

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N

ROBERT CECILE, MICHELLE CECILE, GERALD PATRICK DOYLE,
STANLEY LAWTON, STANISLAO CALANDRA, BRUCE ANDREW MACLELLAN,
JEFFREY MICHAEL SIMPSON, SIMONE MARISA CUPID,
CINDY RUTH ARMSTRONG, JAIME BATISTA and SUSAN HUNTLEY

Plaintiffs

and

RETROFOAM OF CANADA INCORPORATED, RETROFOAM HOLDINGS INC.,
RETROFOAM WINDSOR INC., RETROFOAM OF SOUTHERN ONTARIO INC.,
RETROFOAM OF EASTERN ONTARIO LTD., POLYMASTER, INC., ENERLIV INC.,
PAUL JOHN WEIGEL, NORTHERN RETROFOAM, INC. ENWISE POWER SOLUTIONS
INC., ENWISE BUILDING SCIENCE INC., GARY ZAVAROS, 756882 ONTARIO LTD.
c.o.b. as LAMBTON INSULATION LTD., THE ATTORNEY
GENERAL OF CANADA, NATIONAL RESEARCH COUNCIL OF CANADA,
ATTIE ENTERPRISES LTD., I-GEN ENERGY INC. and FOAM COMFORT INC.

Defendants

Proceeding Under the *Class Proceedings Act, 1992*

NOTICE OF MOTION FOR CERTIFICATION

THE PLAINTIFFS will make a motion to the Honourable Justice Patterson at a
date and time to be fixed by him, at the courthouse, 245 Windsor Ave., Windsor,
Ontario.

PROPOSED METHOD OF HEARING:

The motion is to be heard orally.

1. For the purposes of this notice of motion, the following definitions apply:
 - (a) **“AG”** means the Attorney General of Canada;
 - (b) **“EcoEnergy Program”** means EcoEnergy Retrofit Initiative-Homes Program;
 - (c) **“Excluded Persons”** means the defendants, their subsidiaries, affiliates, shareholders, officers, directors, senior employees and their heirs, predecessors, successors and assigns;
 - (d) **“HPA”** means the *Hazardous Products Act*, R.S., 1985, c.H-3;
 - (e) **“MNR”** means the Minister of Natural Resources of Canada;
 - (f) **“NRCC”** means the National Research Council of Canada;
 - (g) **“Polymaster”** means Polymaster Inc.;
 - (h) **“Property”** or **“Properties”** means the real property into which RetroFoam was injected or installed; and
 - (i) **“RetroFoam”** means a thermal insulation that, when in the form of foam, is intended to be injected into the existing wall cavities and the core of concrete block foundations of properties.

THE MOTION is for orders:

2. certifying this action as a class proceeding;
3. defining the “Class” as:

all persons, except Excluded Persons, who owned or had an interest in a Property when RetroFoam was injected or installed for the purposes of the EcoEnergy Program;
4. appointing Robert Cecile, Michelle Cecile, Gerald Patrick Doyle, Stanley Lawton, Stanislao Calandra, Bruce Andrew MacLellan, Jeffrey Michael Simpson, Simone Marisa Cupid, Cindy Ruth Armstrong, Jaime Batista and

Susan Huntley as the representative plaintiffs of the Class who will fairly and adequately represent the interests of the Class and who have produced the Revised Litigation Plan as of March 13, 2010, attached hereto as Schedule 1, which is a workable method of advancing the proceeding on behalf of the Class;

5. stating the nature of the claims asserted on behalf of the Class to be various declarations, negligence and conspiracy;
6. stating the relief sought by the Class to be as set out in paragraph 2 of the third amended fresh statement of claim;
7. stating the common issues to be as set out in the following list or such other common issues that counsel may advise:
 1. Does RetroFoam contain urea-formaldehyde, a product that is prohibited in Canada pursuant to the *HPA*?
 2. Was the manufacturing, licensing, distribution, importing, advertising, sale and installation of RetroFoam prohibited by the *HPA*?
 3. Did the AG (as the representative of the MNR) owe a duty of care to the Class Members? If so, what was the standard of care? Did the AG breach the standard of care? If so, when and how? Was the AG negligent?
 4. Did the NRCC owe a duty of care to the Class Members? If so, what was the standard of care? Did the NRCC breach the standard of care? If so, when and how? Was the NRCC negligent?
 5. Did the defendants (excluding the AG and the NRCC) conspire with each other? If so, who conspired with whom, when, where, why and for what purpose?
 6. Did Polymaster, Inc. owe a duty of care to the Class Members in relation to the manufacturing, licensing, franchising, importation into Canada and the installation of RetroFoam into the Properties? If so, what was the standard of care? Did Polymaster, Inc. breach the standard of care? If so, when and how? Was Polymaster, Inc. negligent?

7. Did the defendants who were installers of RetroFoam and/or inspectors under the EcoEnergy Program who recommended the use of RetroFoam owe a duty of care to each of the Class Members with whom each did business by recommending, selling, installing or dealing with RetroFoam and their Properties? If so, what was the standard of care? Did these defendants breach the standard of care? If so, when and how? Were these defendants negligent?
 8. Did the defendants who sold but did not install RetroFoam owe a duty of care to each of the Class Members with whom each did business by selling, or dealing with RetroFoam? If so, what was the standard of care? Did these defendants breach the standard of care? If so, when and how? Were these defendants negligent?
 9. Did Weigel owe a duty of care to the Class Members? If so, what was the standard of care? Did Weigel breach the standard of care? If so, when and how? Was Weigel negligent?
 10. Are the defendants, or any of them, liable to pay damages to the Class Members? If so, who should pay damages, to whom, why and in what amount?
 11. Should the court assess damages in the aggregate, in whole or in part, for the Class? If so, who should pay what amount of aggregate damages to whom and why?
 12. Should some or all of the defendants pay punitive damages to the Class Members? If so, who should pay what amount of punitive damages to whom and why?
 13. Should some or all of the defendants pay prejudgment and post judgment interest to the Class Members? If so, who should pay prejudgment and post judgment interest, at what rate and should the interest be simple or compound?
 14. Should some or all of the defendants pay the costs to administer and distribute any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent?
8. requiring the AG, immediately after the certification order is made, to forthwith produce to counsel for the plaintiffs, if available, the name, municipal address, telephone number, email address and fax number of each person who applied to the MNR for a grant under the EcoEnergy Program for installing RetroFoam into their Property, and particulars of each grant that was applied for and paid;
 9. requiring RetroFoam Windsor Inc., RetroFoam of Southern Ontario Inc., RetroFoam of Eastern Ontario Ltd, Enerliv Inc., Northern RetroFoam, Inc.,

Enwise Power Solutions Inc., Gary Zavaros, Lambton Insulation Ltd, Attie Enterprises Ltd., I-Gen Energy Inc., and Foam Comfort Inc., immediately after the certification order is made, to forthwith produce to counsel for the plaintiffs the name, municipal address, telephone number, email address and fax number of each person with whom it contracted for the installation of RetroFoam, or into whose properties it injected RetroFoam, the municipal address or other description of the properties into which it injected RetroFoam, and to produce each such contract, or particulars of each contract if the contract cannot be located and/or the particulars of the installation;

10. settling the form and content of the notice to be published;
11. directing publication of notice to the Class Members that this action has been certified as a class proceeding to be as set out in the Revised Notice Program particularized in the Revised Litigation Plan;
12. specifying that a Class Member may opt out of this proceeding by sending a written election by mail before a date fixed by the court to a person designated by the court;
13. specifying that by a fixed date the person designated by the court to accept the elections to opt-out shall report to the court the names of the persons who have opted out of this class proceeding;

14. specifying that no Class Member may opt out of this class proceeding after the fixed date;
15. requiring the defendants to forthwith pay the costs of the notice program;
16. ordering the defendants to pay to the plaintiffs the costs of this motion on a substantial indemnity basis, plus all applicable taxes; and
17. such further and other relief and directions as counsel may request and this Honourable Court permit.

THE GROUNDS FOR THE MOTION ARE:

1. the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended, including sections 1, 2, 5, 6, 8(1), 9, 12, 13, 17, 20, 21, 22, 34(1) and 35;
2. the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, including Rules 1, 2 and 12;
3. the court should certify this action as a class proceeding and appoint the plaintiffs as representative plaintiffs because the s. 5(1) criteria of the *Class Proceedings Act, 1992* are met, because the representative plaintiffs will fairly and adequately

represent the interest of the Class, and they have produced the Revised Litigation Plan, attached as Schedule 1, which sets out a workable method of advancing the proceeding on behalf of the Class and of notifying Class Members of the proceeding, and because they do not have, on the common issues, an interest in conflict with the interests of other Class Members;

4. a class action will provide access to justice for Class Members, will create judicial economy and will promote behavioural modification;
5. the notice program advising Class Members of the certification of this action, as set out in the Revised Litigation Plan, attached as Schedule 1, is a reasonable method of notifying the Class Members;
6. it is fair, just and reasonable that the defendants should pay the costs of the notice program for the certification of this action;
7. the names, addresses, telephone numbers, email addresses and fax numbers of some of the Class Members are not known to the plaintiffs and their counsel but are known to the defendants;
8. it is reasonable that the defendants disclose to plaintiffs' counsel the names, addresses, telephone numbers, email addresses and fax numbers and particulars of any contracts with the Class Members known to them for the purposes of giving notice if this action is certified as a class proceeding;

9. production by the defendants of the information sought will result in a more efficient notice program;
10. the directions as to the conduct of the class proceeding are sought to ensure a fair and expeditious determination of this action; and
11. such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. the Third Amended Fresh Statement of Claim, and the Revised Litigation Plan attached to this notice of motion as Schedule 1;
2. the affidavit of Robert Cecile, sworn March 9, 2010;
3. the affidavit of Michelle Cecile, sworn March 9, 2010;
4. the affidavit of Gerald Patrick Doyle, sworn March 12, 2010;
5. the affidavit of Stanley Lawton, sworn March 10, 2010;
6. the affidavit of Stanislao Calandra, sworn March 14, 2010;
7. the affidavit of Bruce Andrew MacLellan, sworn March 13, 2010;
8. the affidavit of Jeffrey Michael Simpson, sworn March 10, 2010;
9. the affidavit of Simone Marisa Cupid, sworn March 12, 2010;
10. the affidavit of Cindy Ruth Armstrong, sworn March 11, 2010;
11. the affidavit of Jaime Batista, sworn March 12, 2010;

12. the affidavit of Susan Huntley, sworn March 13, 2010;
13. the affidavit of F.D. Woodall, sworn March 15, 2010;
14. the affidavit of Barry Lebow (unsworn); and
15. such further and other evidence as counsel may advise and this Honourable Court permit.

Date: March 15, 2010

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Incorporated, Enerliv Inc. and RetroFoam of
Southern Ontario Inc.

ROBERT CECILE et al.

vs. RETROFOAM OF CANADA INCORPORATED
et al.

Plaintiffs

Defendants

Court File No. CV-09-12583CM

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT WINDSOR

NOTICE OF MOTION FOR CERTIFICATION

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