Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

(Court Seal)

KORINN GRAY

Plaintiff

and

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

Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date _____ Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue, 9th Floor
Toronto ON M5G 1R7

TO: Philips Electronics Ltd.
281 Hillmount Rd
Markham, ON L6C 2S3
Canada

AND TO: Respironics, Inc.
801 Presque Isle Dr.
Pittsburgh, PA 15239-2723
United States of America

AND TO: Philips North America LLC
222 Jacobs St. 3rd Floor
Cambridge, MA, 02141-2296
United States of America

AND TO: Philips RS North America LLC
1010 Murry Ridge Lane
Murraysville, PA 15668
United States of America

AND TO: Koninklijke Philips N.V.
Breitner Center, Amstelplein 2
1096 BC Amsterdam
The Netherlands

AND TO: Ministry of Health, Third Party Liability
PO Box 9647 STN PROV GOVT
Victoria, BC V8W 9P4
Canada

CLAIM

I. DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

(a) "***CJA***" means the *Courts of Justice Act*, RSO 1990, c C-43;

(b) "**Class**" or "**Class Members**" means all persons in Canada, with the exception of Excluded Persons, who purchased and/or used one of the Recalled Products;

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

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

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

(f) "***Consumer Protection Act***" means the *Consumer Protection Act, 2002*, SO 2002, c 30, Sched A;

(g) "***Crown's Right of Recovery Act***" means the *Crown's Right of Recovery Act*, SA 2009, c C-35;

(h) "***CPA***" means the *Class Proceedings Act, 1992*, SO 1992, c 6;

(i) "**Equivalent Consumer Protection Statutes**" means the *Business Practices and Consumer Protection Act*, SBC 2004, c 2, the *Fair Trading Act*, RSA 2000, c F-2, the *Consumer Protection Act*, SS 1996, c C-30.1, the *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, the *Business Practices Act*, CCSM, c B120, the *Consumer Protection Act*, CQLR, c P-40.1, the *Consumer Protection and*

Business Practices Act, SNL 2009, c C-31.1, the *Consumer Protection Act*, RSNS 1989, c 92 and the *Business Practices Act*, RSPEI 1988, c B-7;

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

(i) Philips and their officers and directors; and

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

(k) "***Health Care Costs Recovery Act***" means the *Health Care Costs Recovery Act*, SBC 2008, c 27;

(l) "***Health Insurance Act***" means the *Health Insurance Act*, RSO 1990, c H.6;

(m) **"PE-PUR Foam"** means polyester-based polyurethane foam;

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

(o) "**Plaintiff**" means Korinn Gray;

(p) **"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, S/T, AVAPS);

(xviii) The Dorma 400, 500;

(xix) The DreamStation (ASV);

(xx) The DreamStation Auto BiPAP;

(xxi) The DreamStation Auto CPAP;

(xxii) The DreamStation BiPAP Auto SV, CA;

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

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

(xxv) The DreamStation BiPAP Pro;

(xxvi) The DreamStation CPAP;

(xxvii) The DreamStation CPAP Pro;

(xxviii) The DreamStation Expert;

(xxix) The DreamStation GO;

(xxx) The DreamStation GO Auto CPAP;

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

(xxxii) The DreamStation GO CPAP;

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

(xxxiv) The DreamStation (CPAP, Auto CPAP, BiPAP);

(xxxv) The DreamStation (ST, AVAPS);

(xxxvi) The E30;

(xxxvii) The Garbin Plus, Aeris, LifeVent;

(xxxviii) The OmniLab Advanced Plus;

(xxxix) The OmniLab Advanced, Domestic;

(xl) The OmniLab, Domestic Core;

(xli) The REMStar Auto with Humidifier, with SD Card, A-FLEX, Canada;

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

(xliii) The REMStar SE Auto;

(xliv) The Restar Plus with Humidifier, with SD Card, C-FLEX, Canada;

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

(xlvi) The Restar Pro with Humidifier, with SD Card, C-FLEX+, Canada;

(xlvii) The Restar Pro with SD Card, C-FLEX+, Canada; and

(xlviii) The Restar, with Smartcard, Canada;

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

(l) The SystemOne;

(li) The Trilogy 100; and

(lii) The Trilogy 200;

(q) "**Representations**" means the representations and omissions described at paragraphs 17-19;

(r) "**VOCs**" means volatile organic compounds

II. RELIEF SOUGHT

2. The Plaintiff, on her own behalf and on behalf of all Class Members, seeks:

(a) an order certifying this action as a class proceeding and appointing her as the representative plaintiff;

(b) a declaration that Philips engaged in conduct contrary to Part VI of the *Competition Act*;

(c) a declaration that Philips engaged in unfair practices contrary to Part III of the *Consumer Protection Act* and the equivalent provisions in the Equivalent Consumer Protection Statutes;

(d) a declaration that it is not in the interests of justice to require that notice be given pursuant to section 18(15) of the *Consumer Protection Act* (and pursuant to any parallel provisions of the Equivalent Consumer Protection Statutes) and waiving any such notice requirements;

(e) an order rescinding the purchases of the Recalled Products or, alternatively, a declaration that Class Members have the right to return the Recalled Products for a full refund;

(f) a reference to decide any issues not decided at the trial of the common issues;

(g) statutory damages pursuant to the *Competition Act*, the *Consumer Protection Act* and the Equivalent Consumer Protection Statutes in an amount to be determined by this Honourable Court;

(h) recovery of:

(i) the Crown's cost of health services as defined in to the *Crown's Right of Recovery Act*;

(ii) the past cost of health care services and the future cost of health care services as defined in the *Health Care Costs Recovery 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 *Health Insurance Act*,

all in an amount to be determined by this Honourable Court;

(i) restitution for unjust enrichment in an amount equivalent to the purchase price of the Recalled Products;

(j) general damages for negligent misrepresentation, unjust enrichment, conduct that is contrary to the *Consumer Protection Act* and Equivalent Consumer Protection Statutes, and conduct that is contrary to Part VI of the *Competition Act*, in the amount of $500,000,000;

(k) special damages in the amount of $500,000,000;

(l) punitive, aggravated and/or exemplary damages in the amount of $250,000,000;

(m) pre-judgment interest compounded and post-judgment interest pursuant to the *CJA*;

(n) investigative costs pursuant to section 36 of the *Competition Act*; and

(o) costs of this action pursuant to the *CPA*, or alternatively, on a full or substantial indemnity basis plus the cost of administration and notice pursuant to section 26(9) of the *CPA* plus applicable taxes; and

(p) such further and other relief as this Honourable Court may deem just.

III. INTRODUCTION

3. 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 Electronics Ltd. is the subsidiary operating in Canada. It is incorporated under the *Canada Business Corporations Act* and its head office is in Markham, Ontario.

(c) Philips North America LLC is a manufacturing subsidiary. It is incorporated under the laws of Delaware and its head office is in Cambridge, Massachusetts.

(d) Philips RS North America LLC is a manufacturing subsidiary. It is incorporated under the laws of Delaware and its head office is in Pittsburgh, Pennsylvania.

(e) Respironics Inc. is a manufacturing subsidiary. It is incorporated under the laws of Pennsylvania and its head office is in Murraysville, Pennsylvania.

4. Philips manufactures and sells breathing assistance devices including CPAP and BiPAP machines, commonly used to treat sleep apnea and intended to be used every night, and ventilators that treat respiratory failure. Philips manufactured and sold approximately four million of the Recalled Products worldwide and more than 100,000 in Canada.

5. The Recalled Products all contain PE-PUR foam for sound abatement, which can break down and may be inhaled or ingested by the patient. PE-PUR foam may also emit carcinogenic VOCs that may be inhaled or ingested, adversely affecting organs.

A. THE PURPOSE OF THE RECALLED PRODUCTS

6. 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.

7. CPAP and BiPAP therapies are common treatments for 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.

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

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

10. Ventilators are often 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.

B. THE PLAINTIFF'S EXPERIENCE

11. The Plaintiff, Korinn Gray, is a registered nurse in North York, Ontario.

12. On July 29, 2020, Ms. Gray met a respirologist to whom she had been referred for diagnosis and treatment of sleep problems. He diagnosed her with sleep apnea.

13. The following day, Ms. Gray purchased the following Philips products from VitalAire, a CPAP retailer:

(a) a DreamStation Expert Auto CPAP listed for sale at $860, but for which Ms. Gray paid a discounted price of $215; and

(b) a small Airfit N30 Nasal Mask listed for sale at $284.99, but for which Ms. Gray paid a discounted price of $184.24.

14. Since July 30, 2020, Ms. Gray has used these products daily to treat her sleep apnea.

15. On June 14, 2021, Ms. Gray received a recall notice from Health Canada. She nevertheless had to continue using the products every day because it was a medical necessity. It would take more than a month for her to be able to get a replacement device at approximately $860 out of pocket.

16. As a result of using one of the Recalled Products, Ms. Gray has suffered headaches; hyper-sensitivity and irritability; irritation of her airway, eyes, and nose; coughing; nausea; and dizziness.

C. MARKETING OF THE RECALLED PRODUCTS

17. 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."

18. 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.

19. 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.

D. REPORTS OF PROBLEMS WITH THE RECALLED PRODUCTS

20. For several years, Philips received reports from users of the Recalled Products about black particles in their machines. As a result, Philips knew, or ought to have known, that the PE-PUR Foam was breaking down in the Recalled Products and that, as a result, users of the Recalled Products were at risk of serious adverse health effects. However, Philips took no steps to warn users of Recalled Products of the hazards of using them until late April 2021 and did not issue a recall until June 14, 2021.

21. Philips timed its recall of the Recalled Breathing Machines to coincide with the launch of its next generation of products, which purportedly do not suffer from the same PE-PUR Foam issues. The purpose of this delay was to encourage users of the Recalled Breathing machines to purchase a new machine from Philips, rather than one from a competing manufacturer.

E. HEALTH EFFECTS OF DEGRADING AND OFF-GASSING OF PE-PUR FOAM

22. The degrading and off-gassing of PE-PUR Foam in the Recalled Products can cause serious, indeed life-threatening health complications. These include, but are not limited to:

(a) Carcinogenicity (causing cancer);

(b) Respiratory damage and asthma;

(c) Adverse effects to other organs;

(d) Irritation of the eyes and throat;

(e) Nausea and vomiting; and

(f) Headaches and dizziness.

23. In this regard, in its letter to customers accompanying the recall, Philips has admitted that the Recalled Products can cause serious, indeed life-threatening, injury:

> These issues [degradation and off-gassing of PE-PUR Foam] can result in serious injury which can be life-threatening, cause permanent impairment, and/or require medical intervention to preclude permanent impairment. To date, Philips Respironics has received several complaints regarding the presence of black debris/particles within the airpath circuit (extending from the device outlet, humidifier, tubing, and mask). Philips also has received reports of headache, upper airway irritation, cough, chest pressure and sinus infection. 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.

24. Notwithstanding that Philips was aware of the problem of degrading PE-PUR Foam and off-gassing in the Recalled Products for several years prior to 2021, it failed to recall the machines in a timely way and did not notify users of the Recalled Products until April 2021, shortly after the launch of the DreamStation 2, the next-generation machine in its widely used DreamStation product family. In particular, on April 26, 2021, two weeks after the official launch of DreamStation 2, Philips issued a press release warning consumers of 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 risks include that the foam may degrade under certain circumstances, influenced by factors including use of unapproved cleaning methods, such as ozone*), and certain environmental conditions involving high humidity and temperature. 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. Philips is in the process of engaging with the relevant regulatory agencies regarding this matter and initiating appropriate actions to mitigate these possible risks. 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.

F. THE RECALL

26. On June 14, 2021, Philips issued a recall notification for several sleep and respiratory devices due to issues they identified which posed certain health risks to users of the devices. The devices that were recalled include models manufactured before April 26, 2021. The recall letter, as well as a notice from the Government of Canada, identified two issues in relation to the PE-PUR foam used in the Recalled Products. It advised that (1) the PE-PUR foam used in the Recalled Products may degrade into small particles that could potentially enter the air pathway of the device and be

inhaled by users of the relevant devices, and (2) the PE-PUR foam used in the devices may emit certain chemicals (i.e. off-gas) which could also potentially pose serious health risks to users. In a document released by Philips entitled "Frequently Asked Questions", Philips advised of multiple causes for the problems with the PE-PUR Foam including natural degradation, degradation from unapproved cleaning methods (e.g., the use of ozone), and possibly high heat and high humidity environments.

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 due to foam degradation exposure:

> **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. Secondly, Philips announced dangers from off-gassing from PE-PUR foam:

> **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 the following symptoms:

> "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. While Philips has advised that it will replace or repair the Recalled Products it has not provided any commitment for when this will happen. Furthermore, it has used its announcement as another marketing opportunity for its DreamStation 2 products:

Repair and replacement program

Philips is providing the relevant regulatory agencies with required information related to the launch and implementation of the projected correction. The company will replace the current sound abatement foam with a new material and has already begun the preparations, which include obtaining the relevant regulatory clearances. Philips aims to address all affected devices in scope of this correction as expeditiously as possible.

As part of the program, the first-generation DreamStation product families will be modified with a different sound abatement foam and shipped upon receipt of the required regulatory clearances. Philips' recently launched next-generation CPAP platform, DreamStation 2, is not affected by the issue.

32. In the meantime, until the Recalled Products can be repaired or replaced, Philips has advised:

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.

33. 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.

34. 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.

IV. THE CLAIMS

A. NEGLIGENCE

35. Philips designed, tested, manufactured, marketed, imported, distributed, licensed, and sold the Recalled Products. It knew, or ought to have known, that any defects in the design, testing, manufacturing, or materials would cause foreseeable damage to the Class.

36. The Recalled Products presented a real and substantial danger to the Class.

37. Philips owed a duty to the Class to exercise reasonable care when designing, testing, manufacturing, and monitoring the ongoing safety of the Recalled Products. At a minimum, that duty required that Philips ensure that the Recalled Products did not cause or materially contribute to adverse health effects. Additional duties included, but were not limited to:

(a) a duty to the Class to ensure that the materials that it put into the Recalled Products did not make those products unsafe, or cause any adverse health effects;

(b) a duty to the Class to monitor the ongoing safety of the Recalled Products including, but not limited to, investigating complaints from users of the Recalled Products and

act on such complaints in a timely way, including without limitation promptly issuing recalls and repairing and replacing the Recalled Products;

(c) Philips owed a duty to the Class not to market the Recalled Products as safe when they were in fact dangerous;

(d) Once Philips knew or ought to have known that there was a risk of adverse health effects, Philips owed a duty to the Class to immediately warn them of those risks;

(e) Once Philips concluded that there was a risk of adverse health effects, Philips owed a duty to the Class to immediately recall all of the Recalled Products.

38. Philips breached all of these duties, causing damages to the Class.

B. BREACH OF WARRANTY

39. Philips gave the Class express or implied warranties that the Recalled Products were safe, or at least that they could be safely used for the purposes for which they were intended. In the alternative, there was an implied warranty that the Recalled Products would be safe to use for their intended purposes under section 15 of the *Sale of Goods Act*, RSO 1990, c S.1 or section 8 of the *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A and the analogous provisions in the Equivalent Consumer Protection Statutes.

40. Philips gave the Class express or implied warranties that the materials used in the Recalled Products were safe, or at least that they would not undermine the purpose of the Recalled Products. In the alternative, there was an implied warranty that the materials used in the Recalled Products would not undermine the purpose of those products under section 15 of the *Sale of Goods Act*,

RSO 1990, c S.1 or section 8 of the *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A and the analogous provisions in Equivalent Consumer Protection Statutes.

41. Philips gave the Class express or implied warranties that if they suspected or found that the Recalled Products caused adverse health effects, then Philips would promptly issue a recall.

42. Philips breached all of these warranties, causing damages to the Class.

C. UNJUST ENRICHMENT

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

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

45. The Class is entitled to equitable and restitutionary relief for this unjust enrichment.

D. BREACH OF THE *COMPETITION ACT*

46. In making the Representations, Philips breached section 52 of the *Competition Act*. Philips made the Representations to the public knowing that they were, or reckless to the possibility that they were false or misleading in a material respect.

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

E. BREACH OF THE *CONSUMER PROTECTION ACT, 2002*

48. In making the Representations, Philips breached section 14, 15, and 17 of the *Consumer Protection Act*, as well as analogous provisions in Equivalent Consumer Protection Statutes.

(a) Philips represented that the Recalled Products were safe – a benefit or quality that they did not have.

(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.

49. As a result, some Class Members have a right to rescission, damages, or equitable relief under section 18 of the *Consumer Protection Act* and analogous provisions in the Equivalent Consumer Protection Statutes.

F. DAMAGES UNDER HEALTH CARE COSTS RECOVERY STATUTES

50. Philips are "wrongdoers" as defined in the *Crown's Right of Recovery Act* and as defined in the *Health Care Costs Recovery Act*. Philips is "another" as defined in *Health Insurance Act*.

51. The Class Members who live in Alberta are "recipients", as defined in the *Crown's Right of Recovery Act*. The Class Members who live in British Columbia are "beneficiaries" as defined in the *Health Care Costs Recovery Act*. The Class Members who live in Ontario are "insured persons" as defined in the *Health Insurance Act*.

52. As a result of Philips' wrongdoing, the recipients have received or are likely to receive "health services" as defined in the *Crown's Right of Recovery Act*. As a result of Philips' wrongdoing, the beneficiaries have received or are likely to receive "health care services" as defined in the *Health Care Costs Recovery Act*. "As the result of the negligence or other wrongful act or omission" of Philips, the insured persons have suffered "personal injuries" for which they received "insured services" as defined in the *Health Insurance Act*.

53. Pursuant to section 38(1) of the *Crown's Right of Recovery Act*, the recipients have a right to recover the cost of their health care services from Philips. Pursuant to section 2 of the *Health Care Costs Recovery Act*, the beneficiaries have a right to recover the past cost of their health care services and the future cost of their health care services from Philips. Pursuant to section 30(1) of the *Health Insurance Act*, the General Manager has a subrogated right to recover "the cost incurred for past insured services and the cost that will probably be incurred for future insured services".

G. DAMAGES

54. Philips' misconduct, as described at paragraphs 35-53, caused damages to Class Members. As a result of this misconduct:

(a) Class Members have suffered and continue to suffer serious personal injuries and harm, with resultant pain and suffering:

(i) directly from using the Recalled Products; and

(ii) indirectly from not having access to treatment while waiting for the Recalled Products to be repaired or replaced;

(b) Class Members have suffered and continue to suffer special damages for:

(i) 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;

(ii) 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

(iii) The cost of replacing the Recalled Devices;

(c) Class Members have suffered and continue to suffer expenses and special damages, of a nature and amount to be particularized prior to trial; and

(d) Class Members have suffered and continue to suffer significant mental distress. The products they purchased to improve their respiration caused additional respiratory problems. The products they purchased to treat their sleep disorders were inserting dangerous chemicals into their bodies as they slept. This warrants aggravated damages.

55. For years, Philips knew that customers had made complaints about this problem, but it chose not to investigate or not to act on the results of the investigation. 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 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.

V. SERVICE OUTSIDE ONTARIO

56. The Plaintiff pleads and relies on sections 17.02(g) of the *Rules of Civil Procedure*, RRO 1990, Reg 194, allowing for service *ex juris* of the foreign defendants. Specifically, this originating process may be served without court order outside Ontario in that the claim is in respect of a tort committed in Ontario.

VI. OTHER

57. The Plaintiff pleads and relies on:

(a) The *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss 4-5, 8-10, 171-172;

(b) The *Business Practices Act*, CCSM, c B120, ss 3-6, 8, 23;

(c) The *Business Practices Act*, RSPEI 1988, c B-7, ss 1-4;

(d) The *Competition Act*, RSC 1985, c C-34, ss 36, 52;

(e) The *Consumer Protection Act, 2002*, SO 2002, c 30, Sch A, ss 8-9, 14-15, 17-18;

(f) The *Consumer Protection Act*, CQLR, c P-40.1, 215, 218-222, 228, 239, 252-253, 271-272;

(g) The *Consumer Protection Act*, RSNS 1989, c 92, s 28;

(h) The *Consumer Protection Act*, SS 1996, c C-30.1, ss 5-8, 14, 16;

(i) The *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, ss 7-10;

(j) The *Consumer Protection and Business Practices Act*, SS 2014, c C-30.2, ss 2, 4, 6-16, 19-22, 24-33, 36-37, 39, 91, 93;

(k) The *Courts of Justice Act*, RSO 1990, c C.43, ss 128-129;

(l) The *Crown's Right of Recovery Act*, SA 2009, c C-35, ss 1, 38;

(m) The *Fair Trading Act*, RSA 2000, c F-2, ss 5-7, 7.2-7.3, 13;

(n) The *Food and Drugs Act*, RSC c F-27, ss 19-20;

(o) The *Health Care Costs Recovery Act*, SBC 2008, c 27, ss 1-2;

(p) The *Health Insurance Act*, RSO 1990, c H.6, ss 30-31;

(q) The *Rules of Civil Procedure*, RRO 1990, Reg 194, rr 17.02(g);

(r) The *Sale of Goods Act*, RSO 1990, c S.1, s 15, 51; and

(s) Such further and other grounds as counsel may advise.

58. The plaintiff proposes that this action be tried in Toronto.

(Date of issue)

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Defendants

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT TORONTO
Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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