

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

**AXIOM PLASTICS INC.**

Plaintiff

- and -

**E.I. DUPONT CANADA COMPANY**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

*(Notice of Action issued on December 15, 2005)*

1. The plaintiff claims:

- (a) Compensation and damages for conduct that is contrary to Part VI of the *Competition Act*, R.S.C. 1985, c. 19 (2d Supp.), and, in particular, Sections 45(1) and 61(1) thereof;
- (b) Damages for civil conspiracy;
- (c) Compensation and/or restitution for unjust enrichment;
- (d) An accounting of monies wrongfully received as a result of the defendant's unlawful conduct;
- (e) Punitive, exemplary and aggravated damages in an amount to be determined by the Court;

- (f) Pre-judgment interest in accordance with commercial rates and on a compounded basis, or in the alternative, pursuant to section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (g) Post-judgment interest in accordance with section 129 of the *Courts of Justice Act*;
- (h) Costs of this action on a substantial-indemnity basis; and
- (i) Such further and other relief as this Honourable Court deems just.

### **The Parties**

2. The plaintiff Axiom Plastics Inc. (“Axiom”) is an Ontario-owned and operated manufacturer, incorporated under the laws of Ontario and based in Aurora, Ontario. Axiom manufactures plastic-injection moulded parts primarily for the automotive industry.

3. Axiom is a member of and brings this claim on behalf of the following proposed class:

“All purchasers in Canada since January 2000 of engineering resins, including Delrin and Zytel brand engineering resins, from E.I. DuPont Canada Company or its authorized Canadian distributors for use in parts manufactured by such purchasers for supply to a Tier 1 automotive manufacturer.”

4. The defendant E.I. DuPont Canada Company (“DuPont”) is incorporated under the laws of Nova Scotia and has its registered office in the City of Halifax and its principal place of business in Ontario in the City of Mississauga. DuPont was a publicly-traded company until in or about July 2003 when it became a wholly-owned subsidiary of E.I. du Pont de Nemours and Company (“DuPont USA”), a company incorporated under the laws of Delaware, one of the United States of America.

## **The Automotive Supply Chain**

5. The Canadian automotive manufacturing market is comprised of a supply pyramid consisting of original equipment manufacturers (“OEMs”) such as Ford, General Motors and DaimlerChrysler at the top of the pyramid. Below the OEMs are Tier 1, Tier 2 and other suppliers.

6. Tier 1 manufacturers supply parts and complete automotive assemblies directly to the OEMs. Tier 2 manufacturers, such as Axiom, supply parts or components to Tier 1 manufacturers for incorporation into assemblies supplied to OEMs. Based on specifications provided by a Tier 1 manufacturer, Tier 2 manufacturers purchase raw materials, such as resins, and manufacture and deliver the finished product to the Tier 1 manufacturer.

7. DuPont manufactures and/or distributes specialized resins, known as ‘engineering resins’, which are used extensively in the manufacture of parts for the Canadian automotive industry and in the parts manufactured by the members of the proposed class. These specialized resins, known for their strength, endurance and heat resistance, are found in a variety of automotive parts including door and window mechanisms, dashboard components, as well as many under-the-hood parts. DuPont is a major supplier of engineering resins used in the manufacture of parts for the Canadian automotive industry.

8. DuPont sells engineering resins to plastics moulders such as Axiom and the members of the proposed class either directly or through a small number of authorized Canadian distributors (the “Authorized Canadian Distributors”). DuPont oversees, monitors and controls the pricing, sales, marketing and distribution of engineering resins through a specialized unit known as the Performance Coatings and Polymers Business Unit (the “Business Unit”).

### **Significance of Resin Costs to Class Members' Profitability and Survival**

9. Because of the increasing demand for plastic in the production of automobiles, plastics moulders form a large part of the Tier 2 manufacturer base.

10. Plastics moulders operate in an intensely price-sensitive environment. They face constant pressure from Tier 1 manufacturers to reduce the price of their parts during the course of a supply contract. Failure to provide ongoing price reductions (or 'givebacks' as they are known in the industry) to a Tier 1 manufacturer's satisfaction can result in de-sourcing, i.e. removal from the list of approved suppliers, or premature termination of existing supply agreements. Given the substantial investment in infrastructure by the plastics moulders, de-sourcing or premature contract termination often leads to their insolvency.

11. The price of engineering resins forms a substantial part of the input costs of plastics moulders. Depending on the specifications of the part produced, engineering resin costs can range anywhere from 30% to 75% of the total piece price. Thus, the ability to procure materials at the lowest price is critical to the success and survival of Tier 2 manufacturers including the members of the proposed class.

### **Breach of the *Competition Act***

12. As more fully particularized in the sections below, from in or about January 2000 to the present (the "Class Period"), DuPont has:

- (a) conspired, combined, agreed or arranged with others to:

- (i) enhance unreasonably the price of engineering resins charged to members of the proposed class, contrary to Section 45(1)(b) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “*Competition Act*”);
  - (ii) prevent or lessen, unduly, competition in the sale or supply of engineering resins to the members of the proposed class, contrary to Section 45(1)(c) of the *Competition Act*;
  - (iii) otherwise restrain or injure competition unduly contrary to Section 45(1)(d) of the *Competition Act*; and
- (b) directly or indirectly entered into agreements, and/or engaged in other conduct and practices to attempt to influence upward, or to discourage the reduction of the prices at which engineering resins are sold, supplied or offered to be supplied, to members of the proposed class, contrary to Section 61(1) of the *Competition Act*.

**Price Enhancement (Section 45(1)(b) of the *Competition Act*)**

13. In order to enhance unreasonably the prices of engineering resins sold to members of the proposed class, DuPont has entered into bilateral conspiracies, combinations, agreements or arrangements at various times during the Class Period, both in writing and orally, with certain Tier 1 manufacturers including but not limited to divisions of Magna International Inc. (the “Tier 1 conspirators”) to:

- (a) require the Tier 2 plastics moulders to use DuPont engineering resins in the manufacture of certain parts;

- (b) fix and maintain the prices (the “Conspiracy Prices”) which the Tier 2 manufacturers pay for DuPont engineering resins, which prices are significantly above the prices which they would pay absent such conspiracy;
  - (c) secretly remit to each Tier 1 conspirator substantial monies (“kickbacks”) obtained as a result of the price enhancement conspiracy in return for the Tier 1 conspirator’s participation in and enforcement of the conspiracy; and
  - (d) require the Tier 1 conspirators to monitor the Tier 2 manufacturers’ purchase volumes and report to DuPont any Tier 2 manufacturer suspected of buying or trying to buy engineering resins from a source other than DuPont or the Authorized Canadian Distributors.
14. In furtherance of its goal of fixing and maintaining the Conspiracy Prices, DuPont:
- (a) with the knowledge and assistance of DuPont USA and other DuPont companies worldwide, engaged in a systematic campaign to eliminate or cut off the supply of all suppliers of DuPont engineering resins in Canada and abroad (“lower priced suppliers”) which were selling or attempting to sell DuPont engineering resins to the members of the proposed class below the Conspiracy Prices;
  - (b) agreed with Tier 1 conspirators that they would provide DuPont with information, including information garnered under compulsion from Tier 2 manufacturers, that could be useful to trace and shut down lower priced suppliers;
  - (c) in cooperation with the Tier 1 conspirators, threatened, coerced and intimidated Tier 2 manufacturers which attempted to purchase from lower priced suppliers and did not disclose the names of their lower priced supplier; and
  - (d) in cooperation with the Tier 1 conspirators, engaged in manipulation of the prices for engineering resins in order to drive lower priced suppliers from the market.

15. Also in order to enhance unreasonably the prices of engineering resins sold to members of the proposed class, DuPont has entered into bilateral conspiracies, combinations, agreements or arrangements at various times during the Class Period, both in writing and orally, with its Authorized Canadian Distributors pursuant to which:

(a) the Authorized Canadian Distributors would sell DuPont engineering resins to the Tier 2 manufacturers at the Conspiracy Prices, without any reductions in the prices thereof; and

(b) the Authorized Canadian Distributors would monitor the Tier 2 manufacturers' purchase volumes and report to DuPont any Tier 2 manufacturer suspected of buying or trying to buy engineering resins from a source other than DuPont or the Authorized Canadian Distributors.

16. The agreements entered into by DuPont with the Tier 1 conspirators include, among others, the following written agreements:

(a) Agreement dated September 27, 2000 with Atoma International Corporation;

(b) Agreement dated October 23, 2001 with Intier Automotive Inc. ("Intier"); and

(c) Agreement dated January 27, 2004 with Intier.

17. Other Tier 1 conspirators include Dortec Industries, KTM Locks, Omron Canada Inc., Edscha North America (a subsidiary of Edscha A.G.) and other Tier 1 manufacturers known only to DuPont and the other conspirators themselves. The dates and particulars of their secret agreements are similarly known only to the conspirators themselves.

18. In furtherance of the price enhancement conspiracy, employees of DuPont including the former Director of the Business Unit, James R. Hay, the current Director of the Business Unit, Eric Beyeler, and Senior Account Managers, Neville R. White and Kathryn Parke, in addition to other agents and employees known only to the conspirators, at various times during the Class Period known only to the conspirators:

- (a) met and corresponded with the Tier 1 conspirators by telephone, email and other means, to fix and maintain prices and track volumes of sales of engineering resins sold to Tier 2 manufacturers;
- (b) distributed lists to the Authorized Canadian Distributors setting out the Conspiracy Prices;
- (c) met and corresponded with the Authorized Canadian Distributors by telephone, email and other means, to enforce compliance with the Conspiracy Prices and discourage or prevent the reduction thereof;
- (d) utilized surveillance and other surreptitious means to monitor the purchases of engineering resins by Tier 2 manufacturers in order to ensure that they purchased engineering resins exclusively from DuPont or its Authorized Canadian Distributors at the Conspiracy Prices;
- (e) used threats, coercion, intimidation and deception on members of the proposed class found to be purchasing DuPont engineering resins from sources other than DuPont or its Authorized Canadian Distributors; and
- (f) took steps to conceal the conspiracy from their direct and indirect customers, the authorities and the public, including by agreeing with the Tier 1 conspirators to keep their agreements confidential and not to report or disclose the kickbacks.



19. In addition, and without limiting the generality of the foregoing, in furtherance of the price enhancement conspiracy, DuPont carried out the acts described below with respect to Axiom. These acts were carried out after DuPont received reports from its co-conspirators that Axiom was purchasing certified DuPont engineering resins at prices lower than the Conspiracy Prices and from sources other than DuPont or the Authorized Canadian Distributors. Thus:

(a) in or about the spring or summer of 2001, DuPont communicated with Canada Colors and Chemicals Limited (“Canada Colors”), an Authorized Canadian Distributor, in order to ensure that it maintain the Conspiracy Prices notwithstanding Canada Colors’ earlier verbal promise to Axiom to reduce prices;

(b) in or about the summer of 2002, DuPont temporarily withdrew kickbacks from Axiom’s largest customer, Tier 1 industry giant, Intier, and communicated with Intier for the purpose of exerting economic pressure on Axiom;

(c) on December 11, 2002, Senior Account Manager Parke (“Parke”) met with the principals of Axiom and threatened economic punishment in concert with Intier if Axiom did not immediately disclose the identity of its supplier, cease purchasing from such supplier and resume purchasing from the Authorized Canadian Distributors at the Conspiracy Prices;

(d) on January 10, 2003, Parke and Director of the Business Unit, Eric Beyeler (“Beyeler”), used threats, coercion and deception in an attempt to force Axiom to disclose the identity of its supplier, including telling Axiom that DuPont was working internationally to trace and shut down its source of supply, and (Beyeler) threatening Axiom with severe economic harm if it did not disclose its source of supply;

(e) in or about 2002 and 2003, after Axiom refused to divulge the identity of its supplier, DuPont arranged with Intier for payments due to Axiom to be withheld; and

(f) at various times between 2002 and 2004 known only to DuPont and Intier, DuPont communicated with Intier regarding the eventual termination of all of Axiom's supply contracts with Intier with a view to forcing Axiom out of business.

20. Thus, DuPont has engaged in a conspiracy during the Class Period to unreasonably enhance prices of DuPont engineering resins contrary to Section 45(1)(b) of the *Competition Act*.

**Preventing, Lessening, Restraining or Injuring Competition (Section 45(1)(c) and (d) of the *Competition Act*)**

21. During the Class Period, DuPont conspired, combined, agreed, or arranged with one or more Tier 1 conspirators and/or Authorized Canadian Distributors to prevent, lessen, or otherwise restrain or injure, unduly, competition in the sale or supply of engineering resins to the members of the proposed class. In furtherance of this purpose DuPont engaged in the acts pleaded in paragraphs 13 to 19 inclusive hereof.

22. Thus, DuPont has engaged in a conspiracy during the Class Period to prevent or lessen, unduly, competition in the sale or supply of engineering resins to the members of the proposed class contrary to Section 45(1)(c) of the *Competition Act*.

23. Furthermore, DuPont engaged in a conspiracy to otherwise restrain or injure competition unduly contrary to Section 45(1)(d) of the *Competition Act*.

**Price Maintenance (Section 61(1) of the *Competition Act*)**

24. At various times during the Class Period, DuPont has entered into agreements, both in writing and orally, with its Authorized Canadian Distributors and/or engaged in threats, promises or other like conduct vis-à-vis its Authorized Canadian Distributors, including but not limited to the

acts set out in paragraphs 15, 18 and 19 hereof, to require the Authorized Canadian Distributors to supply and offer to supply DuPont engineering resins to the Tier 2 manufacturers at the Conspiracy Prices, and to discourage the Authorized Canadian Distributors from reducing the prices thereof.

25. Thus, DuPont has engaged in Price Maintenance contrary to Section 61(1) of the *Competition Act* during the Class Period.

### **Civil Conspiracy**

26. DuPont entered into agreements, and thereby into unlawful and tortious conspiracies, with each of the authorized Canadian distributors and the Tier 1 conspirators with the predominant purpose and/or effect of injuring the plaintiff and other members of the proposed class by unlawful and/or unjustified means, and which resulted in injury to the plaintiff and members of the proposed class. The agreements and unlawful and/or unjustified means include the following:

- (a) the agreements pleaded in paragraphs 12 to 17 inclusive, and 21 hereof;
- (b) the agreements between DuPont and the Tier 1 conspirators referred to in paragraphs 12 to 14, 16, 17 and 21 hereof, by which DuPont aided, abetted and counselled Tier 1 conspirators in maintaining the prices at which DuPont supplied or offered to supply engineering resins to Tier 2 manufacturers, which price maintenance is contrary to section 61(1) of the *Competition Act* and which aiding, abetting and counselling is contrary to sections 21 and 22 of the *Criminal Code* R.S.C. 1985, c. C-46;
- (c) the acts pleaded in paragraphs 13 to 19 inclusive, and 24 hereof; and
- (d) the conduct contrary to the *Competition Act* pleaded herein.

## **Unjust Enrichment**

27. As a result of its conduct, DuPont has benefited from a significant enhancement of its sales volumes, profits and market share. All members of the proposed class have suffered a corresponding deprivation as a result of being forced to pay inflated prices to DuPont or its Authorized Canadian Distributors, and being denied access to competitive pricing and sources of supply. There is no juristic reason or justification for DuPont's enrichment, and indeed such conduct is unlawful under the *Competition Act*, tortious, unjustifiable and contrary to DuPont's own *Business Conduct Guide*.

## **Damages**

28. As a result of the conspiracy and contraventions of the *Competition Act*, the members of the proposed class:

- (a) have paid prices for engineering resins which are unreasonably enhanced and maintained;
- (b) have been denied the ability to negotiate lower engineering resin prices with the Authorized Canadian Distributors;
- (c) have been hindered, prevented or denied the opportunity to source identical lower-priced engineering resins from third-parties suppliers; and
- (d) have been hindered, prevented or denied the opportunity to compete equitably with competitors in countries where the prices of engineering resins were not unreasonably enhanced and maintained.

29. The plaintiff seeks an accounting of and judgment for all amounts wrongfully received by DuPont as a result of said conspiracies.

**Punitive Damages**

30. DuPont has used its market dominance, kickback schemes, threats and deception in furtherance of a conspiracy to inflict harm on the members of the proposed class. It has done so in full knowledge that these customers operate in a price-sensitive environment and that the cost of engineering resins is an overriding determinant of their survival and prosperity. DuPont was, at all times, aware that its actions would have a major adverse impact on all members of the proposed class and would likely cause members of the proposed class to go out of business.

31. Accordingly, the plaintiff requests substantial punitive, exemplary and aggravated damages in favour of each member of the proposed class.

32. The plaintiff proposes that this action be tried at Toronto, Ontario.

January 16, 2006

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