Court File No. VLC-S-S-219243

No.

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

SHELDON NATHANSON

Plaintiff

And

KONINKLIJKE PHILIPS N.V.,
PHILIPS ELECTRONICS LTD.,
PHILIPS NORTH AMERICA LLC., and
PHILIPS RS NORTH AMERICA LLC.

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 reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, 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

Overview

1. This proposed class proceeding arises out of the defendants' design, engineering, testing, developing, manufacturing, marketing, distributing, and sale of Continuous Positive Airway Pressure ("CPAP"), Bi-Level Positive Airway Pressure ("BiPAP") and Mechanical Ventilator machines (collectively, "Airway Machines"). The Airway Machines suffer from a serious defect that results in the inhalation of carcinogenic materials and toxic chemicals for the users of the Airway Machines. Specifically, the polyester-based polyurethane sound abatement foam used in the Airway Machines degrades during normal use of the machines, releasing chemicals and degraded particles into the air pathway of the device (the "Foam Defect"). Users of the Airway Machines inhale the chemicals and particles and suffer adverse health effects including headaches, airway irritation, cough, chest pressure, sinus infection, nausea/vomiting, and toxic and carcinogenic effects. Users also run the risk of developing cancer.

2. As described in detail below, the plaintiff seeks for himself and for a class, damages because the defendants have breached the terms of the warranty for the Airway Machines, and were negligent in their design, engineering, testing, manufacturing, marketing, distributing, and sale of the Airway Machines. The Foam Defect creates a significant safety risk to class members and has caused damage to the class.

The Parties

3. The plaintiff, Dr. Sheldon Nathanson, is a resident of Vancouver, British Columbia, Canada. He is a semi-retired clinical physician and teaches part-time at the Faculty of Medicine at

the University of British Columbia. Dr. Nathanson suffers from sleep apnea (a condition described in more detail below). He purchased a Philips Respironics DreamStation CPAP machine in 2019.

4. The plaintiff brings this claim on behalf of himself and on behalf of a class of persons who purchased or leased an Airway Machine subjected to recall in Canada in 2021. ("Class Members"). The machines include, but are not limited to, models branded either as Philips or Philips Respironics between 2009 and 2021.

5. The Defendant, Kininklijke Philips N.V. ("Royal Philips") (formerly known as Koninklijke Philips Electronics N.V.) is the public holding corporation of Philips Electronics Ltd., Philips North America LLC, and Philips RS North America LLC. Royal Philips is located in Amsterdam and is incorporated under the laws of the Netherlands. Royal Philips is a health technology company and is an active participant in the operations of its subsidiaries. For example, it provides pricing, advertising, and sales channel guidance and publishes marketing materials for the Airway Machines in Canada. Further, it disclosed the Airway Machines product recall notice in Canada.

6. The Defendant Philips Electronics Ltd. ("Philips Electronics") is a wholly-owned subsidiary of Royal Philips and also does business as Philips Canada. It is the resulting company of a merger between Philips Electronics Ltd. and Philips Canada Ltd. in 2016. It is located in Markham, Ontario, and is a federally incorporated company and registered in British Columbia as an Extraprovincial Company. Philips Electronics markets and distributes consumer electronics in Canada, such as televisions, audio and video players, household accessories, and healthcare products, including the Airway Machines.

7. The Defendant Philips North America LLC ("Philips North America") is a wholly-owned subsidiary of Royal Philips and does business as Philips Healthcare. It is located in Cambridge, Massachusetts and is incorporated under the laws of Delaware. Philips North America provides manufacturing support for Philips branded and Philips Respironics branded consumer and healthcare products including the Airway Machines in the US, Canada, and Mexico. Philips North America also conducts research and development for these products.

8. The Defendant Philips RS North America LLC ("Philips RS") (formerly known as Respironics Inc.) is a wholly-owned subsidiary of Royal Philips. Royal Philips acquired Respironics Inc. in 2008. It is located in Murrysville Pennsylvania and is incorporated under the laws of Delaware. Philips RS manufactures and sells Philips and Philips Respironics medical devices, including the Airway Machines. It sells products in Canada and serves customers in Canada.

9. Collectively, the Defendants are known as the "Philips Group".

Airway Machines are Designed to Treat Sleep Apnea

10. Sleep apnea is a common health disorder characterized by poor sleep because of breathing interruptions. Such interruptions are referred to as 'apneas', whereby an individual's airway collapses preventing oxygen from reaching the lungs. Eventually, the person must wake up to resume breathing normally. Sleep apnea results in less sleep, which can dramatically impact a person's work performance, mental health, and short-term and long-term physical health. For example, sleep apnea can lead to hypertension, heart attack, stroke, or accidents arising from 'daytime sleeping'.

11. The invent of sleep apnea devices, intended for personal and household use, resolved many of the symptoms for sleep apnea patients. CPAP machines, for example, push pressurized air into the user's throat, preventing airway collapses. BiPAP machines are similar to CPAP machines, however, they provide two alternating levels of pressurized air both into and out of the user's throat.

12. In some provinces in Canada, physicians must report patients who suffer from moderate-to-severe sleep apnea and are not receiving adequate care (such as using CPAP and BiPAP machines) to the provincial transportation authority.[1] Being without an airway machine can result in the suspension or revocation of a driver's license.

[1] *See, for example, Motor Vehicle Act,* RSBC 1996, c 318, s. 25.1, 29 (British Columbia); *Highway Traffic Act*, RSO 1990, c H.8, s. 203 (Ontario).

The Philips Group Designs, Manufactures, and Sells Airway Machines

13. At all material times, Royal Philips, Philips North America and Philips RS designed, engineered, tested, developed, and manufactured the Airway Machines sold in North America.

14. At all material times, Royal Philips, Philips Electronics, and Philips RS marketed, distributed, and sold the Airway Machines in North America. Philips Electronics markets and distributes the Airway Machines in Canada. Philips RS sells the Airway Machines to dealers in Canada.

15. Together, the Philips Group designed, engineered, tested, developed, manufactured, marketed, distributed, and sold approximately 100,000 recalled Airway Machines in Canada.

The Airway Machines have a Foam Defect that Leads to Health and Safety Risks

16. As noted above, the Airway Machines aid in airflow while patients are asleep, to ensure patients receive a pressurized flow of oxygen into their throat. The Airway Machines are designed with a compressor or motor which generates a stream of pressurized air that travels through sound abatement foam, into a flexible tube, and delivers purified air into the user's mask.

17. Because the Airway Machines use a motor, they can be noisy, which detracts from quality of sleep. Accordingly, Royal Philips, Philips North America and Philips RS designed the Airway Machines with polyester-based polyurethane (PE-PUR) sound abatement foam to reduce noise. The foam is stored in a plastic encasement which surrounds the motor and is attached to the flexible tube flowing air into the user's mask. The Philips Group warrants to all owners and users of the Airway Machines that the sound abatement foam will be free from defect and will not break down for a period of at least three years.

18. The presence of the sound abatement foam results in two issues. First, the foam is located near the motor. The motor heats during use, warming the foam and causing it to release chemicals including toluene diamine, toluene diisocyanate, and diethylene glycol. The foam also disintegrates, releasing black debris/particles and volatile organic compounds. Second, the pressured air from the motor filters through the foam before entering the flexible airway tube. The

pressurized air releases more particles from the foam. As a result, the chemicals and particles are pushed by the motor into the flexible tube and into the user's mask. This is the Foam Defect.

19. Unbeknownst to the plaintiff and Class Members, the Airway Machines suffer from the Foam Defect at the time of purchase. The sound abatement foam contains chemicals which are released in high heat and humidity. The foam itself also disintegrates in high heat and humidity. As the machine motors heat up, the sound abatement foam degrades. Further, the foam degrades during cleaning of the machinery. The degradation causes particles and carcinogenic chemicals to enter the flexible tube delivering air into the user's mask. As a result, users inhale particles and carcinogenic chemicals while using the machine.

The Philips Group Discovers the Foam Defect and Informs Investors (Not Users)

20. The Philips Group announced a recall of the Airway Machines in June 2021. The Philips Group was aware of the Foam Defect long before they issued the recall.

21. Within its marketing materials, Royal Philips and various other Philips Group entities including Philips Electronics Ltd marketed the Airway Machines as being quieter than competing airway machines. This was due to their sound abatement foam which Philips adequately tested for safety.

22. In testing the foam for safety, the Philips Group became aware that certain cleaning materials caused the foam to disintegrate and release chemicals. Cleaning products with ozone in them, for example, could damage the foam and release particles into the machine's airway. Various consumers also complained to the Philips Group about the Foam Defect. The Philips Group knew, or should have known, of the Foam Defect.

23. The Philips Group continued to market and sell the Airway Machines as a safe product with the knowledge that they contain defective and dangerous foam without warning customers or physicians of the issue.

24. The Philips Group was aware of the risk of the Foam Defect when they designed the DreamStation 2. The DreamStation 2 is a CPAP/BiPAP machine which does not use the sound

abatement foam used in the Airway Machines. The DreamStation 2 does not suffer from the Foam Defect. On April 13, 2021, the Philips Group announced the release of the DreamStation 2.

25. On April 26, 2021, the Philips Group notified investors of the Foam Defect. As part of its Q1 2021 Quarterly Report, Royal Philips stated that there are possible risks to users related to the sound abatement foam used in the Airway Machines. They reassured investors that most of the machines suffering from the Foam Defect were first-generation machines – the new DreamStation 2 was not affected.

The Philips Group Issues Insufficient Recall

26. Despite their knowledge, the Philips Group failed to notify the plaintiff and Class Members, or their treating physicians, of the problems and associated hazards at the time of purchasing their Airway Machines until June 2021. Instead, the Philips Group did not perform a recall until they received mounting complaints. The Philips Group delayed the recall to avoid the financial ramifications of having to acknowledge that their Airway Machines and sound abatement foam were inherently defective by design and incapable of safely providing customers with treatment for sleep apnea.

27. On June 14, 2021, Royal Philips announced it was recalling the Airway Machines due to the Foam Defect. This was the first warning the Philips Group provided to users of the Airway Machines of the Foam Defect. An estimated 3 million to 4 million devices were recalled.

28. Subsequently, the US FDA classified this as a Class I, the most serious type of recall wherein there is a reasonable probability of death or other severe health consequences. Health Canada also issued a recall alert

29. Rather than replace the dangerous foam and motor apparatus immediately, the Philips Group has advised they will replace or repair the Airway Machines at some later date. The Philips Group proposed to have patients continue using the Airway Machines if users require life-sustaining therapy, or if the user's family physician advises to continue using the machine. Otherwise, the Philips Group has suggested users simply stop using the Airway Machines.

30. Instead of offering owners a full repair or foam replacement, the Philips Group provided a less than suitable remedy for a significant and dangerous defect. Further, within the recall materials, the Philips Group marketed their new airway machines to Class Members - in their recall notice, the Philips Group opportunistically advertises that the DreamStation 2 CPAP machine does not suffer from the Foam Defect.

Harm to the plaintiff and Class Members

31. The plaintiff, Dr. Sheldon Nathanson, has suffered from sleep apnea since approximately 2005. At that time, Dr. Nathanson had difficulty sleeping, fatigue, distress, and daytime sleepiness. After attending a sleep study at UBC, it was determined he had moderate to severe sleep apnea and was advised to use a CPAP machine.

32. In 2019, Dr. Nathanson purchased a Philips Respironics DreamStation from Coastal Sleep in Vancouver. The purchase included a limited warranty "that the system shall be free from defects of workmanship and materials and will perform in accordance with the product specifications for a period of three (3) years from the date of sale by [Philips] to the dealer." "If the product fails to perform in accordance with the product specifications, [Philips] will repair or replace – at its option - the defective material or part." (the "**Warranty**").

33. In June 2021, Dr. Nathanson received a letter from the Philips Group stating that his CPAP machine had been recalled. He registered his unit via the recall process on the Royal Philips website and received a message from the Philips Group to stop using his machine immediately.

34. Dr. Nathanson stopped using his machine at the end of June 2021. However, he began suffering moderate to severe symptoms of sleep apnea: he was groggy, suffered daytime fatigue, would wake up often during the night, and he was having distress. In July 2021, he consulted his family doctor, and his family doctor referred Dr. Nathanson to a sleep clinic. Dr. Nathanson attended the sleep study on August 3, 2021. The study showed that he suffered moderate to severe sleep apnea when not using a CPAP machine. If Dr. Nathanson does not use a CPAP machine, he risks systemic illness in his cardiac, respiratory, and neurological systems.

35. After receiving his sleep study results, Dr. Nathanson started using his recalled Airway Machine again, and continues to use the machine. He is exposing himself to potential risks,

including: irritation of his skin, eyes, and respiratory tract, inflammatory response, sinus infection, headaches, asthma, adverse effects to other organs (eg. kidney and liver), and other toxic carcinogenic effects including cancer. He suffers from stress, anxiety, and personal injury. Dr. Nathanson has put his name on a waiting list for an alternate machine manufactured by ResMed.

36. The plaintiff and the Class Members purchased their airway machines for primarily personal, family, and household use.

37. The Foam Defect creates a substantial likelihood of harm to the plaintiff and Class Members. There were safer and economically feasible foams that should have been used in the design and manufacturing of the Airway Machines, but the defendants elected to use defective foams. The materials used in sleep apnea devices manufactured by ResMed, Fisher and Paykel are not affected by the Foam Defect and are safe to use. ResMed, for example, uses two foam materials, either polyether-urethan or silicon foams, in the airpath of their devices. These foams are safe for use in an airway machine.

38. Further, there were safer and economically feasible designs for the Airway Machines that could have prevented foam degradation from being inhaled through the machines.

39. As a result of the Foam Defect and the marketing and sale practices of the Philip Group, the plaintiff and the Class Members have suffered loss and damages.

40. The plaintiff and Class Members paid for an Airway Machine that was safe and free from defects. The plaintiff and Class Members overpaid for their Airway Machines and the resale value is nil.

41. The plaintiff and Class Members have also suffered loss due to the inconvenience and costs associated with having their Airway Machines repaired and associated with having to be without their machines during the recall.

42. The plaintiff and Class Members have suffered stress, anxiety, and personal injury as a result of the Philips Group deceptively marketing the Airway Machines and selling the Airway Machines with the Foam Defect. Users of the machine must decide whether to stop using the machines, and face health effects such as hypertension, heart attack, stroke, or severe accidents

arising from 'daytime sleeping'. Alternatively, users can continue to use the machines, and face headaches, airway irritation, cough, chest pressure, sinus infection, nausea/vomiting, and run the risk of developing cancer.

43. The plaintiff and Class Members have also suffered as a result of the time they have had to spend investigating the matter, communicating with the Philips Group about the issues, and attending to have the problem diagnosed and addressed.

44. Had the plaintiff and the Class Members known of the Foam Defect, they would not have purchased the Airway Machines.

45. The Philips Group as a whole was enriched by selling the Airway Machines which should not have been sold, and by delaying the recall which resulted in increased revenues for the Philips Group.

Part 2: RELIEF SOUGHT

46. The plaintiff claims, on his own behalf, and on the behalf of the Class Members, as follows:

a. an order certifying this action as a class proceeding and appointing the plaintiff as representative plaintiff under the *Class Proceeding Act*;

b. general damages;

c. special damages;

d. punitive damages;

e. an accounting and disgorgement;

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

g. recovery of health care costs incurred by the Ministry of Health Services on their behalf pursuant to the *Health Care Cost Recovery Act*, S.B.C. 2008, c.27, and comparable legislation in the other provinces and territories;

h. relief under the *Family Compensation Act*, R.S.B.C. 1996, c 126, the *Family Law Act*, R.S.O. 1990, c F 3, the *Fatal Accidents Act*, R.S.A. 2000, c F-8 or equivalent or comparable legislation in other provinces and territories;

i. costs;

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

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

Part 3: LEGAL BASIS

47. The plaintiff pleads and relies on the *Class Proceedings Act*, RSBC 1996, c 50, the *Competition Act*, RSC 1985, c C-34, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (and comparable legislation in other Canadian provinces), the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, the *Limitation Act*, SBC 2012, c 13, and the common law generally, including, negligence and unjust enrichment.

Breach of Warranty

48. For each Airway Machine sold in Canada, Philips RS, formerly Respironics Inc., provided the Warranty described above. The Airway Machines were covered by the Warranty and by failing to adequately remedy the Foam Defect, in a reasonable time, Philips RS has breached the terms of the Warranty. Further, by encouraging Class Members to continue using an unsafe machine, rather than repairing the machine, the Philips Group have breached the terms of the Warranty.

49. Additionally, by marketing, advertising, distributing and selling the Airway Machines containing the Foam Defect while misrepresenting or failing to report information concerning the Foam Defect and the dangers of the Airway Machines to Class Members, Royal Philips, Philips Electronics, and Philips RS created and breached implied warranties that the machines were safe and free of defects.

50. Royal Philips, Philips Electronics, and Philips RS breached these warranties and as a result, the plaintiff and the Class Members have suffered damages.

Negligence

Duty of Care

51. As the designers, testers, manufacturers, marketers, distributors, importers, and sellers of the Airway Machines, the Philips Group were in such a close and proximate relationship to the plaintiff, and Class Members, as to owe them a duty of care. The Philips Group, and specifically Royal Philips, Philips Electronics, and Philips RS caused the Airway Machines to be introduced into the stream of commerce in Canada, and they knew that any dangers or adverse effects related to the machines would cause foreseeable injury to the plaintiff and Class Members.

52. The Philips Group owed a duty to the plaintiff and Class Members to exercise reasonable care when designing, testing, manufacturing, marketing, distributing, importing, and selling the Airway Machines.

Negligent Development, Design, Testing, and Monitoring

53. Royal Philips, Philips North America and Philips RS breached their duty of care to the plaintiff and Class Members by negligently developing, designing, and testing the Airway Machines, including (without limitation), by:

a. carelessly, recklessly, and wrongfully choosing to employ a design in which the sound abatement foam is heated by the motor, and pressurized air is sent through the foam and into the breathing tube, when they could have chosen a safer design;

b. failing to properly design, develop, test, the Airway Machines to ensure that they were safe from defects;

c. failing to discover, through reasonably expected adequate testing, that the Airway Machines were designed in such a manner that the sound abatement foam was heated during normal operation of the machine;

d. failing to discover that heating the sound abatement foam, and then flowing pressurized air through it, made it prone to release dangerous materials and chemicals into the breathing tube; and

e. failing to commercially develop safer and economically feasible designs in the Airway Machines.

54. Royal Philips, Philips North America and Philips RS had a duty to provide users with the safest machine design available. However, they deliberately chose to sell less-safe machines which the Philips Group could advertise as quieter than the alternatives made by competitors. The Philips Group knew that a safer airway machine design would be noisier and cut into sales of the Airway Machines in Canada.

55. There are no individuals for whom the benefits of the Airway Machines outweigh the risks, given that there was at all material times a significantly safer alternative design which the Philips Group elected not to incorporate in their Airway Machines. Despite knowledge of the risk of foam disintegration, the Philips Group repeatedly designed the Airway Machines in a way that caused the Foam Defect.

Negligent Manufacturing

56. Royal Philips, Philips North America and Philips RS breached their duty of care to the plaintiff and Class Members by negligently manufacturing the Airway Machines with defective foam that degrades and releases toxic chemicals when it is heated or in humid conditions.

57. Royal Philips, Philips North America and Philips RS breached their duty of care to the plaintiff and Class Members by negligently manufacturing the Airway Machine with materials that were not reasonably safe and free from defects when safer foam alternatives were available and economically feasible.

Negligent Distribution, Marketing, and Sale

58. Royal Philips, Philips Electronics, and Philips RS were negligent in their distribution, marketing and sale of the Airway Machines.

59. Royal Philips, Philips Electronics, and Philips RS breached their duty of care to the plaintiff and Class Members by negligently distributing, marketing (in print or on any of the Philip Group's websites), and selling the Airway Machines, including (without limitation), by:

a. failing to adequately monitor the safety and performance of the Airway Machines sold since 2009;

b. failing to warn of the dangers of the defects in the Airway Machines, despite knowledge of the problems;

c. electing to distribute, market and sell the Airway Machines while at material times knowing of the Foam Defect;

d. failing to properly and adequately warn of the dangers attendant with the use of the Airway Machines;

e. failing to refrain from selling an unreasonably dangerous product; and

f. failing to promptly recall the Airway Machines from the Canadian market upon discovery of issues concerning the Foam Defect and when issuing a recall, failing to provide a solution in a reasonable amount of time.

60. Royal Philips, Philips Electronics, and Philips RS's conduct in distributing, marketing and selling the Airway Machines while knowing of safer designs and safer foam alternatives resulted in foreseeable, real and substantial danger to the health and safety of the Class Members. The plaintiff and other Class Members suffered loss and damage as a result of the Royal Philips, Philips Electronics, and Philips RS's negligent marketing, distribution, and sale of the Airway Machines

Causation and Damages

61. As a result of the Philips Group's negligence as detailed above, the plaintiff and Class Members have suffered and will continue to suffer loss and damage including, but not limited to:

a. personal injury;

b. medical expenses;

c. out of pocket expenses;

d. loss of past and prospective income;

e. cost of future care;

f. economic loss; and

g. stress and anxiety.

Breach of Consumer Protection Legislation

British Columbia

62. The conduct of the Philips Group was in breach of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "BC Consumer Protect Act").

63. The Philips Group's solicitations, offers, advertisements, promotions, sales and supply of the Airway Machines – ultimately for personal, family, or household use by the plaintiff and by British Columbia Class Members – were "consumer transactions" within the meaning of the BC Consumer Protect Act.

64. With respect to these consumer transactions, the plaintiff and the British Columbia Class Members were "consumers" within the meaning of the BC Consumer Protect Act, Royal Philips, Philips Electronics, and Philips RS were each "suppliers" within the meaning of the BC Consumer Protect Act, and the Airway Machines were each "goods" within the meaning of the BC Consumer Protect Act.

65. Royal Philips, Philips Electronics, and Philips RS's conduct with regards to the marketing and sale of the Airway Machines, and through statements in the Warranty and elsewhere, had the capability, tendency or effect of deceiving or misleading the plaintiff and British Columbia Class Members with respect to the safety of the Airway Machines. Royal Philips, Philips Electronics, and Philips RS's conduct constituted deceptive acts and practices within the meaning of s.4 of the BC Consumer Protect Act and contrary to s. 5 of the BC Consumer Protect Act.

66. As a result of Royal Philips, Philips Electronics, and Philips RS's deceptive acts and practices, the plaintiff and British Columbia Class Members have suffered losses and damages. The plaintiff seeks remedies pursuant to ss. 171 and 172 of the BC Consumer Protect Act on their own behalf and on behalf of British Columbia Class Members.

67. It is not necessary for the plaintiff and British Columbia Class Members to establish reliance on Royal Philips, Philips Electronics, and Philips RS's deceptive acts or practices in order to establish a breach of the BC BPCPA and a remedy for that breach.

Alberta

68. The conduct of the Philips Group was in breach of the *Consumer Protection Act,* RSA 2000, c C-26.3 (the "Alberta Consumer Protection Act").

69. Royal Philips, Philips Electronics, and Philips RS supply of the Airway Machines – goods ordinarily used primarily for personal, family, or household purposes by Alberta Class Members – were "consumer transactions" within the meaning of the Alberta Consumer Protection Act.

70. With respect to these consumer transactions, the Alberta Class Members were "consumers" within the meaning of the Alberta Consumer Protection Act, Royal Philips, Philips Electronics, and Philips RS were each "suppliers" within the meaning of the Alberta Consumer Protection Act, and the Airway Machines were each "goods" within the meaning of the Alberta Consumer Protection Act.

71. Royal Philips, Philips Electronics, and Philips RS conduct with regards to the marketing and sale of the Airway Machines, as particularized above, had the capability, tendency or effect of deceiving or misleading the Alberta Class Members with respect to the safety of the Airway Machines. Royal Philips, Philips Electronics, and Philips RS's conduct constituted unfair practices within the meaning of and contrary to s. 6 of the Alberta Consumer Protection Act.

72. As a result of Royal Philips, Philips Electronics, and Philips RS's unfair practices, the Alberta Class Members have suffered losses and damages. The plaintiff seeks remedies for the Alberta Class Members pursuant to s.13 of the Alberta Consumer Protection Act.

73. It is not necessary for the Alberta Class Members to establish reliance on Royal Philips, Philips Electronics, and Philips RS's unfair practices in order to establish a breach of the Alberta Consumer Protection Act and a remedy for that breach.

Saskatchewan

74. The conduct of the Philips Group was in breach of *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2 (the "Saskatchewan Consumer Protection Act").

75. Royal Philips, Philips Electronics, and Philips RS supply of the Airway Machines – goods ordinarily used primarily for personal, family, or household purposes by Saskatchewan Class Members – were transactions involving goods, within the meaning of the Saskatchewan Consumer Protection Act.

76. With respect to the Philips Group supply of the Airway Machines, the Saskatchewan Class Members were "consumers" within the meaning of the Saskatchewan Consumer Protection Act, Royal Philips, Philips Electronics, and Philips RS were each "suppliers" within the meaning of the Saskatchewan Consumer Protection Act, and the Airway Machines were each "goods" within the meaning of the Saskatchewan Consumer Protection Act.

77. Royal Philips, Philips Electronics, and Philips RS's conduct with regards to the marketing and sale of the Airway Machines, as particularized above, had the capability, tendency or effect of reasonably deceiving or misleading the Saskatchewan Class Members with respect to the safety of the Airway Machines. Royal Philips, Philips Electronics, and Philips RS's conduct constituted unfair practices within the meaning of ss. 4, 6, and 7 of the Saskatchewan Consumer Protection Act and contrary to s. 8 of the Saskatchewan Consumer Protection Act.

78. As a result of Royal Philips, Philips Electronics, and Philips RS's unfair practices, the Saskatchewan Class Members have suffered losses and damages. The plaintiff seeks remedies for the Saskatchewan Class Members pursuant to s. 93 of the Saskatchewan Consumer Protection Act.

79. It is not necessary for the Saskatchewan Class Members to establish reliance on Philips Electronics Ltd, Philips RS, and Royal Philips's unfair practices in order to establish a breach of the Saskatchewan Consumer Protection Act and a remedy for that breach.

Manitoba

80. The conduct of the Philips Group was in breach of *The Business Practices Act*, C.C.S.M., c B-120 ("Manitoba Business Practices Act").

81. Royal Philips, Philips Electronics, and Philips RS's solicitations, offers, advertisements, promotions, sales and supply of the Airway Machines – ultimately for personal, family, or household use by the Manitoba Class Members – were "consumer transactions" within the meaning of the Manitoba Business Practices Act.

82. With respect to these consumer transactions, the Manitoba Class Members were "consumers" within the meaning of the Manitoba Business Practices Act, Royal Philips, Philips Electronics, and Philips RS were each "suppliers" within the meaning of the Manitoba Business Practices Act, and the Airway Machines were each "goods" within the meaning of the Manitoba Business Practices Act.

83. Royal Philips, Philips Electronics, and Philips RS's conduct with regards to the marketing and sale of the Airway Machines, as particularized above, had the capability, tendency or effect of deceiving or misleading the Manitoba Class Members with respect to the safety of the Airway Machines. Royal Philips, Philips Electronics, and Philips RS's conduct constituted unfair business practices within the meaning of s. 2 of the Manitoba Business Practices Act and contrary to s. 5 of the Manitoba Business Practices Act.

84. As a result of Royal Philips, Philips Electronics, and Philips RS's unfair business practices, the Manitoba Class Members have suffered losses and damages. The plaintiff seeks remedies for the Manitoba Class Members pursuant to s. 23 of the Manitoba Business Practices Act.

85. It is not necessary for the Manitoba Class Members to establish reliance on Royal Philips, Philips Electronics, and Philips RS's unfair business practices in order to establish a breach of the Manitoba Business Practices Act and a remedy for that breach.

Quebec

86. The conduct of the Philips Group was in breach of the *Consumer Protection Act,* C.Q.L.R. c. P-40.1 (the "Quebec Consumer Protection Act").

87. With respect to these consumer transactions, the Quebec Class Members were "consumers" within the meaning of the Quebec Business Practices Act, and the Airway Machines were each "goods" within the meaning of the Quebec Business Practices Act.

88. Royal Philips, Philips Electronics, and Philips RS in the course of marketing and advertising of the Airway Machines, as particularized above, made false or misleading representations to Quebec Class Members with respect to the safety of the Airway Machines contrary to s. 219 of the Quebec Consumer Protection Act.

89. As a result, the Quebec Class Members have suffered losses and damages. The plaintiff seeks remedies for the Quebec Class Members pursuant to s. 272 of the Quebec Consumer Protection Act.

90. It is not necessary for the Quebec Class Members to establish reliance on Royal Philips, Philips Electronics, and Philips RS's false or misleading representations to establish a breach of the Quebec Consumer Protection Act and a remedy for that breach.

Newfoundland and Labrador

91. The conduct of the Philips Group was in breach of the *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1 (the "Newfoundland Consumer Protection Act").

92. Royal Philips, Philips Electronics, and Philips RS's solicitations, offers, advertisements, promotions, sales and supply of the Airway Machines – goods ordinarily used primarily for personal, family, or household purposes by Newfoundland and Labrador Class Members – were "consumer transactions" within the meaning of the Newfoundland Consumer Protection Act.

93. With respect to these consumer transactions, the Newfoundland and Labrador Class Members were "consumers" within the meaning of the Newfoundland Consumer Protection Act, Royal Philips, Philips Electronics, and Philips RS were each "suppliers" within the meaning of the Newfoundland Consumer Protection Act, and the Airway Machines were each "goods" within the meaning of the Newfoundland Consumer Protection Act.

94. Royal Philips, Philips Electronics, and Philips RS's conduct with regards to the marketing and sale of the Airway Machines, as particularized above, had the capability, tendency or effect of deceiving or misleading the Newfoundland and Labrador Class Members with respect to the safety of the Airway Machines. Royal Philips, Philips Electronics, and Philips RS's conduct constituted

unfair business practices within the meaning of s. 7 of the Newfoundland Consumer Protection Act and contrary to s. 9 of the Newfoundland Consumer Protection Act.

95. As a result of Royal Philips, Philips Electronics, and Philips RS's unfair business practices, the Newfoundland and Labrador Class Members have suffered losses and damages. The plaintiff seeks remedies for the Newfoundland and Labrador Class Members pursuant to s. 10 of the Newfoundland Consumer Protection Act.

96. It is not necessary for the Newfoundland and Labrador Class Members to establish reliance on Royal Philips, Philips Electronics, and Philips RS's unfair business practices in order to establish a breach of the Newfoundland Consumer Protection Act and a remedy for that breach.

Prince Edward Island

97. The conduct of the Philips Group was in breach of the *Business Practices Act*, R.S.P.E.I. 1988, c. B-7 ("PEI Business Practices Act").

98. Royal Philips, Philips Electronics, and Philips RS's solicitations, offers, advertisements, promotions, sales and supply of the Airway Machines – goods ordinarily used primarily for personal, family, or household purposes by Newfoundland and Labrador Class Members – were "consumer representations" within the meaning of the PEI Business Practices Act.

99. With respect to Royal Philips, Philips Electronics, and Philips RS's supply of the Airway Machines, the PEI Class Members were "consumers" within the meaning of the PEI Business Practices Act, and the Airway Machines were each "goods" within the meaning of the PEI Business Practices Act.

100. Royal Philips, Philips Electronics, and Philips RS's conduct with regards to the marketing and sale of the Airway Machines, as particularized above, had the capability, tendency or effect of deceiving or misleading the PEI Class Members with respect to the safety of the Airway Machines. Royal Philips, Philips Electronics, and Philips RS's conduct constituted unfair practicse within the meaning of s. 2 of the PEI Business Practices Act and contrary to s. 3 of the PEI Business Practices Act.

101. As a result of Royal Philips, Philips Electronics, and Philips RS's unfair practices, the PEI Class Members have suffered losses and damages. The plaintiff seeks remedies for the PEI Class Members pursuant to s. 4 of the PEI Business Practices Act.

102. It is not necessary for the PEI Class Members to establish reliance on Royal Philips, Philips Electronics, and Philips RS's unfair practices in order to establish a breach of the PEI Business Practices Act and a remedy for that breach.

Unjust Enrichment

103. In this case, the Philips Group were enriched by selling the Airway Machines which were unsafe, delaying the recall of the Airway Machines, and the opportunistic promotion of the DreamStation 2 CPAP machines to Class Members (who were without a safe airway machine to treat their ongoing health problems). These actions resulted in increased revenues for the Philips Group as a whole.

104. The plaintiff and Class Members suffered a corresponding deprivation as a consequence, namely: paying for a defective Airway Machine. The Airway Machine holds no economic value, and so, the plaintiff and Class Members have overpaid the entire value of the machines. Further, Class Members who purchased the DreamStation 2 machine or another airway machine after having their Airway Machine recalled suffered a corresponding deprivation as a result of paying for a replacement machine.

105. The actions of the Philips Group were in breach of the Warranty and the provincial consumer protection statutes described above. There was no juristic reason or justification for the enrichment of the Philips Group and restitution should be paid to the plaintiff and Class Members.

Punitive Damages

106. The Philips Group's misconduct in deceptively marketing the Airway Machines to consumers, delaying the recall, and failing to comply with the terms of the Warranty, was oppressive and high-handed, and departed to a marked degree from ordinary standards of decent behaviour.

107. Moreover, the Philips Group's misconduct in waiting to notify users of the Foam Defect until a Philips branded safer alternative was commercially available, and then notifying investors first, was oppressive and high-handed, and departed to a marked degree from ordinary standards of decent behaviour.

108. Lastly, attempting to profit from the recall, by using the recall as an advertising opportunity for the new DreamStation 2, was oppressive and high-handed, and departed to a marked degree from ordinary standards of decent behaviour.

109. The Philips Group's actions are part of a pattern of willful disregard for the plaintiff's and Class Members' rights. The Philips Group's actions offend the moral standards of the community and warrant the condemnation of the Court such that an award of punitive damages should be made against them.

Quebec Class Claims

110. The plaintiff pleads and relies on the *Civil Code of Québec*, C.Q.L.R. c.C-1991 in support of the claims raised in these pleadings for the Class Members residing in Québec.

Family Member Claims

111. The plaintiff pleads and relies on the *Family Compensation Act*, R.S.B.C. 1996, c 126, the *Family Law Act*, R.S.O. 1990, c F 3, the *Fatal Accidents Act,* R.S.A. 2000, c F-8 or equivalent or comparable legislation in other provinces and territories in support of the claims for the Family Members.

Health Care Cost Recovery

112. The plaintiff and Class Members have a claim for the recovery of health care costs incurred on their behalf by the British Columbia Ministry of Health Services and by other provincial and territorial governments. The plaintiff plead the *Health Care Cost Recovery Act,* S.B.C. 2008, c. 27 and the comparable legislation from the other provinces and territories.

Limitation Period

113. The plaintiff pleads on its behalf and the behalf of Class Members that limitation periods have been temporarily suspended in the province due to COVID-19 pursuant to Order of the Minister of Public Safety and the Solicitor General, Ministerial Order, dated March 26, 2020, made under the *Emergency Program Act*, R.S.B.C., c.111, s. 1 0.

114. The plaintiff pleads and relies on the *Limitation Act*, S.B.C. 2012, c. 13 and the *Limitation Act*, R.S.B.C. 1996, c. 266

Jurisdiction

115. 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: the Philips Group marketed and sold the Airway Machines in British Columbia; the plaintiff resides in British Columbia; and 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 on the defendants outside British Columbia on the grounds that: this action concerns a tort committed in British Columbia and a business carried on in British Columbia pursuant to section 10(g) and (h) of the *Court Jurisdiction and Proceeding Transfer Act*, S.B.C. 2003, c.28.

Plaintiff's address for service:

Klein Lawyers LLP
1385 W 8th Ave #400
Vancouver, BC V6H 3V9

Place of trial: Vancouver, BC

The address of the registry is:

800 Smithe Street
Vancouver, BC
V6Z 2E1

Date: October 4, 2021

Signature of lawyer for plaintiff

OBO David A. Klein

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

[*The following information is provided for data collection purposes only and is of no legal effect.*]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

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

[x] 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:

[x] a class action

[ ] maritime law

[ ] aboriginal law

[ ] constitutional law

[ ] conflict of laws

[ ] none of the above

[ ] do not know

Part 4:

Business Practices and Consumer Protection Act, SBC 2004, c 2;

Business Practices Act, R.S.P.E.I. 1988, c. B-7;

Class Proceeding Act, RSBC 1996, c 50;

Consumer Protection Act, CQLR c P-40. 1;

Consumer Protection Act, RSA 2000, c C-26.3;

Consumer Protection and Business Practices Act, SNL 2009, c C-31.1;

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28;

Court Order Interest Act, RSBC 1996, c 79;

Crown's Right of Recovery Act, S.A. 2009, c. C-35;

Family Compensation Act, R.S.B.C. 1996, c 126;

Family Law Act, R.S.O. 1990, c F 3;

Family Services Act, S.N.B. 1980, c. F-2.2;

Fatal Accidents Act, R.S.A. 2000, c F-8;

Fatal Accidents Act, R.S.N.B. 2012, c 104;

Fatal Accidents Act, R.S.N.L. 1990, c F-6;

Fatal Accidents Act, R.S.N.W.T. 1988, c. F-3;

Fatal Accidents Act, R.S.Y. 2002, c 86;

Fatal Accidents Act, S.Nu. 20 10, c 14;

Fatal Injuries Act, R.S.N.S. 1989, c 163;

Fatal Accidents Act, R.S.P.E.I. 1988, c F-5;

Health Care Cost Recovery Act, S.B.C. 2008, c. 27;

Health Insurance Act, R.S.O. 1990, c. H.6;

Health Services Act, R.S.N.B. 1973, c. H-3;

Health Services and Insurance Act, R.S.N.S. 1989, c. 197;

Health Services Insurance Act, C.S.S.M., c. H35;

Health Services Payment Act, R.S.P.E.I. 1988, c. H-2;

Home Care and Community Services Act, 1994, S.O. 1994, c. 26;

Hospital Act, R.S.A. 2000, c. H-12;

Hospital and Diagnostic Services Insurance Act, R.S.P.E.I. 1988, c. H-8;

Hospital Insurance Agreement Act, R.S.N. 1990, c. H-7;

Hospital Services Act, R.S.N.B. 1973, c. H-9;

Limitation Act, SBC 2012, c 13;

Medical Care and Hospital Insurance Act, S.N.L. 2016, c. M-5.01;

Medical Services Payment Act, R.S.N.B. 1973, c. M-7;

Medicare Protection Act, R.S.B.C. 1996, c. 286;

Pharmaceutical Services Act, S.B.C. 2012, c. 22;

Survival of Actions Act, R.S.A. 2000, c S-27;

Survival of Actions Act, R.S.N.B. 2011, c 227;

Survival of Actions Act, R.S.N.L. 1990, c S-32;

Survival of Actions Act, R.S.N.S. 1989, c 453;

Survival of Actions Act, R.S.P.E.I. 1988, c S-11;

Survival of Actions Act, R.S.Y. 2002, c 212;

The Business Practices Act, CCSM c B120;

The Consumer Protection and Business Practices Act, SS 2013, c C-30.2;

The Fatal Accidents Act, C.C.S.M. c FS0;

The Fatal Accidents Act, R.S.S. 1978, c F-11;

The Health Administration Act, R.S.S. 1978, c. H-0.0001 (formerly known as the *Department of Health Act*); and,

The Survival of Actions Act, S.S. 1990, c S-66.1.