



Court File No. **VLC-S-S-205402**

No.  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Between

SHELDON IRVING

PLAINTIFF

and

WESTERN DIGITAL CORPORATION AND  
WESTERN DIGITAL CANADA CORPORATION

DEFENDANTS

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**NOTICE OF CIVIL CLAIM**

**This action has been started by the plaintiff for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

**Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff,

- (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

## **THE PLAINTIFF'S CLAIM**

### **Part 1: STATEMENT OF FACTS**

#### *Overview*

1. The Defendants design, develop, manufacture, market and sell hard disc drives. On a date currently unknown to the Plaintiff, the Defendants changed the technology used in hard disc drives marketed as optimized for use in Network Attached Storage (“**NAS**”) devices specifically and Redundant Array of Independent Discs (“**RAID**”) arrays generally to an inferior technology not suited for use in NAS devices specifically and RAID arrays generally, and misled consumers by not informing them of the change (“**Affected WD RED NAS Drives**” with model numbers WD20EFAX, WD30EFAX, WD40EFAX, WD60EFAX). Through this suit, Canadians seek to hold the Defendants accountable for this unlawful conduct.

#### *The Parties*

2. The Plaintiff is a resident of British Columbia. He purchased Affected WD RED NAS Drives in British Columbia at material times.

3. The Plaintiff brings this action on his own behalf and on behalf all persons who purchased Affected WD RED NAS Drives in Canada with model numbers WD20EFAX, WD30EFAX, WD40EFAX, WD60EFAX (the “**Class**”, “**Class Members**” and “**Class Period**”) and on behalf of an included subclass of persons who purchased Affected WD RED NAS Drives for personal, family or household purposes (the “**Consumer Subclass**” and “**Subclass Members**”).

4. The Defendant Western Digital Corporation is incorporated under the laws of Delaware, with an address for service at c/o Corporation Service Company, 251 Little Falls Drive,

Wilmington, DE 19808 USA. The Defendant is the designer, manufacturer, distributor, and marketer of computer hard disc drives sold in Canada and worldwide under the brand name “Western Digital”, including the Affected WD RED NAS Drives at issue in this proceeding.

5. The Defendant Western Digital Canada Corporation is incorporated under the laws of Ontario, with an address for service at Suite 303, Plaza 1, 2000 Argentinia Rd, Mississauga, Ontario. The Defendant is the distributor and marketer of computer hard disc drives sold in Canada under the brand name “Western Digital”, including the Affected WD RED NAS Drives at issue in this proceeding.

### ***Hard Drives and Network Attached Storage***

6. A hard disc drive is a device used to store electronic information magnetically. The hard disc drive uses a number of spinning platters coated with a magnetic material, each paired with a read/write head on a moving arm that uses an electromagnet to read or write information to the spinning platters. Hard disc drives are categorized by manufacturers into different “grades” or models depending on the workload and type of work they are rated to perform.

7. NAS devices are typically configured as network file servers containing two to twelve hard disc drives configured in a RAID architecture. RAID architecture is typically used in a configuration that duplicates data across multiple hard disc drives to prevent data loss if a single hard disc drive fails. If a hard disc drive in a RAID array fails, it can be replaced by a new hard disc drive. The RAID array can then enter a rebuilding mode whereby a new hard disc drive is incorporated into the RAID array and data from the failed drive is duplicated to the new hard disc drive to ensure data redundancy and prevent permanent data loss.

8. A RAID array can be deployed without a NAS device. A RAID array can be run on various hardware architectures including in rackmount servers, desktop computers, or hardware “shuttles” connected to a computer. In these cases, the RAID array is managed by a purpose-built hardware RAID controller, or by a software program designed to run and manage the RAID array.

9. Conventional Magnetic Recording (“CMR”), also known as Perpendicular Magnetic Recording (“PMR”), is a magnetic data storage technology that records data in non-overlapping tracks on the spinning platter of a hard disc drive.

10. Shingled Magnetic Recording (“**SMR**”) increases storage density by overlapping portions of the tracks being laid down on a spinning platter of a hard disc drive. SMR allows more data to be recorded on the same amount of physical media, but at the expense of complicating the data writing process.

11. The performance of hard disc drives employing SMR is inferior to hard disc drives that employ CMR in most use case scenarios. Hard drive discs employing SMR are particularly unsuitable in NAS and other RAID deployments. This was well known to the Defendants at all material times.

12. SMR is inappropriate and not fit for purpose for hard disc drives deployed in NAS devices specifically and RAID arrays generally, as SMR drives suffer from poor random write performance which negatively impacts performance of the NAS device or RAID array as a whole. This was well known to the Defendants at all material times.

13. Another reason that SMR is inappropriate and not fit for purpose for NAS devices specifically and RAID arrays generally is because of problems with recovering and rebuilding the RAID array when a hard disc drive in the array fails. The slower performance of hard disc drives with SMR results in a longer RAID rebuild process when replacing a failed drive, and the failure of a further hard disc drive in a RAID array while a previously failed hard disc drive is being rebuilt can result in permanent data loss. Additionally, SMR hard disc drives may cause a RAID array to refuse to rebuild entirely, increasing the risk of permanent data loss until the failed hard disc drive can be replaced and the RAID array rebuilt. Similarly, SMR hard disc drives may result in RAID errors and/or the SMR hard disc drive being dropped from the RAID array, causing further risk of data loss until the failed hard disc drive can be replaced. In all these cases the consumer must purchase a new hard disc drive that does not contain SMR. This was well known to the Defendants at all material times.

14. Hard disc drives manufactured using SMR cost less to manufacture compared to hard disc drives using CMR. This is because they require less physical media and fewer internal parts than hard disc drives of similar capacity that use CMR. This was well known to the Defendants at all material times.

### *The Defendants' Hard Drive Products*

15. Beginning in 2012 the Defendants introduced to the market hard disc drives designed and optimized for use in NAS devices under the brand name "WD RED NAS Drive". These hard disc drives employed CMR.

16. The Defendants marketed WD RED NAS Drives, including the Affected WD RED NAS Drives, to users of NAS devices in Canada and worldwide. The Defendants specifically stated in their marketing that WD RED NAS Drives, including the Affected WD RED NAS Drives, were "designed and optimized for NAS compatibility" and "designed for RAID environments".

17. The Defendants' website refers to WD RED NAS Drives, including the Affected WD RED NAS Drives, as "The Drive For NAS" and "Reliable: Designed to operate in the always-on environment of a NAS or RAID configuration".

18. The Defendants publish data sheets for its products, and the data sheet for WD RED NAS Drives, including the Affected WD RED NAS Drives, stated at material times:

"Desktop drives aren't purpose-built for NAS. But WD Red drives with NASware technology are. Our exclusive technology takes the guesswork out of selecting a drive. WD Red drives are for small NAS systems, and our unique algorithm balances performance and reliability in NAS and RAID environments."

19. The data sheet for WD RED NAS Drives further stated at all material times that the WD RED NAS Drives, including the Affected WD RED NAS Drives, were appropriate for use in a home NAS or a small business NAS containing between 1 to 8 hard disc drives. These statements accompanied WD RED NAS Drives, including the Affected WD RED NAS Drives, and were representations about the Affected WD RED NAS Drives.

20. WD RED NAS Drives, including the Affected WD RED NAS Drives, command a premium price compared to hard disc drives of similar capacity intended for use in desktop computer systems.

21. The Affected WD RED NAS Drives are widely available at retail and wholesale outlets in British Columbia and across Canada.

### ***The Defendants' Misconduct regarding WD RED NAS Drive Products***

22. Beginning in 2012, WD Red NAS Drives were manufactured using CMR.

23. On a date after 2012 but currently unknown to the Plaintiff, the Defendants stopped manufacturing WD RED NAS Drives using CMR and began manufacturing those hard disc drives using SMR (the Affected WD RED NAS Drives).

24. The Affected WD RED NAS Drives include model numbers WD20EFAX, WD30EFAX, WD40EFAX, WD60EFAX, and such additional model numbers as may become known.

25. The Defendants did not notify consumers of the change in the technology being used in the Affected WD RED NAS Drives until an April 22, 2020 post on the Defendants' corporate blog.

26. The Defendants' marketing did not communicate that the Affected WD RED NAS Drives had changed to use SMR prior to April 22, 2020. The Defendants now include an indication as to whether a WD RED NAS Drive uses SMR or CMR next to the model number on the Western Digital website and on the Western Digital product brief downloadable from the Western Digital website.

27. Beyond a list of affected model numbers released by the Defendant, there is no way for a consumer to independently ascertain that the technology being used in the Affected WD RED NAS Drives has been changed from CMR to SMR prior to purchase, and no reasonable way for a consumer to determine that the Affected WD RED NAS Drives uses SMR post-purchase.

28. Under the *Competition Act*, R.S.C., 1985, c. C-34, s 52(1), a manufacturer must not make a false or misleading representations. By marketing the Affected WD RED NAS Drives as designed and optimized for usage in NAS devices specifically and RAID arrays generally, the Defendants misled consumers into believing the technology employed in the Affected WD RED NAS Drives was both suitable and superior for the purpose of being configured in a RAID array, whether in a NAS device or generally, when it was neither suitable nor superior for this purpose. Having previously established in the marketplace that WD RED NAS Drives equipped with CMR were well-suited to use in NAS devices specifically and RAID arrays generally, and knowing that SMR was inadequate for that purpose, the Defendants' failure to inform consumers that the

Affected WD RED NAS Drives had switched to SMR misled consumers as to a material aspect of the Affected WD RED NAS Drives.

29. The *Sale of Goods Act*, RSBC 1996, C 410, ss 18(b) and (c) requires a seller to ensure that the goods being purchased by the consumer are of merchantable quality and durable for the use to which they would be normally put. The Affected WD RED NAS Drives are not suitable for use in NAS devices specifically and RAID arrays generally as the SMR employed in them negatively impacts NAS performance and the ability of a RAID array to rebuild and recover from a disc failure, which is a primary purpose of the RAID array. Including any of the Affected WD RED NAS Drives in a RAID array, whether hosted in a NAS device or generally, increases the risk of permanent data loss due to both the increased time required to rebuild a RAID array and the risk of the Affected WD RED NAS Drives failing to rebuild at all.

30. The *Business Practices and Consumer Protection Act*, SBC 2004, C 2 (“*BPCPA*”), s 4(3)(a)(i) and (a)(ii) prohibits a supplier of goods from making deceptive representations about the performance characteristics, components, standard, quality, and grade of goods. The Defendants marketed the Affected WD RED NAS Drives as suitable and optimized for use in NAS devices specifically and RAID arrays generally when the Affected WD RED NAS Drives were neither suitable nor optimized for this use. By failing to inform consumers that the Affected WD RED NAS Drives had switched to SMR when they had previously employed CMR, the Defendants made a deceptive representation as to the components contained within the Affected WD RED NAS Drives.

31. The *BPCPA*, s 4(3)(b)(vi) states that a representation that uses ambiguity or that fails to state a material fact is deceptive. WD Red NAS Drives were previously suitable for use in NAS devices specifically and RAID arrays generally when they employed CMR, but the Defendants switched to SMR rendering the Affected WD RED NAS Drives inappropriate and not fit for use in NAS devices specifically and RAID arrays generally without communicating this fact to consumers. Consumers who had previously purchased WD RED NAS Drives for use in NAS devices specifically and RAID arrays generally were thusly misled as to the suitability and performance of the Affected WD RED NAS Drives when used in NAS devices specifically and RAID arrays generally, as well as the technology being employed therein.

32. The *BPCPA*, s 8(3) prohibits unconscionable acts and practices. Section 8(3)(b) states that it is an unconscionable act or practice to take advantage of a consumer's inability to protect their own interest due to ignorance. Prior to the April 22, 2020 corporate blog post, there was no way for a consumer to determine that the Affected WD RED NAS Drives contained SMR that would impact the performance and suitability of the Affected WD RED NAS Drives when used in NAS devices specifically and RAID arrays generally, and this information is absent from the marketing for the Affected WD RED NAS Drives. Even after purchase the fact that the Affected WD RED NAS Drives contained SMR could only be reasonably ascertained by an individual with a sophisticated understanding of hard disc drive and data storage technology who had reason to investigate and was actively looking for this information.

33. The *BPCPA*, s 8(3)(c) states that it is an unconscionable act or practice to charge a price which grossly exceeds the price at which similar products are readily obtainable. A hard disc drive optimized for use in a NAS device or RAID array commands a premium above the price for a consumer desktop hard drive. Because the Affected WD RED NAS Drives were unsuited for use in NAS devices specifically and RAID arrays generally it was unconscionable for the Defendants to charge such a premium for them.

34. In its role as designer, manufacturer, developer, marketer and seller of the Affected WD RED NAS Drives, the Defendants knew or ought to have known that changing from CMR to SMR in an existing product category without notice to customers or proper disclosure was unconscionable. The Defendants had total control over what the manufacturing of the Affected WD RED NAS Drives and the disclosures and marketing of the Affected WD RED NAS Drives. The relationship between the Defendants and the Plaintiff and Class Members as purchasers of the Affected WD RED NAS Drives was characterized by a fundamental inequality of bargaining power, resulting in a substantially unfair bargain to the Plaintiff and Class Members to the Defendants' benefit as a direct consequence of the Defendants' misconduct.

35. A reasonable consumer would not have looked behind the information presented to them in the Defendants' representations about the Affected WD RED NAS Drives to determine whether it accurately reflected the embedded technology in the Affected WD RED NAS Drives.



36. As a result of the Defendants' misconduct and breaches of the *Competition Act*, the Plaintiff and Class Members have suffered damage and loss.
37. As a result of the Defendants' misconduct and breaches of the *Sale of Goods Act*, the Plaintiff and Class Members have suffered damage and loss.
38. As a result of the Defendants' misconduct and breaches of the *BPCPA*, Consumer Subclass Members have suffered damage and loss.
39. The damages to the Plaintiffs and Class Members include:
- a. the cost of replacing the Affected WD RED NAS Drives with an equivalent product equipped with CMR such as a Seagate IronWolf NAS Hard Drive;
  - b. time and expenses lost in rebuilding a NAS or other RAID array equipped with Affected WD RED NAS Drives and transferring the data therein contained; and
  - c. the loss of data or increased risk of permanent data loss occasioned by the unsuitableness of the Affected WD RED NAS Drives in NAS devices specifically and RAID arrays generally.

**Part 2: RELIEF SOUGHT**

40. The Plaintiff claims, on his own behalf and on behalf of the Class Members:
- a. an order certifying this action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*Class Proceedings Act*");
  - b. an accounting and restitution or, in the alternative, disgorgement;
  - c. damages for breach of statutory warranty;
  - d. damages under the *Business Practices and Consumer Protection Act*, SBC 2004, c. 2 ("*BPCPA*"), s 171 on behalf of the Consumer Subclass and related enactments from other provinces;

- e. a declaration under the *BPCPA*, s 172(1)(a) that:
  - i. representing the Affected WD RED NAS Drives as suitable and optimized for use in NAS devices specifically and RAID arrays generally constitutes a deceptive representation, contrary to ss 4(3)(a)(i) and 4(3)(a)(ii) of the *BPCPA* when those products were manufactured using SMR technology;
  - ii. failing to inform consumers that the Affected WD RED NAS Drives had materially changed so as to render them unsuitable for use in NAS devices specifically and RAID arrays generally constitutes a representation that deceptively uses ambiguity or that fails to state a material fact, contrary to s 4(3)(b)(vi) of the *BPCPA*;
  - iii. taking advantage of the consumer's inability to protect their own interests due to ignorance of the technology used within the Affected WD RED NAS Drives is an unconscionable practice, contrary to s 8(3)(b) of the *BPCPA*; and
  - iv. charging a price which grossly exceeds the price at which similar products are readily obtainable constitutes an unconscionable practice, contrary to s 8(3)(c) of the *BPCPA*;
- f. an injunction under the *BPCPA*, s 172(1)(b) to restrain further breaches of the *BPCPA* in the Defendants' marketing of the Affected WD RED NAS Drives by requiring it to disclose the technology used and to advise prospective consumers;
- g. pre-judgment and post-judgment interest under the *Court Order Interest Act*, RSBC 1996, c 79; and
- h. Such further and other relief as this Honourable Court may deem just.

### **Part 3: LEGAL BASIS**

41. The Plaintiff and Class Members plead and rely on the *BPCPA*, the *Sale of Goods Act*, the *Class Proceedings Act*, the *Limitation Act*, SBC 2012, c 13, the *Court Order Interest Act*, RSBC

1996, c 79, the *Emergency Program Act*, Ministerial Order No. M098, the *Supreme Court Civil Rules*, and related enactments.

### ***Unjust Enrichment***

42. The Defendants have been enriched by the sale of the Affected WD RED NAS Drives in Canada that were not fit for purpose and misleadingly marketed and sold to customers.

43. The Plaintiff and Class Members have been deprived through their purchases of the Affected WD RED NAS Drives.

44. There is no juristic reason why the Defendants should have received or should retain these benefits. In particular, the breaches of the *Criminal Code* s 380(2) and the *Competition Act*, s 52 negate any juristic reason why the Defendants should have received or should retain these benefits and voids any contracts for the purchase of the Affected WD RED NAS Drives by the Plaintiff and Class Members.

45. In particular, the marketing and sale of the Affected WD RED NAS Drives in Canada during the Class Period as suitable for NAS and RAID use when the Defendants knew or were reckless or willfully blind to the fact that the Affected WD RED NAS Drives were unsuitable for use in NAS devices specifically and RAID arrays generally, was a breach of the *Criminal Code*, s 380(2) (fraud affecting the public market price of merchandise or anything offered for sale to the public).

46. In addition, the marketing and sale of the Affected WD RED NAS Drives in Canada during the Class Period as suitable for NAS and RAID use when the Defendants knew or were reckless or willfully blind to the fact that the Affected WD RED NAS Drives were unsuitable for use in NAS devices specifically and RAID arrays generally, was a breach of the *Competition Act*, s 52(1) (false or misleading representations). The marketing by the Defendants that the Affected WD RED NAS Drives were suitable for NAS use was done for the purpose of promoting, directly or indirectly, the supply or use of the Affected WD RED NAS Drives and for the purpose of promoting, directly or indirectly, the Defendants' business interests. Such marketing by the Defendants was false or misleading in a material respect, as set out above. The Defendants' representations regarding the Affected WD RED NAS Drives included representations

accompanying products, under the *Competition Act*, s-s 52(2), whether from Canada or from outside Canada under the *Competition Act*, s-s 52(2.1).

47. As a result of their actions, the Defendants have been unjustly enriched. The Plaintiff and Class Members are entitled to restitution of the benefit received by the Defendants on account of the sale of the Affected WD RED NAS Drives in Canada during the Class Period.

48. In the alternative, justice and good conscience require that the Defendants disgorge to the Plaintiff and Class Members an amount attributable to the benefits received by them on account of the sale of the Affected WD RED NAS Drives in Canada during the Class Period.

### ***Sale of Goods Act***

49. The Defendants have breached the *Sale of Goods Act*.

50. The Plaintiff and Class Members are “buyers” within the meaning of the *Sale of Goods Act*, s 1.

51. The Defendants are “sellers” within the meaning of the *Sale of Goods Act*, s 1.

52. The Affected WD RED NAS Drives are “goods” within the meaning of the *Sale of Goods Act*, s 1.

53. By the acts set out above, the Defendants have breached the *Sale of Goods Act*, s 18. In particular, the Defendants have breached s-s (b) and (c) by:

- a. marketing and selling the Affected WD RED NAS Drives as suitable for use in NAS devices specifically and RAID arrays generally when the Affected WD RED NAS Drives were not suitable for use in NAS devices specifically and RAID arrays generally;
- b. selling the Affected WD RED NAS Drives as suitable for use in NAS devices specifically and RAID arrays generally when the SMR employed within them negatively impacts NAS device and RAID array performance;

- c. selling the Affected WD RED NAS Drives as suitable for use in NAS devices specifically and RAID arrays generally when the SMR employed within them negatively impacts the ability of the RAID array to rebuild and recover from a disc failure, which is the purpose of a RAID array; and
- d. selling the Affected WD RED NAS Drives as suitable for use in NAS devices specifically and RAID arrays generally when the SMR employed within them increases the risk of permanent data loss because of the increased time required to rebuild a RAID array and the risk of the RAID failing to rebuild at all.

54. The Plaintiff and Class Members are entitled to damages for breach of warranty under the *Sale of Goods Act*, s 56.

55. On behalf of Class Members resident outside of British Columbia, the Plaintiff pleads and relies on *inter alia*: *Sale of Goods Act*, RSO 1990, c S.1; *Sale of Goods Act*, RSS 1978, c S-1; *Sale of Goods Act*, RSA 2000, c S-2; *Consumer Product Warranty and Liability Act*, SNB 1978, c C-18.1; *Sale of Goods Act*, RSNS 1989, c 408; *The Sale of Goods Act*, CCSM c S10; *Sale of Goods Act*, RSNL 1990, c S-6; *Sale of Goods Act*, RSPEI 1988, c S-1; *Sale of Goods Act*, RSY 2002, c 198; *Sale of Goods Act*, RSNWT 1988, c S-2; *Sale of Goods Act*, RSNB 2016, c 110; *Sale of Goods Act*, RSNWT (Nu) 1988, c S-2.

***Breach of the Business Practices and Consumer Protection Act***

56. The Defendants have breached the *BPCPA*.

57. Consumer Subclass Members who purchased the Affected WD RED NAS Drives for purposes that are primarily personal, family or household are “consumers” within the meaning of the *BPCPA*, s 1.

58. The Affected WD RED NAS Drives are “products” within the meaning of the *BPCPA*, s 1.

59. The Defendants are “suppliers” within the meaning of the *BPCPA*, s 1. The *BPCPA* does not require privity of contract between suppliers and consumers.

60. The sale and supply of the Affected WD RED NAS Drives is a “consumer transaction” within the meaning of the *BPCPA*, s 1. An unconscionable act or practice can occur before, during or after a consumer transaction.

61. By the conduct set out above, the Defendants have breached ss 4-5 and 8-9 of the *BPCPA*. The Defendants’ actions constitute unconscionable business practices. The Defendants knew or ought to have known that their conduct was unconscionable and deceptive.

62. The *BPCPA*, s 5 prohibits suppliers from engaging in deceptive acts or practices in respect of consumer transactions. Once it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

63. In particular, the Defendants have breached the *BPCPA*, s-ss 4-5. In their marketing and sale of the Affected WD RED NAS Drives, the Defendants have breached *inter alia* s-ss 4(3)(a)(i), (a)(ii), and (b)(vi) by

- a. marketing the Affected WD RED NAS Drives as suitable for use in NAS devices specifically and RAID arrays generally, when they are not suitable for that usage;
- b. marketing the Affected WD RED NAS Drives as optimized for use in NAS devices specifically and RAID arrays generally, when they are not optimized for that usage;
- c. failing to inform consumers that the components of the Affected WD RED NAS Drives had changed; and
- d. relying on the reputation of WD RED NAS Drives that employed CMR to sell units of the Affected WD RED NAS Drives which employed the inferior SMR.

64. In particular, the Defendants have breached the *BPCPA*, s-ss 8(3), (b) and (c) by

- a. failing to inform consumers that the Affected WD RED NAS Drives no longer employed CMR and instead employed SMR;

- b. implicitly and explicitly leading consumers to believe that the Affected WD RED NAS Drives were of the same quality as previous WD RED NAS Drives that employed CMR;
- c. failing to provide a method for consumers to determine pre-purchase that the Affected WD RED NAS Drives contained SMR;
- d. failing to provide a reasonable method for consumers to determine post-purchase that the Affected WD RED NAS Drives contained SMR; and
- e. charging a premium for the Affected WD RED NAS Drives based on the premise that they employed technology specific to their suitability and performance in NAS devices specifically and RAID arrays generally when the Affected WD RED NAS Drives were unsuitable for those uses.

65. The *BPCPA* s 9 prohibits suppliers from engaging in unconscionable acts or practices in respect of consumer transactions. Once it is alleged that a supplier committed or engaged in an unconscionable act or practice, the burden of proof that the unconscionable act or practice was not committed or engaged in is on the supplier.

66. As a result of the Defendants' breaches of the *BPCPA*, the Consumer Subclass Members are entitled to damages under the *BPCPA*, s 171.

67. As a result of the Defendants' breaches of the *BPCPA*, the Consumer Subclass Members are entitled to a declaration under *BPCPA*, s 172(1)(a) and injunction to restrain the practices under s 172(1)(b).

68. Consumer Subclass Members resident outside of British Columbia plead and rely on *inter alia*: *Consumer Protection Act*, RSA 2000, c C-26.3; *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2; *Consumer Protection Act*, CCSM c C200; *Consumer Protection Act*, 2002, SO, c 30, Sch A; *Consumer Protection Act*, CQLR c P-40.1; *Consumer Protection Act*, RSNS 1989, c 92; *Consumer Protection Act*, RSPEI 1988, c C-19; *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1; *Consumers Protection Act*, RSY 2002, c 40;

*Consumer Protection Act*, RSNWT 1988, c C-17; and *Consumer Protection Act*, RSNWT 1988 (Nu), c C-17; each as amended from time to time and with regulations in force at material times.

### ***Joint and Several Liability***

69. The Defendants are jointly and severally liable for the actions and damages allocable to any of them.

### ***Limitation Periods***

70. The Plaintiff or Class Members could not reasonably have known that loss or damage had occurred, that it was caused or contributed to by acts of the Defendant, or that a court proceeding would be an appropriate means to seek to remedy the injury until April 22, 2020.

71. The Plaintiff and Class Members rely on the doctrines of postponement, discoverability, and fraudulent concealment per *Pioneer Corp. v. Godfrey* to postpone the running of the limitation period until April 22, 2020.

72. The Plaintiff and Class Members plead and rely on and the *Limitation Act*, SBC 2012, c 13, and in particular ss 8 and 21(3). In the alternative, or in addition, the Plaintiff and Class Members rely on the *Limitation Act*, SBC 2012, c 13, s 30 and the *Limitation Act*, RSBC 1996, c 266. In addition, the Plaintiff and Class Members in British Columbia plead and rely on the *Emergency Program Act*, Ministerial Order No. M098 to suspend the running of the limitation period from March 26, 2020.

### ***Service***

73. The Plaintiff and Class Members have the right to serve this Notice of Civil Claim on the Defendants pursuant to the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 (*CJPTA*), because there is a real and substantial connection between British Columbia and the facts on which this proceeding is based.

74. The Plaintiff and Class Members rely on the following grounds, in that this action concerns:



- a. restitutionary obligations that, to a substantial extent, arose in British Columbia (*CJPTA*, s 10(f));
- b. a tort committed in British Columbia (*CJPTA*, s 10(g)); and
- c. a business carried on in British Columbia (*CJPTA*, s 10(h)).

Plaintiff's address for service:

Slater Vecchio LLP  
1800 - 777 Dunsmuir Street  
Vancouver, BC V7Y 1K4

Fax number for service: 604.682.5197

Email address for service: [service@slatervecchio.com](mailto:service@slatervecchio.com)

Place of trial: Vancouver, BC

The address of the registry is:

800 Smithe Street  
Vancouver, BC  
V6Z 2E1

Date: May 19, 2020



Signature of lawyer for plaintiff  
Anthony A Vecchio QC  
James A Richards  
Saro J Turner  
Sam J Jaworski  
Ryan T Matheuszik  
Mathew P Good

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION  
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The plaintiff claims the right to serve this pleading on the Defendants outside British Columbia on the ground that the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 10 (*CJPTA*) applies because there is a real and substantial connection between British Columbia and the facts on which this proceeding is based. The Plaintiff and Class Members rely on the following grounds, in that this action concerns:

- a. restitutionary obligations that, to a substantial extent, arose in British Columbia (*CJPTA*, s 10(f));
- b. a tort committed in British Columbia (*CJPTA*, s 10(g)); and
- c. a business carried on in British Columbia (*CJPTA*, s 10(h)).

## Appendix

*[The following information is provided for data collection purposes only and is of no legal effect.]*

### **Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:**

This is a proposed class proceeding regarding undisclosed side effects of the Elmiron drug.

### **Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:**

*[Check one box below for the case type that best describes this case.]*

A personal injury arising out of:

a motor vehicle accident

medical malpractice

another cause

A dispute concerning:

contaminated sites

construction defects

real property (real estate)

personal property

the provision of goods or services or other general commercial matters

investment losses

the lending of money

an employment relationship

a will or other issues concerning the probate of an estate

a matter not listed here

**Part 3: THIS CLAIM INVOLVES:**

*[Check all boxes below that apply to this case]*

a class action

maritime law

aboriginal law

constitutional law

conflict of laws

none of the above

do not know

**Part 4:**

Limitation Act, SBC 2012, c 13, Court Order Interest Act, RSBC 1996, c 79, Business Practices and Consumer Protection Act, SBC 2004