. 50