

AMENDED THIS 14th DAY OF: OCTOBER 2009
PURSUANT TO THE ORDER OF: JUSTICE H. RADY
DATED THE 13th DAY OF OCTOBER 2009
LOCAL REGISTRAR, SUPERIOR COURT OF JUSTICE
MODIFIÉ DE
CONFORMÉMENT À L'ORDONNANCE DE ONTARIO
FAIT LE SUPERIOR COURT OF JUSTICE

Court File No. 45604CP

~~BEFORE THE COURT SUPERIEUR DE JUSTICE~~

WATERVILLE TG, INC.

Plaintiff

- and -

DSM ELASTOMERS EUROPE B.V., and DSM COPOLYMER, INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

SECOND FRESH AS AMENDED 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.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1000.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400.00 for costs and have the costs assessed by the court.

Date October 25, 2004

Issued by "N. TENEBBAUM"
Local Registrar

Address of court office London Court House
Civil, Landlord/Tenant Section
Group Floor, Unit "A"
80 Dundas Street
London, ON N6A 6A3

TO: DSM Elastomers Europe B.V.
Postraat 1
6135 KR Sittard
P.O. Box 43
6130 AA Sittard
The Netherlands

AND TO: DSM Copolymer, Inc.
5955 Scenic Hwy
Baton Rouge, Louisiana

CLAIM

1. The plaintiff claims on behalf of itself and other persons in Canada who are similarly situated:
 - (a) general damages for conspiracy in the amount of \$30,000,000.00;
 - (b) general damages for intentional interference with economic relations in the amount of \$30,000,000.00;
 - (c) general damages for conduct that is contrary to Part VI of the *Competition Act*, R.S.C. 1985, Chap. C-34 in the amount of \$30,000,000.00;
 - (d) punitive and exemplary damages in the amount of \$5,000,000.00;
 - (e) costs of investigation pursuant to Part VI of the *Competition Act*, R.S.C. 1985, Chap. C-34 s. 36;
 - (f) pre-judgement interest at the rate of 10% compounded annually or as otherwise ordered by the Honourable Court;
 - (g) costs of this action on a solicitor and client basis; and
 - (h) such further and other relief as this Honourable Court awards.

The Plaintiff

2. The plaintiff, Waterville TG, Inc., is a federal corporation with its registered head office in Waterville, Quebec. At all relevant times, the plaintiff purchased EPDM in the course of its business.

The Defendants

3. DSM Elastomers Europe B.V. ("DSM Europe") is a Dutch company and is a division of parent DSM Elastomers B.V. . At all relevant times, DSM Europe manufactured, marketed, sold and/or distributed EPDM in Canada directly or indirectly through an agent, affiliate or subsidiary.
4. DSM Copolymer, Inc. ("DSM America") is a subsidiary, affiliate and/or a division of DSM BV with its principal place of business in Baton Rouge, Louisiana. At all relevant times, DSM America manufactured, marketed, sold and/or distributed EPDM in Canada directly or indirectly through an agent, affiliate or subsidiary. DSM America has at times sold EPDM under the trade name DSM Elastomers America.
5. The business of each of DSM Europe, and DSM America (collectively "DSM") is inextricably interwoven with that of the other and each is the agent of the other for the purposes of the manufacture, marketing, sale and/or distribution of EPDM in Canada and for the purposes of the conspiracy described hereinafter.
6. The acts alleged in this complaint to have been done by each defendant were authorized, ordered and done by its officers, directors, agents, employees or representatives while engaged in the management, direction, control or transaction of its business affairs.
7. Various persons and/or firms, not named as defendants herein, including, but not limited to, DuPont Dow Elastomers L.L.C., E.I. Du Pont de Nemours and Company, E.I. Dupont Canada Company, The Dow Chemical Company, Dow Chemicals Canada Inc., Chemtura Corporation (f/k/a Crompton Corporation), Crompton Co./Cie., Crompton Canada Corporation, Uniroyal Chemical Company Inc., Exxon Mobil Chemical Company, Polimeri Euopa S.r.l., Polimeri Europa S.p.A., Polimeri Europa

Americas Inc., Enichem S.p.A., Enichem Americas Inc., Syndial S.p.A., Bayer Inc., Bayer A.G., Bayermaterial Science A.G., Bayer Materialscience LLC, and Bayer Corporation (the "Co-Conspirators"), may have participated as Co-Conspirators in the violation alleged herein and may have performed acts and made statements in furtherance thereof.

Factual Background

8. Ethylene-propylene diene monomer ("EPDM") is one of the most widely used and fastest growing synthetic rubbers. It was commercially introduced in the early 1960's. It is made by copolymerizing ethylene and propylene with a small amount of nonconjugated diolefin that is vulcanized in the conventional manner with sulphur or with peroxides. EPDM is estimated to account for 80-85% of the total world production of ethylene-propylene elastomers ("EP elastomers"). EP elastomers constitute the third largest synthetic rubber consumed worldwide.
9. EPDM has excellent resistance to heat, oxidation, ozone and weather aging due to its stable, saturated polymer backbone structure. EPDM's maximum service temperature is about 121°C. EPDM has heat aging resistance up to 130°C with properly selected sulphur acceleration systems and heat resistance at 160°C can be obtained with peroxide cured compounds. EPDM has a good abrasion and tear resistance while offering good electrical resistivity as well as resistance to polar solvents such as water, acids, alkalies, phosphate esters and many ketones and alcohols.
10. EPDM is commonly used in the auto industry, glass-run channels, radiators, pond liners, garden and appliance hoses, tubing, belts, electrical insulation, roofing

membrane, rubber mechanical goods, plastic impact modification, thermoplastic vulcanizates and motor oil additive applications.

11. The named defendants supply a substantial majority of the total volume of EPDM sold in Canada.

The Conspiracy

12. The defendants and Co-Conspirators were involved in an unlawful conspiracy as detailed herein.
13. At various times from at least January 1, 1994 to December 31, 2002, senior executives and employees of each of the defendants and Co-Conspirators engaged in telephone conversations and meetings with each other.
14. As a result of these conversations and meetings, the defendants and Co-Conspirators entered into a conspiracy in which they unlawfully agreed to the price at which each defendant and Co-Conspirator would sell EPDM to its customers and to the volume that each company would supply to its customers.
15. In furtherance of the conspiracy, during the relevant time, the following acts were done by the defendants and Co-Conspirators, and their senior executives, employees and agents:
 - (a) From 1997 through 2001 representatives of the defendants and Co-Conspirators met secretly on at least a biannual basis to discuss prices and volumes of sales of EPDM;
 - (b) From 1997 through 2001 the defendants and Co-Conspirators implemented coordinated price increases at least once each year;

- (c) They agreed to, and did, allocate the volumes of sales, customers, and markets for EPDM among themselves;
 - (d) They agreed to refrain from bidding or to submit intentionally high, complementary and non-competitive bids for particular EPDM supply contracts;
 - (e) They exchanged information regarding the prices and volumes of sales of EPDM for the purpose of monitoring and enforcing adherence to the agreed-upon prices, volumes of sales and markets;
 - (f) They instructed members of the conspiracy not to divulge the existence of the conspiracy;
 - (g) They took active steps to conceal the unlawful conspiracy from their customers, the authorities, and the public; and
 - (h) They disciplined any corporation that failed to comply with the conspiracy.
16. The defendants and Co-Conspirators were motivated to conspire and their predominant purpose and intention was:
- (a) To harm the plaintiff and members of the public by requiring them to pay artificially high prices for EPDM and/or products containing or derived from EPDM; and
 - (b) To unlawfully increase their profits on the sale of EPDM.
17. The acts particularized in paragraphs 12 to 16 were unlawful acts directed towards purchasers or EPDM or products containing EPDM, including the plaintiff, which

unlawful acts the defendants and Co-Conspirators knew in the circumstances would likely cause injury to those purchasers and plaintiffs and the defendants are liable for the tort of civil conspiracy.

18. The acts particularized in paragraphs 12 to 16 were also in breach of Part VI of the *Competition Act* and render the defendants and Co-Conspirators liable to pay damages pursuant to s. 36 of the *Competition Act*.
19. The plaintiff suffered the following damages:
 - (a) The price of EPDM purchased by the plaintiff has been fixed, raised, maintained and stabilized at artificially high and non-competitive levels;
 - (b) Competition in the sale of EPDM has been restrained.
20. During the period covered by this claim, the plaintiff purchased EPDM manufactured by the defendants and/or Co-Conspirators. By reason of the alleged violations of the *Competition Act* and the common law, the plaintiff paid more for EPDM and/or products containing EPDM than it would have paid in the absence of the illegal conspiracy and, as a result, it has been injured in its business and property and has suffered damages in an amount presently undetermined.
21. The plaintiff's damages and those of other persons who are similarly situated are capable of being quantified on an aggregate basis as the difference between the prices actually obtained by the defendants and the prices which would have been obtained in the absence of the unlawful agreements.
22. The defendants' and Co-Conspirators' conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in

contumelious disregard of the plaintiffs' rights and the rights of others who are similarly situated, and as such renders the defendants and Co-Conspirators liable to pay aggravated, exemplary and punitive damages.

23. The plaintiff's damages have been suffered in the Province of Ontario.
24. The plaintiff pleads and relies on the *Competition Act*, R.S. 1985, c. 19 (2nd Supp), s.36 & Part VI.
25. The plaintiff pleads and relies on clauses 17 (g), (h), (o) and (p) of the *Rules of Civil Procedure*, 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:
 - (a) in respect of a tort committed in Ontario (rule 17.02(g));
 - (b) in respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
 - (c) against a person outside Ontario who is a necessary and proper party to this proceeding properly brought against another person served in Ontario (rule 17.02(o)); and
 - (d) against a person carrying on business in Ontario (rule 17.02(p)).
26. The plaintiff pleads and relies on the *Class Proceedings Act, 1992*.
27. The plaintiff states that it is representative of persons in Canada who purchased EPDM or products containing EPDM during the relevant time period.

28. The plaintiff proposes that this action be tried at London, Ontario.

DATE:

Siskinds ^{LLP}
680 Waterloo Street
London, Ontario N6A 3V8

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Waterville TG, Inc. Plaintiff and DSM Elastomers Europe B.V et al. Defendants

Court File No: 45604CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at London

Proceeding under the *Class Proceedings Act, 1992*

**SECOND FRESH AS AMENDED
STATEMENT OF CLAIM**

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