



NO. S006106
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LEONARD OLSEN, PAUL DENNIS and LINDA DENNIS

PLAINTIFFS

AND:

BEHR PROCESS CORPORATION and BEHR PROCESS
CANADA LTD.

DEFENDANTS

Brought under the *Class Proceedings Act*

**STATEMENT OF DEFENCE OF THE DEFENDANT
BEHR PROCESS CORPORATION**

1. Except where expressly admitted herein, the Defendant Behr Process Corporation (“Behr”) specifically denies each and every allegation of fact in the Further Amended Statement of Claim (the “Statement of Claim”).
2. Behr admits paragraph 3 of the Statement of Claim.
3. In answer to the whole of the Statement of Claim, Behr denies that it has any liability to any of the Plaintiffs.
4. In further answer to the whole of the Statement of Claim, if any of the Plaintiffs has suffered any damage, loss or expense, which is not admitted but specifically denied, any such damage, loss or expense was neither caused nor contributed to as the result of any fault or

negligence, wrongful conduct, or breach of any duty or obligation on the part of Behr, and Behr denies any alleged fault, negligence, wrongful conduct, or breach of any duty or obligation.

5. In further answer to the whole of the Statement of Claim, and alternatively, if any of the Plaintiffs has suffered any damage, loss or expense, which is not admitted but specifically denied:

- (a) any such damage, loss and expense was caused or contributed to by the fault or negligence of the Plaintiffs and/or others whose identity is not presently known to Behr. Behr pleads and relies on the provisions of the *Negligence Act*, R.S.B.C., 1996, c. 333;
- (b) each of the Plaintiffs has failed to take reasonable steps to mitigate any such damage, loss and expense.

6. Further, or alternatively, in answer to the whole of the Statement of Claim, Behr pleads the facts set out in paragraphs 7 – 32 below.

7. With reference to paragraphs 5 and 12 of the Statement of Claim:

- (a) Behr designed and manufactured a line of products sold under the name “Natural Seal Plus” (the “NSP Products”);
- (b) Behr designed and manufactured a line of products sold under the name “Super Liquid Raw-Hide” (the “SLR Products”);

- (c) Behr ceased to manufacture both the NSP Products and the SLR Products in 2002;
- (d) Behr sold the NSP Products and the SLR Products to retailers in Canada, including in B.C.;
- (e) the NSP Products and the SLR Products were sold by retailers to consumers in British Columbia for use on exterior wood surfaces.

Behr denies all other allegations in paragraphs 5 and 12.

8. With reference to paragraphs 6 – 11 of the Statement of Claim:

- (a) Behr has maintained executive and marketing offices, a manufacturing plant, a distribution centre and some product testing facilities at Santa Ana, California;
- (b) from time to time, an individual who was a director of Behr was at the same time also a director of the Defendant Behr Process Canada Ltd. (“Behr Canada”);
- (c) from time to time, Behr has had departments referred to as “Fundamentals” and “Product Development”;

- (d) from time to time employees of Behr working in those departments were involved in the design, manufacture or testing of the NSP Products and the SLR Products;
- (e) Behr has a Technical Services Department, which can be reached by telephoning 1-800-854-0133;
- (f) the Behr Technical Services Department shares a database of information with the Behr Canada Technical Services Department.

Behr denies all other allegations in paragraphs 6 – 11. Further, the allegations in paragraphs 6 – 11 of the Statement of Claim do not, either alone or together with other allegations in the Statement of Claim, state material facts disclosing a cause of action against Behr.

9. With reference to paragraphs 13 and 14 of the Statement of Claim, Behr admits that:

- (a) NSP Products and SLR Products have been sold for use on exterior wood surfaces;
- (b) from time to time, it has issued in the United States and in Canada written information about the Products, which information varies from product to product, has changed from time to time, and is not identical as between the United States and Canada;

- (c) there is a toll-free number in Canada available for use by members of the public in Canada;
- (d) it has programs in place to train its employees;
- (e) Behr has text in labels for its products sold in Canada translated into French.

Behr denies all other allegations in paragraphs 13 and 14 of the Statement of Claim. Further, or alternatively, the allegations in paragraph 14 of the Statement of Claim do not, either alone or together with other allegations in the Statement of Claim, state material facts disclosing a cause of action against Behr.

10. With reference to paragraph 15 and paragraph 17 (so far as it relates to NSP Products) of the Statement of Claim, Behr's NSP Products have been packaged in containers with labels, the contents of which labels vary from product to product, have changed from time to time, are not identical as between the United States and Canada, and will speak for themselves. Further, from time to time, Behr has issued written information about NSP Products, which writings have changed from time to time, and will speak for themselves.

11. Further, with reference to paragraph 15 and paragraph 17 (so far as it relates to NSP Products) of the Statement of Claim:

- (a) Behr denies that the words alleged in paragraph 15(a), or any close variation thereof, were used in respect of NSP Products at any time;

- (b) Behr denies that the words alleged in paragraph 15(b), (c), (t), (u), (v) and (w) were found on Canadian labels for NSP Products sold in Canada, where the labels had a revision date after January, 1992;
- (c) Behr denies that the words alleged in paragraph 15(d) and (e) were found on Canadian labels for NSP Products sold in Canada, where the labels had a revision date after May, 1996;
- (d) Behr denies that the words alleged in paragraph 15(f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (y) and (z) were found on Canadian labels for NSP Products sold in Canada, where the labels had a revision date before February, 1999;
- (e) Behr denies that the words alleged in paragraph 15(y) and (z) were found on any Canadian labels for NSP No. 92 or NSP No. 31-92; and
- (f) Behr denies that the words alleged in paragraph 15(c), (e), (g), (i), (k), (m), (o), (q), (s), (u), (w) and (z) were found on any labels for NSP Products sold in the U.S. or on any written information available in the U.S. about NSP Products, and, in particular, Behr denies that any of these words were found on labels of any Product alleged to be purchased or used by the Plaintiffs Paul Dennis and Linda Dennis.

Behr further denies all other allegations in paragraph 15 and paragraph 17 (so far as it relates to NSP Products), and in particular Behr denies that any of the words or statements alleged, or any close variations thereof, constitute either warranties or representations at law.

12. With reference to paragraph 16 and paragraph 17 (so far as it relates to SLR Products) of the Statement of Claim, Behr's SLR Products have been packaged in containers with labels, the contents of which labels vary from product to product, have changed from time to time, are not identical as between the United States and Canada, and will speak for themselves. Further, from time to time Behr has issued written information about SLR Products, which writings have changed from time to time, and will speak for themselves.

13. Further with reference to paragraph 16 and paragraph 17 (so far as it relates to SLR Products) of the Statement of Claim:

- (a) Behr denies that the words alleged in paragraph 16(a) were found on Canadian labels for SLR Products sold in Canada;
- (b) alternatively, Behr denies that the words alleged in paragraph 16(a), or any close variation thereof, were found on Canadian labels for SLR Products sold in Canada, where the labels had a date after May, 1993;
- (c) alternatively, Behr denies that the words alleged in paragraph 16(a), or any close variation thereof, were found on SLR Product brochures with a revision date after August, 1993;

- (d) Behr denies that the words alleged in paragraph 16(b) and (o) were found on Canadian labels for SLR Products sold in Canada;
- (e) Behr denies that the words alleged in paragraph 16(c) and (d), or any close variation thereof, were found on Canadian labels for SLR Products sold in Canada, where the labels had a revision date after March, 1997;
- (f) Behr denies that the words alleged in paragraph 16(e), (f),(g), (h), (m) and (n) were found on Canadian labels for SLR Products sold in Canada, where the labels had a revision date other than either February, 1994 (for SLR No. 12) or March, 1994 (for SLR No. 13);
- (g) Behr denies that the words alleged in paragraph 16(i) and (j) were found on Canadian labels for SLR No. 12 or SLR No. 31-12;
- (h) Behr denies that the words alleged in paragraph 16(k) and (l) were found on Canadian labels for SLR Products sold in Canada, where the labels had a revision date other than March, 1997;
- (i) Behr denies that the words alleged in paragraph 16(d), (f), (h), (j) and (n) were found on any labels for SLR Products sold in the U.S. or on any written information available in the U.S. about SLR Products, and, in particular, Behr denies that any of these words were found on labels of any Products alleged to be purchased or used by the Plaintiffs Paul Dennis and Linda Dennis.

Behr further denies all other allegations in paragraph 16 and in paragraph 17 (so far as they relate to SLR Products), and in particular Behr denies that any of the words or statements alleged, or any close variations thereof, constitute either warranties or representations at law.

14. With reference to the allegations in paragraphs 19 – 21 and 27 of the Statement of Claim:

- (a) the NSP Products were linseed-oil based exterior wood coatings. At all material times, linseed oil was a common ingredient in exterior wood coatings manufactured by both Behr and other manufacturers;
- (b) the NSP Products were designed to penetrate into wood, and were appropriate for use on fences and on decks;
- (c) prior to May of 2000, the NSP Products consisted of seven different products, known as NSP Nos. 79, 80, 81, 82, 83, 84 and 92;
- (d) NSP No. 92 was a clear product. NSP Nos. 79, 80, 81, 82, 83 and 84 were all factory tinted products, containing a variety of different pigmentations;
- (e) the pigments in the tinted NSP Products provided an increased level of protection from ultraviolet radiation, as compared with the clear NSP Product, since the pigments act as ultraviolet inhibitors that help shield wood cells from ultraviolet radiation;

- (f) greater pigment concentrations provide greater protection from ultraviolet degradation, which turns wood grey and makes it more susceptible to the effects of weathering;
- (g) between July and September, 1998, Behr changed the formulation of its then-existing NSP Products by replacing the mildewcide previously used, Troy Chemical's P-100 ("P-100"), with different mildewcide, Troy Chemical's P20T ("P20T");
- (h) in September, 1998, Behr changed the formulation of NSP No. 92 by replacing the ultraviolet absorber previously used, called Tinuvin P ("Tinuvin P") with a hindered amine light stabilizer called Uvinul 5050H ("Uvinul 5050H");
- (i) in December, 1998, Behr added Uvinul 5050H to the tinted NSP Products (NSP Nos. 79, 80, 81, 82, 83, 84) in place of Tinuvin P. It was added to those products in reduced concentrations, relative to NSP No. 92, because the pigmentation contained in the tinted products already provided a certain amount of ultraviolet protection;
- (j) in about May, 2000, Behr ceased manufacture of NSP Nos. 79, 80, 81, 82, 83, 84 and 92 and began manufacture of new NSP Products, NSP Nos. 31-79, 31-80, 31-81, 31-82, 31-83, 31-84, and 31-92. These new Products contained a 33% increase in the level of mildewcide over that contained in the previous NSP Products;

- (k) NSP Nos. 31-79, 31-80, 31-81, 31-82, 31-83, 31-84, and 31-92 also contained Neville LS-1200, a hydrocarbon resin, intended to provide additional wood surface protection when the product is first applied. This ingredient was not previously included in any NSP Product;
- (l) in July, 2000, Behr added an ultraviolet inhibitor to NSP No. 31-92, in addition to Uvinul 5050H. This ingredient was not previously included in any NSP Product, and was not added to the tinted NSP Products because the pigment contained in those Products already provided a certain level of ultraviolet protection.

Behr denies all other allegations in paragraphs 19 – 21 and 27 (so far as it relates to NSP Products) of the Statement of Claim.

15. With reference to the allegations in paragraphs 22 – 25 and 27 of the Statement of Claim:

- (a) the SLR Products also contained linseed oil. They were sold for use on vertical surfaces or surfaces that were not walked on or touched regularly. SLR Products were not designed for use on decks, and they were not interchangeable with NSP Products;
- (b) SLR No. 12 was a clear product. SLR No. 13 was a factory-tinted product. The pigments in SLR No. 13 helped shield wood cells from ultraviolet radiation, as compared with the clear product;

- (c) in September, 1998, Behr replaced the mildewcide, namely P-100, in SLR Nos. 12 and 13 with a different mildewcide, namely P20T;
- (d) in about May, 2000, Behr ceased manufacturing SLR No. 12 and SLR No. 13 and commenced the manufacture of new SLR products SLR Nos. 31-12 and 31-13. SLR 31-12 was a clear product, and SLR No. 31-13 was factory-tinted;
- (e) SLR Nos. 31-12 and 31-13 contained a 100% increase in the level of mildewcide relative to SLR Nos. 12 and 13.

Behr denies all other allegations in paragraphs 22 – 25 and 27 (so far as it relates to SLR Products) of the Statement of Claim.

16. Further with reference to paragraphs 19 – 25, 27 and 39 of the Statement of Claim, as the Plaintiffs are alleged to have purchased only NSP No. 81, SLR No. 12 and SLR No. 13, the allegations in paragraphs 19 – 25, 27 and 39 of the Statement of Claim, with the exception of allegations respecting NSP No. 81, SLR No. 12 and SLR No. 13 Products, disclose no cause of action against Behr.

17. With reference to paragraphs 18, 26, and 28 – 41 of the Statement of Claim, if any of the Plaintiffs either purchased or used any SLR Product or any NSP Product, which is not admitted but specifically denied, and if any property of the Plaintiffs is or has been damaged, which is not admitted but specifically denied, Behr denies that any of its Products has caused or

continues to cause damage or loss or expense to any such property. Further, Behr denies all other allegations in paragraphs 18, 26, and 28 – 41 of the Statement of Claim.

18. Further, or alternatively, with reference to paragraphs 26 and 28 – 41 of the Statement of Claim, if any of the Plaintiffs used any SLR Product or any NSP Product, which is not admitted but specifically denied, and if any property of the Plaintiffs is or has been damaged or injured, which is not admitted but specifically denied, such damage or injury is not the result of any defect in the Products alleged to have been used (and the existence of any defect is not admitted but specifically denied), but is the result of other factors, including:

- (a) the condition of the wood when the Product was applied, and in particular, the length of time the wood was exposed, without any coating, to precipitation, moisture, humidity, ultraviolet radiation, temperature changes and wind, and allowed to weather;
- (b) the continued exposure of the wood surface to which the Product was applied to precipitation, moisture, humidity, ultraviolet radiation, temperature changes and wind, all of which are climatic factors causing wood to weather and which, depending on the orientation and location of the wood surface, impact the effectiveness, wear pattern and longevity of any exterior wood coating;
- (c) the Product reaching the end of its useful life, without being replaced;
- (d) the presence of mildew on or in the wood when the Product was applied;

- (e) failure on the part of the person who applied the Product to ensure that, before the Product was applied to the wood surface, the wood was clean, sound and dry;
- (f) failure on the part of the person who applied the Product to ensure that, before the Product was applied to the wood surface, all mildew was removed;
- (g) failure on the part of the person who applied the Product to follow Behr's instructions for application of the Product, including the instruction respecting thorough removal of all mildew prior to application;
- (h) failure by the Plaintiffs to ensure adequate drainage around wood structures and wood surfaces;
- (i) failure by the Plaintiffs to properly maintain the wood surface after applying the Products, including, as part of routine and normal maintenance, cleaning the wood surface, and replacing the coating at the end of the Product's useful life taking into account climatic factors described in subparagraph (b) above; and/or
- (j) failure of the Plaintiffs to apply the Products in appropriate weather conditions.

19. Further, or alternatively, with reference to paragraphs 26 and 28 – 41 of the Statement of Claim, if any property of the Plaintiffs is or has been damaged, or if there is

discolouration, blackening, peeling, cracking and blistering of, or mildew growth on, wood surfaces of the Plaintiffs to which any product in issue has been applied, or degradation of the wood fibre, none of which is admitted but specifically denied, any such damage was not caused by either:

- (a) any alleged negligence on the part of Behr; or
- (b) any alleged defect in the Products in issue; or
- (c) breach of a duty (if any) to test or monitor performance of any of the Products in issue; or
- (d) breach of a duty (if any) to act on results from testing and monitoring of any Product in issue; or
- (e) breach of a duty (if any) to warn.

20. Further, or alternatively, with reference to paragraphs 26 and 28 – 41 of the Statement of Claim, if there is discolouration, blackening, peeling, cracking and blistering of, or mildew growth on, wood surfaces of the Plaintiffs to which any Product in issue has been applied, or degradation of the wood fibre, none of which is admitted but specifically denied, any such discolouration, blackening, peeling, cracking and blistering of, or mildew growth on, such wood surfaces, or any degradation of the wood fibre, was caused as a result of factors for which Behr has no responsibility, including one or more of those factors described in paragraph 18 above, and one or more of the following:

- (a) use of fasteners containing iron, or wire brushes, which, among other things, may cause wood to turn black when wet if the iron is exposed to water, or as a result of reaction with certain wood extractives;
- (b) the species of wood, as certain species possess extractives that may bleed and discolour wood surfaces;
- (c) the part of the tree from which the wood was cut, as starch and sugar in sapwood serve as a food source for mould fungi;
- (d) whether wood was cut from young growth or older growth, as lumber cut from young growth logs tends to cup or warp more than lumber from old growth logs.

21. Further, or alternatively, with reference to paragraph 38 of the Statement of Claim:

- (a) at all material times, Behr took reasonable care to ensure that the Products in issue were free from defects that could result in injury or damage to the Plaintiffs' property in a Product's ordinary use;
- (b) Behr denies that any of the Products at any material time contained ingredients that were incompatible or unstable as alleged;
- (c) Behr denies that any of NSP Nos. 79, 80, 81, 82, 83, 84 or 92 or any of NSP Nos. 31-79, 31-80, 31-81, 31-83, 31-84 or 31-92 contained

insufficient concentrations of mildewcide at any material time, and denies further that the concentration of mildewcide in any of these Products resulted in any injury, loss or damage to any property of any Plaintiff;

- (d) Behr denies that any of SLR No. 12, SLR No. 13, SLR No. 31-12 or SLR No. 31-13 contained insufficient concentrations of mildewcide at any material time, and denies further that the concentration of mildewcide in any of these Products resulted in any injury, loss or damage to any property of any Plaintiff;
- (e) Behr denies that the type of mildewcide, namely P-100, used in NSP Products and in SLR Products in the period prior to September 28, 1998 was the wrong type of mildewcide and denies that it was chemically incompatible with Tinuvin P. Behr denies further that either the type of mildewcide or any alleged chemical incompatibility between P-100 and Tinuvin P (which incompatibility is denied) resulted in any injury, loss or damage to any property of any Plaintiff;
- (f) Behr denies that the P20T mildewcide used in NSP Products and in SLR Products in the period after September 28, 1998 was the wrong type of mildewcide and denies further that it was chemically incompatible either with Tinuvin P or with Uvinul 5050H. Behr denies further that either the type of mildewcide or any alleged chemical incompatibility (which incompatibility is denied) between P20T and Tinuvin P, or between P20T

and Uvinul 5050H, resulted in any injury, loss or damage to any property of any Plaintiff.

Further, Behr denies all other allegations in paragraph 38 of the Statement of Claim.

22. Further, or alternatively, with reference to paragraph 39 of the Statement of Claim:

- (a) Behr denies any negligence, as particularized in paragraph 39, in connection with either testing or monitoring of the Products;
- (b) Behr denies that it received any warnings as alleged in paragraph 39(a) of the Statement of Claim;
- (c) alternatively, if Behr received any warnings as alleged in paragraph 39(a) of the Statement of Claim, Behr denies that it ignored such warnings;
- (d) further, or alternatively, if Behr received any warnings as alleged in paragraph 39(a) of the Statement of Claim and if Behr ignored such warnings, Behr denies that it was negligent in so doing, and denies further that any Plaintiff has suffered any injury, loss or damage as a result;
- (e) Behr denies that, if it did not act on any particular result from testing or monitoring of any Product in issue, it was negligent or any of the Plaintiffs has or can have any cause of action as a result;

- (f) Behr denies that any Plaintiff has suffered any injury, loss or damage as a result of any alleged failure (which is denied) either to test or monitor performance of the Products or to act on any particular result of testing or monitoring;
- (g) Behr denies that any Plaintiff has or can have any cause of action based on any act alleged to be done, or which it is alleged Behr failed to do, after the date on which a Plaintiff is alleged to have purchased and used any of the Products;
- (h) Behr denies that any Plaintiff has suffered any injury, loss or damage as a result of concealment of any test result, and Behr denies further that any Plaintiff has or can have a cause of action based on alleged concealment of a test result where the alleged test was carried out after the date on which a Plaintiff is alleged to have purchased and used a Product;
- (i) Behr denies that any Plaintiff has suffered any injury, loss or damage as a result of Behr ignoring any test result, and Behr denies further that any Plaintiff has or can have a cause of action based on alleged ignoring of a test result where the alleged test was carried out after the date on which a Plaintiff is alleged to have purchased and used a Product;
- (j) Behr denies that any Plaintiff has suffered any injury, loss or damage as a result of Behr destroying any test results, and Behr denies further that any Plaintiff has or can have a cause of action based on alleged destruction of

a test result where the alleged test was carried out after the date on which a Plaintiff is alleged to have purchased and used a Product;

- (k) Behr denies that any Plaintiff has suffered any injury, loss or damage as a result of Behr losing any test results. Behr denies further that any Plaintiff has or can have any cause of action based on the alleged loss of a test result, and denies further that any Plaintiff has or can have any cause of action based on alleged loss of a test result were the alleged test was carried out after the date on which a Plaintiff is alleged to have purchased and used a Product.

Further, or alternatively, the allegations in paragraph 39(g) disclose no reasonable claim by any Plaintiff against Behr.

23. Further, or alternatively, with reference to paragraph 40 of the Statement of Claim, if Behr owed any duty to warn as alleged, which is not admitted but specifically denied, and if Behr breached any such duty, which is not admitted but specifically denied, any failure on the part of Behr to warn neither caused nor contributed to any damage, loss or expense alleged to be suffered by the Plaintiffs (which such damage, loss and expense is not admitted but denied). Further, or alternatively, with reference to paragraph 40, the allegations are inconsistent with allegations in paragraphs 36 and 38 of the Statement of claim, and are not pleaded in the alternative.

24. Further, or alternatively, with reference to paragraphs 26 and 28 – 41 of the Statement of Claim, if any of the Products in issue did contain defects as alleged (which is not

admitted but specifically denied), any such defects did not cause damage or injury to property of such a nature for which a cause of action in negligence exists.

25. With reference to paragraphs 42 and 43 of the Statement of Claim:

- (a) Behr denies that any act or practice alleged in paragraph 42 is in law a deceptive act or practice for the purposes of the *Trade Practice Act*, R.S.B.C. 1996, c. 457 (the "*Trade Practice Act*"), and Behr denies it engaged in any deceptive acts or practices as alleged;
- (b) alternatively, if any alleged act or practice is a deceptive act or practice for the purposes of the *Trade Practice Act*, and if Behr engaged in such act or practice, Behr denies that any Plaintiff suffered any loss or damage or expense because of any such act or practice;
- (c) Behr denies that any act or practice alleged in paragraph 42 is in law an unconscionable act or practice for the purposes of the *Trade Practice Act*, and Behr denies that it engaged in any unconscionable acts or practices as alleged;
- (d) alternatively, if any alleged act or practice is an unconscionable act or practice for the purposes of the *Trade Practice Act*, and if Behr engaged in such act or practice, Behr denies that any Plaintiff suffered any loss or damage or expense because of any such act or practice.

Behr denies all other allegations in paragraphs 42 and 43 of the Statement of Claim.

26. Further, or alternatively, with reference to paragraphs 42 and 43 of the Statement of Claim:

- (a) if any alleged act or practice was deceptive and Behr engaged in it, none of the Plaintiffs has or can have any cause of action based on any such act or practice if it occurred after, or if it had ceased as of, the date on which a Plaintiff is alleged to have purchased and used any Product;
- (b) if any alleged act or practice was unconscionable and Behr engaged in it, none of the Plaintiffs has or can have any cause of action based on any such act or practice if it occurred after, or if it had ceased as of, the date on which a Plaintiff is alleged to have purchased and used any Product;
- (c) in particular, the Plaintiff Olsen has and can have no cause of action based on acts and practices alleged in paragraph 42(f), (g), (k) and (l)(v), which, if they occurred at all, occurred after the date on which the Plaintiff Olsen alleges he purchased and used Products.

27. With reference to paragraph 44 of the Statement of Claim, Behr pleads and relies on the facts set out in paragraphs 10 – 13 above. Further:

- (a) Behr denies making any alleged representation that was false;
- (b) Behr denies making any alleged representation that was misleading in a material respect;

- (c) Behr denies that any Plaintiff relied on any alleged representation, as alleged;
- (d) if any alleged representation was either false or misleading in a material respect, Behr denies that any Plaintiff suffered any loss or damage as a result of any such representation;
- (e) Behr denies that any Plaintiff has or can have any cause of action based on any alleged representation made after the date on which the Plaintiff is alleged to have purchased and used a Product;
- (f) Behr denies that any Plaintiff has or can have any cause of action based on any alleged representation if the alleged representation was not being made at the time the Plaintiff is alleged to have purchased and used a Product.

Further, Behr denies all other allegations in paragraph 44 of the Statement of Claim.

28. Further, or alternatively, with reference to paragraph 44 of the Statement of Claim, the right of any of the Plaintiffs to bring a claim under s. 36 of the *Competition Act* in respect of conduct alleged to be contrary to a provision of Part VI of the *Act* expires after two years from a day on which the conduct was engaged in, and Behr pleads and relies on s. 36(4) of the *Competition Act*. The right, if any, of the Plaintiff Olsen to bring a claim under s. 36 of the *Competition Act* had expired not later than October, 1998.

29. With reference to paragraphs 45 – 47 of the Statement of Claim, Behr pleads and relies on the facts set out in paragraphs 10 – 13 above. Further:

- (a) Behr denies that any express words were intended as warranty by Behr, as alleged, and Behr denies that any Plaintiff relied on any such words in deciding to purchase any Product;
- (b) further, or alternatively, if any particular words created an express warranty by Behr, Behr denies any such express warranty was breached;
- (c) further, or alternatively, if any particular words created an express warranty by Behr and such express warranty was breached, Behr denies that any Plaintiff suffered any loss or damage as a result;
- (d) further, Behr denies that by any words used, any warranty by Behr was implied as alleged, and Behr denies that any Plaintiff relied on any such words, or on any alleged implied warranty (and the existence of any such warranty is denied) in deciding to purchase any Product;
- (e) further, or alternatively, if any words created an implied warranty by Behr, Behr denies any such implied warranty was breached;
- (f) further, or alternatively, if any particular words created an implied warranty by Behr and such implied warranty was breached, Behr denies that any Plaintiff experienced any loss or damage as a result.

Further, Behr denies all other allegations in paragraphs 45 – 47 of the Statement of Claim.

30. With reference to paragraphs 48 of the Statement of Claim, Behr denies that the Plaintiffs are entitled to bring any proceedings on behalf of “Class Members” as described.

Further, or alternatively, no identifiable class, in accordance with the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, is described in the Statement of Claim.

31. With reference to paragraph 50 of the Statement of Claim, as no facts have been pleaded with respect to any claim except under the *Trade Practice Act*, the allegations in this paragraph disclose no cause of action against Behr.


32. In further answer to the whole of the Statement of Claim, and alternatively, if Behr breached any duty owed to any of the Plaintiffs, or breached any warranty alleged to have been given, all of which is not admitted but specifically denied, the right to bring a claim against Behr in respect of injury to property, including economic loss arising from the injury, arose not later than:

- (a) in relation to any alleged breach of duty, two years after the date on which the Product was applied to the wood surface of the Plaintiff; or, alternatively, two years after the date on which mildew first appeared on the wood surface of the Plaintiff to which the Product was applied;
- (b) in relation to any alleged breach of warranty, two years after the date on which such alleged warranty was breached.

and all other claims are statute-barred. Behr pleads and relies on the provisions of the *Limitation Act*, R.S.B.C. 1996, c. 266.

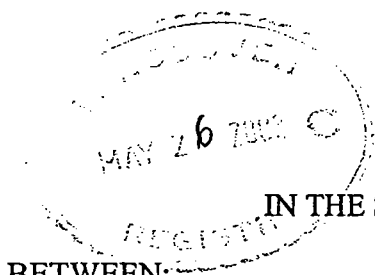
WHEREFORE the Defendant Behr Process Corporation submits that this action against it be dismissed, with costs.

DATED: 26 May 2003



Solicitor for the Defendant Behr Process Corporation

THIS STATEMENT OF DEFENCE is filed by Elaine J. Adair, of the firm of McCarthy Tétrault LLP, Barristers and Solicitors, whose place of business and address for service is Suite 1300, 777 Dunsmuir Street, Vancouver, British Columbia, V7Y 1K2, (604) 643-7100.



NO. S006106
VANCOUVER REGISTRY

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Brought under the *Class Proceedings Act*

**STATEMENT OF DEFENCE OF THE DEFENDANT
BEHR PROCESS CANADA LTD.**

1. Except where expressly admitted herein, the Defendant Behr Process Canada Ltd. ("Behr Canada") denies each and every allegation in the Further Amended Statement of Claim (the "Statement of Claim").
2. Behr Canada admits paragraph 4 of the Statement of Claim.
3. In answer to the whole of the Statement of Claim, Behr Canada denies that it has any liability to any of the Plaintiffs.
4. In further answer to the whole of the Statement of Claim, if any of the Plaintiffs has suffered any damage, loss or expense, which is not admitted but specifically denied, any such damage, loss, or expense was neither caused nor contributed to as the result of any fault or

negligence, wrongful conduct, or breach of any duty or obligation on the part of Behr Canada, and Behr Canada denies any alleged fault, negligence, wrongful conduct, or breach of any duty or obligation.

5. In further answer to the whole of the Statement of Claim, and alternatively, if any of the Plaintiffs has suffered any damage, loss or expense, which is not admitted but specifically denied:

- (a) any such damage, loss and expense was caused or contributed to by the fault or negligence of the Plaintiffs and/or others whose identity is not presently known to Behr Canada. Behr Canada pleads and relies on the provisions of the *Negligence Act*, R.S.B.C., 1996, c. 333;
- (b) each of the Plaintiffs has failed to take reasonable steps to mitigate any such damage, loss and expense.

6. Further, or alternatively, at no time material to these proceedings was there any relationship between Behr Canada and any of the Plaintiffs such that it should have been in the reasonable contemplation of Behr Canada that failure on its part to take reasonable care (which such failure is denied) might cause damage to any of the Plaintiffs, either as alleged or at all.

7. Further, or alternatively, as the products alleged to have been purchased and used by the Plaintiffs Paul and Linda Dennis are alleged to have been purchased outside of Canada, at no time material to these proceedings was there any relationship between Behr Canada and the Plaintiffs Paul and Linda Dennis such that it should have been in the reasonable contemplation of

Behr Canada that failure on its part to take reasonable care (which such failure is denied) might cause damage to either Paul Dennis or Linda Dennis, either as alleged or at all.

8. Further, or alternatively, in answer to the whole of the Statement of Claim, Behr Canada pleads the facts set out in paragraphs 9 – 30 below.

9. With reference to paragraphs 5, 12 – 17 and 44 – 47 of the Statement of Claim:

- (a) Behr Canada denies that at any material time it either designed, manufactured, produced, marketed or promoted any products as alleged;
- (b) Behr Canada denies that at any material time it made any of the statements alleged in paragraphs 13, 15 and 16;
- (c) Behr Canada denies that any of the words or statements alleged in paragraphs 15 and 16, or any close variation thereof, constitute either warranties or representations at law.
- (d) since January, 2000, Behr Canada has distributed in Canada products manufactured and sold by Behr Process Corporation (“Behr”), including a line of products sold under the name Natural Seal Plus (the “NSP Products”) and a line of products sold under the name, Super Liquid Raw-Hide (the “SLR Products”);
- (e) at all material times, Behr Canada’s distribution activities have been confined to Canada.

Behr Canada denies all other allegations in paragraphs 5, 12 – 17, and 44 – 47 of the Statement of Claim.

10. With reference to paragraphs 7 – 11 of the Statement of Claim:

- (a) beginning in January, 2000, Behr Canada had distribution facilities in Canada, located in Calgary, Alberta;
- (b) from time to time, an individual who was a director of Behr was at the same time also a director of Behr Canada;
- (c) since January, 2000, Behr Canada has had a Technical Services Department, which was physically located in Calgary, Alberta, and which can be reached by telephoning 1-800-661-1591;
- (d) the Behr Canada Technical Services Department shares a database of information with the Behr Technical Services Department.

Behr Canada denies all other allegations in paragraphs 7 – 11. Further, the allegations in paragraphs 7 – 11 of the Statement of Claim do not, either alone or together with other allegations in the Statement of Claim, state material facts disclosing a cause of action against Behr Canada.

11. Further, or alternatively, with reference to paragraph 15 and paragraph 17 (so far as it relates to NSP Products) of the Statement of Claim:

- (a) Behr Canada denies that the words alleged in paragraph 15(a), or any close variation thereof, were used in respect of NSP Products at any time;
- (b) Behr Canada denies that the words alleged in paragraph 15(b), (c), (t), (u), (v) and (w) were found on Canadian labels for NSP Products sold in Canada, where the labels had a revision date after January, 1992;
- (c) Behr Canada denies that the words alleged in paragraph 15(d) and (e) were found on Canadian labels for NSP Products sold in Canada, where the labels had a revision date after May, 1996;
- (d) Behr Canada denies that the words alleged in paragraph 15(f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (y) and (z) were found on Canadian labels for NSP Products sold in Canada, where the labels had a revision date before February, 1999;
- (e) Behr Canada denies that the words alleged in paragraph 15(y) and (z) were found on any Canadian labels for NSP No. 92 or NSP No. 31-92; and
- (f) Behr Canada denies that the words alleged in paragraph 15(c), (e), (g), (i), (k), (m), (o), (q), (s), (u), (w) and (z) were found on any labels for NSP Products sold in the U.S. or on any written information available in the U.S. about NSP Products, and, in particular, Behr Canada denies that any of these words were found on labels of any Product alleged to be purchased or used by the Plaintiffs Paul Dennis and Linda Dennis.

12. Further, or alternatively with reference to paragraph 16 and paragraph 17 (so far as it relates to SLR Products) of the Statement of Claim:

- (a) Behr Canada denies that the words alleged in paragraph 16(a) were found on Canadian labels for SLR Products sold in Canada; _____
- (b) alternatively, Behr Canada denies that the words alleged in paragraph 16(a), or any close variation thereof, were found on Canadian labels for SLR Products sold in Canada, where the labels had a date after May, 1993;
- (c) alternatively, Behr Canada denies that the words alleged in paragraph 16(a), or any close variation thereof, were found on SLR Product brochures with a revision date after August, 1993;
- (d) Behr Canada denies that the words alleged in paragraph 16(b) and (o) were found on Canadian labels for SLR Products sold in Canada;
- (e) Behr Canada denies that the words alleged in paragraph 16(c) and (d), or any close variation thereof, were found on Canadian labels for SLR Products sold in Canada, where the labels had a revision date after March, 1997;
- (f) Behr Canada denies that the words alleged in paragraph 16(e), (f),(g), (h), (m) and (n) were found on Canadian labels for SLR Products sold in

Canada where the labels had a revision date other than either February, 1994 (for SLR No. 12) or March, 1994 (for SLR No. 13);

- (g) Behr Canada denies that the words alleged in paragraph 16(i) and (j) were found on Canadian labels for SLR No. 12 or SLR No. 31-12;
- (h) Behr Canada denies that the words alleged in paragraph 16(k) and (l) were found on Canadian labels for SLR Products sold in Canada, where the labels had a revision date other than March, 1997;
- (i) Behr Canada denies that the words alleged in paragraph 16(d), (f), (h), (j) and (n) were found on any labels for SLR Products sold in the U.S. or on any written information available in the U.S. about SLR Products, and, in particular, Behr Canada denies that any of these words were found on labels of any Products alleged to be purchased or used by the Plaintiffs Paul Dennis and Linda Dennis.

13. With reference to paragraphs 19 – 25, 27 and 39 of the Statement of Claim, as the Plaintiffs are alleged to have purchased only the Products known as NSP No. 81, SLR No. 12 and SLR No. 13, the allegations in paragraphs 19 – 25, 27 and 39 of the Statement of Claim, with the exception of allegations respecting the products NSP No. 81, SLR No. 12 and SLR No. 13, disclose no cause of action against Behr Canada. Further, Behr Canada denies the allegations in paragraphs 19 – 25, 27 and 39 of the Statement of Claim.

14. With reference to paragraphs 18, 26, and 28 – 41 of the Statement of Claim, if any of the Plaintiffs either purchased or used any SLR Product or any NSP Product, which is not admitted but specifically denied, and if any property of the Plaintiffs is or has been damaged, which is not admitted but specifically denied, Behr Canada denies that any of the Products has caused or continues to cause damage or loss or expense to any such property. Further, Behr Canada denies all other allegations in paragraphs 18, 26, and 28 – 41 of the Statement of Claim.

15. Further, or alternatively, with reference to paragraphs 26 and 28 – 41 of the Statement of Claim, if any of the Plaintiffs used any SLR Product or any NSP Product, which is not admitted but specifically denied, and if any property of the Plaintiffs is or has been damaged or injured, which is not admitted but specifically denied, such damage or injury is not the result of any defect in the Products alleged to have been used (and the existence of any defect is not admitted but specifically denied), but is the result of other factors, including:

- (a) the condition of the wood when the Product was applied, and in particular, the length of time the wood was exposed, without any coating, to precipitation, moisture, humidity, ultraviolet radiation, temperature changes and wind, and allowed to weather;
- (b) the continued exposure of the wood surface to which the Product was applied to precipitation, moisture, humidity, ultraviolet radiation, temperature changes and wind, all of which are climatic factors causing wood to weather and which, depending on the orientation and location of the wood surface, impact the effectiveness, wear pattern and longevity of any exterior wood coating;

- (c) the Product reaching the end of its useful life, without being replaced;
- (d) the presence of mildew on or in the wood when the Product was applied;
- (e) failure on the part of the person who applied the Product to ensure that, before the Product was applied to the wood surface, the wood was clean, sound and dry;
- (f) failure on the part of the person who applied the Product to ensure that, before the Product was applied to the wood surface, all mildew was removed;
- (g) failure on the part of the person who applied the Product to follow Behr's instructions for application of the Product, including the instruction respecting thorough removal of all mildew prior to application;
- (h) failure by the Plaintiffs to ensure adequate drainage around wood structures and wood surfaces;
- (i) failure by the Plaintiffs to properly maintain the wood surface after applying the Products, including, as part of routine and normal maintenance, cleaning the wood surface, and replacing the coating at the end of the Product's useful life taking into account climatic factors described in subparagraph (b) above; and/or

- (j) failure of the Plaintiffs to apply the Products in appropriate weather conditions.

16. Further, or alternatively, with reference to paragraphs 26 and 28 – 41 of the Statement of Claim, if any property of the Plaintiffs is or has been damaged, or if there is discolouration, blackening, peeling, cracking and blistering of, or mildew growth on, wood surfaces of the Plaintiffs to which any product in issue has been applied, or degradation of the wood fibre, none of which is admitted but specifically denied, any such damage was not caused by either:

- (a) any alleged negligence on the part of Behr Canada; or
- (b) any alleged defect in the Products in issue; or
- (c) breach of a duty (if any) to test or monitor performance of any of the Products in issue; or
- (d) breach of a duty (if any) to act on results from testing and monitoring of any Product in issue; or
- (e) breach of a duty (if any) to warn.

17. Further, or alternatively, with reference to paragraphs 26 and 28 – 41 of the Statement of Claim, if there is discolouration, blackening, peeling, cracking and blistering of, or mildew growth on, wood surfaces of the Plaintiffs to which any Product in issue has been applied, or degradation of the wood fibre, none of which is admitted but specifically denied, any

such discolouration, blackening, peeling, cracking and blistering of, or mildew growth on, such wood surfaces, or any degradation of the wood fibre, was caused as a result of factors for which Behr Canada has no responsibility, including one or more of those factors described in paragraph 15 above, and one or more of the following:

- (a) use of fasteners containing iron, or wire brushes, which, among other things, may cause wood to turn black when wet if the iron is exposed to water, or as a result of reaction with certain wood extractives;
- (b) the species of wood, as certain species possess extractives that may bleed and discolour wood surfaces;
- (c) the part of the tree from which the wood was cut, as starch and sugar in sapwood serve as a food source for mould fungi;
- (d) whether wood was cut from young growth or older growth, as lumber cut from young growth logs tends to cup or warp more than lumber from old growth logs.

18. Further, or alternatively, with reference to paragraph 38 of the Statement of Claim:

- (a) Behr Canada denies that any of the Products at any material time contained ingredients that were incompatible or unstable as alleged;

- (b) Behr Canada denies that any of NSP Nos. 79, 80, 81, 82, 83, 84 or 92 or any of NSP Nos. 31-79, 31-80, 31-81, 31-83, 31-84 or 31-92 contained insufficient concentrations of mildewcide at any material time, and denies further that the concentration of mildewcide in any of these Products resulted in any injury, loss or damage to any property of any Plaintiff;
- (c) Behr Canada denies that any of SLR No. 12, SLR No. 13, SLR No. 31-12 or SLR No. 31-13 contained insufficient concentrations of mildewcide at any material time, and denies further that the concentration of mildewcide in any of these Products resulted in any injury, loss or damage to any property of any Plaintiff;
- (d) Behr Canada denies that the type of mildewcide used in NSP Products and in SLR Products in the period prior to September 28, 1998, namely Troy Chemical's P-100, was the wrong type of mildewcide and denies that the type of mildewcide was chemically incompatible with the UV inhibitor used at the time. Behr Canada denies further that either the type of mildewcide or any alleged chemical incompatibility between the mildewcide and the UV inhibitor (which incompatibility is denied) resulted in any injury, loss or damage to any property of any Plaintiff;
- (e) Behr Canada denies that the type of mildewcide used in NSP Products and in SLR Products in the period after September 28, 1998, namely Troy Chemical's P20T, was the wrong type of mildewcide and denies further that the mildewcide was chemically incompatible with any UV inhibitor

(including a hindered amine light absorber) used at any material time. Behr Canada denies further that either the type of mildewcide or any alleged chemical incompatibility (which incompatibility is denied) between the type of mildewcide and the UV inhibitor, resulted in any injury, loss or damage to any property of any Plaintiff.

Further, Behr Canada denies all other allegations in paragraph 38 of the Statement of Claim.

19. Further, or alternatively, with reference to paragraph 39 of the Statement of Claim:

- (a) Behr Canada denies any negligence, as particularized in paragraph 39, in connection with either testing or monitoring of the Products, and Behr Canada denies that at any material time there was any relationship between Behr Canada and the Plaintiffs Paul and Linda Dennis such that Behr Canada owed any duty to them either to test or monitor Products or take any action;
- (b) Behr Canada denies that it received any warnings as alleged in paragraph 39(a) of the Statement of Claim;
- (c) alternatively, if Behr Canada received any warnings as alleged in paragraph 39(a) of the Statement of Claim, Behr Canada denies that it ignored such warnings;

- (d) further, or alternatively, if Behr Canada received any warnings as alleged in paragraph 39(a) of the Statement of Claim and if Behr Canada ignored such warnings, Behr Canada denies that it was negligent in so doing, and denies further that any Plaintiff has suffered any injury, loss or damage as a result;
- (e) Behr Canada denies that, if it did not act on any particular result from any testing or monitoring of any Product in issue, it was negligent or any of the Plaintiffs has or can have any cause of action as a result;
- (f) Behr Canada denies that any Plaintiff has suffered any injury, loss or damage as a result of any alleged failure (which is denied) either to test or monitor performance of the Products or to act on any particular result of testing or monitoring;
- (g) Behr Canada denies that any Plaintiff has or can have any cause of action based on any act alleged to be done, or which it is alleged Behr Canada failed to do, after the date on which a Plaintiff is alleged to have purchased and used any of the Products;
- (h) Behr Canada denies that any Plaintiff has suffered any injury, loss or damage as a result of concealment of any test result, and Behr Canada denies further that any Plaintiff has or can have a cause of action based on alleged concealment of a test result where the alleged test was carried out

after the date on which a Plaintiff is alleged to have purchased and used a Product;

- (i) Behr Canada denies that any Plaintiff has suffered any injury, loss or damage as a result of Behr Canada ignoring any test result, and Behr Canada denies further that any Plaintiff has or can have a cause of action based on alleged ignoring of a test result where the alleged test was carried out after the date on which a Plaintiff is alleged to have purchased and used a Product;
- (j) Behr Canada denies that any Plaintiff has suffered any injury, loss or damage as a result of Behr Canada destroying any test results, and Behr Canada denies further that any Plaintiff has or can have a cause of action based on alleged destruction of a test result where the alleged test was carried out after the date on which a Plaintiff is alleged to have purchased and used a Product;
- (k) Behr Canada denies that any Plaintiff has suffered any injury, loss or damage as a result of Behr Canada losing any test results. Behr Canada denies further that any Plaintiff has or can have any cause of action based on the alleged loss of a test result, and denies further that any Plaintiff has or can have any cause of action based on alleged loss of a test result were the alleged test was carried out after the date on which a Plaintiff is alleged to have purchased and used a Product.

Further, or alternatively, the allegations in paragraph 39(g) disclose no reasonable claim by any Plaintiff against Behr Canada.

20. Further, or alternatively, with reference to paragraph 40 of the Statement of Claim, if Behr Canada owed any duty to warn as alleged, which is not admitted but specifically denied, and if Behr Canada breached any such duty, which is not admitted but specifically denied, any failure on the part of Behr Canada to warn neither caused nor contributed to any damage, loss or expense alleged to be suffered by the Plaintiffs (which such damage, loss and expense is not admitted but denied). Further, or alternatively, with reference to paragraph 40, the allegations are inconsistent with allegations in paragraphs 36 and 38 of the Statement of claim, and are not pleaded in the alternative.

21. Further, or alternatively, with reference to paragraph 40 of the Statement of Claim, at no time material to these proceedings was there any relationship between Behr Canada and the Plaintiffs Paul and Linda Dennis such that Behr Canada had any duty to warn these Plaintiffs as alleged.

22. Further, or alternatively, with reference to paragraphs 26 and 28 – 41 of the Statement of Claim, if any of the Products in issue did contain defects as alleged (which is not admitted but specifically denied), any such defects did not cause damage or injury to property of such a nature for which a cause of action in negligence exists.

23. With reference to paragraphs 42 and 43 of the Statement of Claim:

- (a) Behr Canada denies that any act or practice alleged in paragraph 42 is in law a deceptive act or practice for the purposes of the *Trade Practice Act*, R.S.B.C. 1996, c. 457 (the "*Trade Practice Act*"), and Behr Canada denies it engaged in any deceptive acts or practices as alleged;
- (b) alternatively, if any alleged act or practice is a deceptive act or practice for the purposes of the *Trade Practice Act*, and if Behr Canada engaged in such act or practice, Behr Canada denies that any Plaintiff suffered any loss or damage or expense because of any such act or practice;
- (c) Behr Canada denies that any act or practice alleged in paragraph 42 is in law an unconscionable act or practice for the purposes of the *Trade Practice Act*, and Behr Canada denies that it engaged in any unconscionable acts or practices as alleged;
- (d) alternatively, if any alleged act or practice is an unconscionable act or practice for the purposes of the *Trade Practice Act*, and if Behr Canada engaged in such act or practice, Behr Canada denies that any Plaintiff suffered any loss or damage or expense because of any such act or practice.

Behr Canada denies all other allegations in paragraphs 42 and 43 of the Statement of Claim.

24. Further, or alternatively, with reference to paragraphs 42 and 43 of the Statement of Claim:

- (a) if any alleged act or practice was deceptive and Behr Canada engaged in it, none of the Plaintiffs has or can have any cause of action based on any such act or practice if it occurred after, or if it had ceased as of, the date on which a Plaintiff is alleged to have purchased and used any Product;
- (b) if any alleged act or practice was unconscionable and Behr Canada engaged in it, none of the Plaintiffs has or can have any cause of action based on any such act or practice if it occurred after, or if it had ceased as of, the date on which a Plaintiff is alleged to have purchased and used any Product;
- (c) in particular, the Plaintiff Olsen has and can have no cause of action based on acts and practices alleged in paragraph 42(f), (g), (k) and (l)(v), which, if they occurred at all, occurred after the date on which the Plaintiff Olsen alleges he purchased and used Products.

25. Further, or alternatively, with reference to paragraph 44 of the Statement of Claim, Behr Canada pleads and relies on the facts set out in paragraphs 9, 11 – 12 above, and the following:

- (a) if Behr Canada made any alleged representations, Behr Canada denies making any alleged representation that was either false or misleading in a material respect;

- (b) Behr Canada denies that any Plaintiff relied on any alleged representation, as alleged;
- (c) if Behr Canada made any alleged representation and the representation was either false or misleading in a material respect, Behr Canada denies that any Plaintiff suffered any loss or damage as a result of any such representation;
- (d) Behr Canada denies that any Plaintiff has or can have any cause of action based on any alleged representation made after the date on which the Plaintiff is alleged to have purchased and used a Product;
- (e) Behr Canada denies that any Plaintiff has or can have any cause of action based on any alleged representation if the alleged representation was not being made at the time the Plaintiff is alleged to have purchased and used a Product.

26. Further, or alternatively, with reference to paragraph 44 of the Statement of Claim, the right of any of the Plaintiffs to bring a claim under s. 36 of the *Competition Act* in respect of conduct alleged to be contrary to a provision of Part VI of the *Act* expires after two years from a day on which the conduct was engaged in, and Behr Canada pleads and relies on s. 36(4) of the *Competition Act*. The right, if any, of the Plaintiff Olsen to bring a claim under s. 36 of the *Competition Act* had expired not later than October, 1998.

27. Further, or alternatively, with reference to paragraphs 45 – 47 of the Statement of Claim, Behr Canada pleads and relies on the facts set out in paragraphs 9, 11 – 12 above, and the following:

- (a) Behr Canada denies that any express words were intended as warranty by Behr Canada, as alleged, and Behr Canada denies that any Plaintiff relied on any such words in deciding to purchase any Product;
- (b) further, or alternatively, if any particular words created an express warranty by Behr Canada, Behr Canada denies any such express warranty was breached;
- (c) further, or alternatively, if any particular words created an express warranty by Behr Canada and such express warranty was breached, Behr Canada denies that any Plaintiff suffered any loss or damage as a result;
- (d) further, Behr Canada denies that by any words used, any warranty by Behr Canada was implied as alleged, and Behr Canada denies that any Plaintiff relied on any such words, or on any alleged implied warranty (and the existence of any such warranty is denied) in deciding to purchase any Product;
- (e) further, or alternatively, if any words created an implied warranty by Behr Canada, Behr Canada denies any such implied warranty was breached;

- (f) further, or alternatively, if any particular words created an implied warranty by Behr Canada and such implied warranty was breached, Behr Canada denies that any Plaintiff experienced any loss or damage as a result.

28. With reference to paragraphs 48 of the Statement of Claim, Behr Canada denies that the Plaintiffs are entitled to bring any proceedings on behalf of "Class Members" as described. Further, or alternatively, no identifiable class, in accordance with the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, is described in the Statement of Claim.

29. With reference to paragraph 50 of the Statement of Claim, as no facts have been pleaded with respect to any claim except under the *Trade Practice Act*, the allegations in this paragraph disclose no cause of action against Behr Canada.

30. In further answer to the whole of the Statement of Claim, and alternatively, if Behr Canada owed any duty to any of the Plaintiffs and breached that duty, or breached any warranty alleged to have been given, all of which is not admitted but specifically denied, the right to bring a claim against Behr Canada in respect of injury to property, including economic loss arising from the injury, arose not later than:

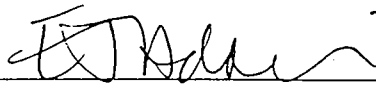
- (a) in relation to any breach of such alleged duty, two years after the date on which the Product was applied to the wood surface of the Plaintiff; or, alternatively, two years after the date on which mildew first appeared on the wood surface of the Plaintiff to which the Product was applied;

- (b) in relation to any alleged breach of warranty, two years after the date on which such alleged warranty by Behr Canada was breached.

and all other claims are statute-barred. Behr Canada pleads and relies on the provisions of the *Limitations Act*, R.S.B.C. 1996, c. 266.

WHEREFORE the Defendant Behr Process Canada Ltd. submits that this action against it be dismissed, with costs.

DATED: 26 May 2003


Solicitor for the Defendant Behr Process
Canada Ltd.

THIS STATEMENT OF DEFENCE is filed by Elaine J. Adair, of the firm of McCarthy Tétrault LLP, Barristers and Solicitors, whose place of business and address for service is Suite 1300, 777 Dunsmuir Street, Vancouver, British Columbia, V7Y 1K2, (604) 643-7100.