

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

NICHOLAS ROSATI and ANTHONY BELLISSIMO

Plaintiffs

and

IPEX USA LLC and IPEX INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**FRESH STATEMENT OF CLAIM**  
(Notice of action issued on July 21, 2009)

**DEFINITIONS**

1. The following definitions apply for the purpose of this notice of action:
  - (a) **“Anthony”** means Anthony Bellissimo;
  - (b) **“CJA”** means the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;
  - (c) **“Class”** and **“Class Members”** means all persons, other than **Excluded Persons**, that own, have owned, lease, or have leased, and all those who have or may pursue claims through or in the name or right of those who own or have owned or lease or have leased, buildings, homes, residences, or any other structures located in Canada which contain or have ever contained the **Kitec Plumbing System**;
  - (d) **“CPA”** means the *Class Proceedings Act, 1992*, S.O. 1992, c.6;

Amended FEB 02 2011  
Honourable Justice T. Patterson  
dated: FEB 11 2011  
Book #: 22  
Registrar of Wills, Justice R. Marzi

- (e) **“Defendants”** means Ipex and Ipex USA;
- (f) **“Excluded Persons”** means the **Defendants**, their subsidiaries, affiliates, officers, directors, senior employees, legal representatives and their heirs, predecessors, successors and assigns;
- (g) **“Ipex”** means Ipex Inc.;
- (h) **“Ipex USA”** means Ipex USA LLC;
- (i) **“Kitec Plumbing System”** means the plumbing system that is designed, manufactured, assembled, marketed, distributed and/or sold by the **Defendants** between January 1, 1995 and December 31, 2007 which includes PEX and Kitec brass compression fittings;
- (j) **“Nicholas”** means Nicholas Rosati;
- (k) **“PEX”** means Kitec pipe included in the Kitec Plumbing System made from flexible aluminum tube bonded between two layers of smooth cross-linked polyethylene plastic which is sometimes referred to as PEX-AL-PEX; and
- (l) **“Plaintiffs”** means Nicholas and Anthony.

## THE CLAIM

2. The Plaintiffs claim on their own behalf and on behalf of the Class

Members:

- (a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing them as the representative plaintiffs;
- (b) a declaration that each of the Defendants owed a duty of care to the Class Members and breached the standard of care as hereinafter particularized;
- (c) damages in the amount of \$200,000,000;
- (d) punitive damages in the amount of \$10,000,000 or such other sum as this court finds appropriate at the trial of the common issues;

- (e) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (f) prejudgment and postjudgment interest compounded, or pursuant to the sections 128 and 129 of the *CJA*;
- (g) costs of this action on a substantial indemnity basis, or in an amount that provides full indemnity, plus the costs of administration and notice pursuant to s. 26(9) of the *CPA* plus applicable taxes; and
- (h) such further and other relief as to this court seems just.

#### **THE NATURE OF THE ACTION**

3. This action concerns the design, testing, development, manufacture, assembly, license, marketing, distribution, sale and installation of the Kitec Plumbing System in Canada.

4. The Kitec Plumbing System consists of waterlines made with PEX pipe and Kitec brass compression fittings that are used for plumbing systems and radiant heating systems installed in commercial, industrial and residential buildings. It was installed in each of the Plaintiffs' properties.

5. The Plaintiffs state that the Kitec Plumbing System is not of merchantable quality and is prone to failure as a result of defects and is therefore not fit for its intended use. As a result, the Plaintiffs and Class Members have incurred or will incur costs to

replace the Kitec Plumbing System in the properties that they own, occupy or in which they have an interest.

**THE PLAINTIFFS**

6. Nicholas resides in LaSalle, Ontario. He owns a home on Suzanne Street in LaSalle, Ontario that was constructed in or about 1999 at which time a Kitec Plumbing System was installed.

7. Anthony resides in Toronto, Ontario. He owns a house on Benson Avenue in Toronto, Ontario. In 1998, Anthony had a new furnace system installed in his home that included components of the Kitec Plumbing System.

**THE DEFENDANTS**

8. Ipex USA is a corporation incorporated pursuant to the laws of the State of North Carolina with a registered head office in Pineville, North Carolina and an office in Verdun, Quebec. Ipex USA designs, develops, manufactures and markets integrated thermoplastic piping systems consisting of pipe, valves, fittings, auxiliary components and tools, such as the Kitec Plumbing System, that are used in industrial, commercial and residential buildings in Canada, the United States of America and elsewhere.

9. Ipex is an Ontario corporation with a registered head office in Don Mills, Ontario and an office in Verdun, Quebec. Ipex designs, develops, manufactures and markets integrated thermoplastic piping systems consisting of pipe, valves, fittings, auxiliary components and tools, such as the Kitec Plumbing System, that are used in industrial, commercial and residential buildings in the Canada, the United States of America and throughout the world.

10. At all material times, the Defendants designed, developed, tested, assembled, manufactured, licensed, marketed, distributed and sold the Kitec Plumbing System installed in the properties of the Plaintiffs and the other Class Members in Canada for profit.

11. The business of each of Ipex and Ipex USA is inextricably interwoven with that of the other. At all material times, each of the Defendants was the agent of the other and each was vicariously liable for the acts and omissions of the other.

#### **BACKGROUND**

12. Commencing in or about 1995 until 2007, the Defendants manufactured, warranted, advertised, marketed and sold Kitec Plumbing System in Canada that was not of merchantable quality or reasonably fit for their intended purpose, and that was prone to premature failure.

13. During the relevant period, the Defendants marketed, represented and warranted its PEX pipe as safe, reliable, corrosion-resistant, clean and does not taint water quality. The Defendants made various representations that the Kitec Plumbing System was virtually maintenance-free, provides proven and long-term performance, has a low lifetime cost of ownership, and adds to the value of a property.

14. Through advertising and through their authorized agents and sales representatives, the Defendants represented and warranted that the Kitec Plumbing System has undergone extensive testing and that, based on the results of the research and tests, the Kitec Plumbing System was properly designed, developed and manufactured so as to operate adequately, reliably and as represented.

15. During the relevant period, the Defendants and their authorized agents and sales representatives made various representations that the Kitec Plumbing System would not rust or corrode and that the smooth plastic inner wall of the PEX pipe would resist scaling and mineral build-up, keeping water flow constant year after year. The Defendants represented that, with the largest inside diameter of any piping system, PEX pipe provided more water whenever and wherever needed.

16. The Defendants' websites tout that the Defendants have "[m]ore than 50 years' experience in plastics combined with progressive manufacturing technologies,

efficient distribution centers and coast-to-coast customer support has made the IPEX name synonymous with quality, innovation and performance.”

17. The Defendants and their authorized agents and sales representatives made the above-described assertions, representations and warranties with the intent and purpose of inducing plumbing suppliers, builders, plumbers, and consumers to purchase the Kitec Plumbing System for installation in homes, offices and other buildings.

18. The Defendants’ various representations did not disclose that the Kitec Plumbing System was defective and prone to premature failure or that it would not last the entire warranty period.

#### **THE DEFECTIVE KITEC PLUMBING SYSTEM**

19. In or about October, 2008, a PEX pipe that was part of the Kitec Plumbing System installed in Rosati’s home failed causing water to leak in the mechanical room, resulting in damage. In addition, at least one of the Kitec brass fittings that were part of the Kitec Plumbing System installed in Rosati’s home deteriorated to the point where it crumbled apart.

20. In or about 2008, the Kitec brass compression fittings that were part of the Kitec Plumbing System installed in Anthony's home developed leaks, such that they require replacement.

21. The Defendants have received other complaints about failures in the Kitec Plumbing System installed in residential, commercial and industrial buildings in Canada and elsewhere, particulars of which are fully within the Defendants' knowledge.

22. The failures in the Kitec Plumbing System installed in the buildings owned by Nicholas and Anthony were the result of defects in the materials used for the Kitec Plumbing System. The Kitec Plumbing System installed in their buildings and in the buildings that the Class Members own, have owned, lease or have leased is not of merchantable quality and is unfit for its intended use as a plumbing system to service the plumbing needs of those buildings.

23. As a result, the Plaintiffs and Class Members have incurred or will incur the cost to replace the Kitec Plumbing System in the properties that they own, owned, lease or leased.

**NEGLIGENCE**

24. The Defendants have known about the defects described above for several years and that such defects could result in a failure and cause damage to those who owned, had an interest in, or occupied a property in which a Kitec Plumbing System was installed. Despite this knowledge, the Defendants concealed the known defects and permitted the Kitec Plumbing System to continue to be distributed, sold and installed into the properties owned or leased by the Plaintiffs and Class Members.

25. On August 3, 2005, the Defendants issued a product recall notice in respect of Kitec compression brass fittings that are components of the Kitec Plumbing System. However, this notice was only sent to retailers and distributors and not to owners of properties in which the Kitec Plumbing System had been installed.

26. The Defendants subsequently changed the design of components, including the Kitec compression brass fittings that are used in the Kitec Plumbing System.

27. The Defendants owed the Plaintiffs and the Class Members a duty of care which it breached, causing injury and damage to them and to the members of the Class. The Defendants breached the standard of care expected in the circumstances. Particulars of the Defendants' negligence are as follows:

- (a) they knew or ought to have known that the fittings and piping used in the Kitec Plumbing System were defective and that they would not properly perform the functions for which they were intended;
- (b) they knew that the Kitec Plumbing System was defective and failed to warn retailers, distributors, builders and homeowners;
- (c) they failed to disclose the defects in the Kitec Plumbing System to the public in a timely manner;
- (d) they continued to sell the Kitec Plumbing System with design defects after the design change in 2005;
- (e) they failed to collect and analyze information about the performance of the Kitec Plumbing System;
- (f) they improperly collected and analyzed information about the performance of the Kitec Plumbing System;
- (g) they collected and analyzed information about the performance of the Kitec Plumbing System but failed to conclude that a field action was necessary;
- (h) they collected and analyzed information about the performance of the Kitec Plumbing System, concluded that a field action was necessary but failed to perform a field action;
- (i) they failed to adequately design, manufacture and test the Kitec Plumbing System to ensure that it was safe and free from defects prior to selling or distributing it;
- (j) they failed to properly train their employees responsible for the design, testing, assembly and manufacture of the Kitec Plumbing System;
- (k) they failed to ensure that their employees complied with the appropriate quality system standards applicable to the manufacturing process;
- (l) they failed to properly supervise their employees and subsidiaries;
- (m) they distributed and sold the Kitec Plumbing System without conducting tests to ensure it was defect-free;

- (n) they performed inadequate tests and clinical to determine whether the Kitec Plumbing System was defective or would be susceptible to defects over time;
- (o) they failed to conduct testing in accordance with good laboratory practice and relevant International Organization for Standardization standards;
- (p) they failed to properly record the results of testing the Kitec Plumbing System;
- (q) they failed to interpret or report the data from pre-market testing in an accurate and objective manner;
- (r) they failed to adequately test the Kitec Plumbing System particularly in light of previous failures;
- (s) they failed to properly report the results of testing the Kitec Plumbing System;
- (t) they knew or ought to have known that the Kitec Plumbing System was defective and that it would not properly perform the functions for which it was intended;
- (u) they failed to ensure that the component and material characteristics (including those for the fittings and piping) were fully monitored and controlled during production;
- (v) they failed to take any steps to cure the defects in the Kitec Plumbing System after they knew of the defects and the damages and risks associated with their use;
- (w) they failed to perform, adequately or at all, trend analysis to monitor the post-market performance of the Kitec Plumbing System;
- (x) they failed to report, adequately or at all, in a fair, objective and unbiased manner, the results of post-market adverse event investigations;
- (y) they failed to warn the Class Members that the Kitec Plumbing System was defective when knowledge of the defects became known to them;
- (z) they failed to warn suppliers and builders that the Kitec Plumbing System was defective when knowledge of the defects became known to them;
- (aa) they preferred their commercial interests over consumer interest;

- (bb) they used defective components to manufacture the Kitec Plumbing System;
- (cc) they failed to ensure that the Kitec Plumbing System's history records included complete acceptance records that demonstrated that it was manufactured in accordance with the device master record;
- (dd) they failed to ensure that during the production of the Kitec Plumbing System, component characteristics were fully monitored and controlled;
- (ee) they knew or should have known that the design, materials and manufacture of the Kitec Plumbing System would unreasonably increase the risks of failure;
- (ff) they operated without any system of quality assurance;
- (gg) they failed to ensure that appropriate sources of quality data were adequately analyzed to identify existing and potential causes of nonconforming product and other quality problems;
- (hh) they failed to constitute an independent committee of experts to advise on actions to be taken regarding failures of the Kitec Plumbing System;
- (ii) they knew or should have known that the Kitec Plumbing System was susceptible to unreasonable failure rates;
- (jj) they failed to ensure that procedures for conducting quality audits were complete;
- (kk) they failed to establish an effective post-market surveillance process; and
- (ll) they failed to investigate, adequately or at all, adverse event reports.

28. The Plaintiffs plead that, as a result of the acts and omissions above described, the Defendants are liable to the Class Members for damages as hereinafter particularized.

## CONSUMER PROTECTION LEGISLATION

### Canada Consumer Protection Legislation

29. The Plaintiffs plead and rely upon the *Competition Act*, R.S., 1985, c. C-34, s. 74.01, and plead:

- (a) a person engages in “reviewable conduct” who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, (i) makes a representation to the public that is false or misleading in a material respect or (ii) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation.

### Ontario Consumer Protection Legislation

30. The Plaintiffs plead and rely upon the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A, s. 14, the *Business Practices Act*, R.S.O. 1990, c. B.18, ss. 2 and 3 and plead:

- (a) it is an unfair practice contrary to the *Consumer Protection Act, 2002* to make false, misleading or deceptive representations, including representations that goods are of a particular standard, quality and grade, if they are not; and
- (b) it is an unfair practice contrary to the *Business Practices Act* to make false, misleading or deceptive representations, including representations that goods are of a particular standard, quality and grade, if they are not and representations that goods have performance characteristics that they do not have.

**Alberta Consumer Protection Legislation**

31. The Plaintiffs plead and rely upon the *Fair Trading Act*, R.S.A. 200, c. F-2, ss. 1 and 6, and plead:

- (a) it is an unfair practice contrary to the *Fair Trading Act* for a supplier to do or say anything that might reasonably deceive or mislead a customer, to represent that goods are of a particular standard, quality, grade, style or model if they are not, or to make a representation about the performance, capability or length of life of the goods unless: (i) the representation is based on adequate and proper independent testing that was done before the representation was made, (ii) the testing substantiates the claim, and (iii) the representation accurately and fairly reflects the results of the testing. A supplier is defined to include, a person who, in the course of the person's business, manufactures, assembles or produces goods, or promotes the use or purchase of goods or services.

**British Columbia Consumer Protection Legislation**

32. The Plaintiffs plead and rely upon the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, ss. 1, 4 and 203, and the *Trade Practice Act*, R.S.B.C. 1996, c. 457, s. 3, and plead:

- (a) it is a deceptive act or practice contrary to the *Business Practices and Consumer Protection Act* for a supplier to make an oral, written, visual, descriptive or other representation that has the capability, tendency or effect of deceiving or misleading a consumer. A representation by a supplier that goods are of a particular standard, quality, grade, style or model if they are not constitutes a deceptive act or practice. A supplier is defined to include a person, who in the course of business, participates in a consumer transaction by (i) supplying goods to a consumer, or (ii) soliciting, offering, advertising or promoting with respect to the supply of goods by a supplier to a consumer for purposes that are primarily personal, family or household, whether or not privity of contract exists between that person and the consumer;

- (b) a contract or consumer transaction entered into before the *Business Practices and Consumer Protection Act* came into force is not invalid or does not contravene the *Business Practices and Consumer Protection Act* if the contract or consumer transaction complies with the provisions of a "former Act". A "former Act" is defined to include the *Trade Practices Act*; and
- (c) it is a deceptive practice under the *Trade Practices Act* to make a representation, including a failure to disclose that has the capability or effect of deceiving or misleading a person, and to make a representation that the subject of a consumer transaction is of a particular standard, quality, grade, style or model if it is not.

**Manitoba Consumer Protection Legislation**

33. The Plaintiffs plead and rely upon *The Business Practices Act*, S.M.

1990-91, c. 6, ss. 1 or 2, and plead:

- (a) it is an unfair practice contrary to *The Business Practices Act* for a supplier to do or say anything, if as a result a consumer might reasonably be deceived or misled, to make a false claim, representing that goods are of a particular standard, quality, grade, style or model if they are not. A supplier is defined to include a person who is carrying on or is engaged in the business of manufacturing, producing or assembling goods.

**Newfoundland Consumer Protection Legislation**

34. The Plaintiffs plead and rely upon the *Trade Practices Act*, R.S.N.L.

1990, c. T-7, s. 5, and plead:

- (a) it is an unfair practice contrary to *Trade Practices Act* to represent, act or fail to disclose material facts that has the effect, or might reasonably have the effect, of deceiving or misleading a consumer, or to make a representation that goods are of a particular standard, quality or grade where they are not.

**Prince Edward Island Consumer Protection Legislation**

35. The Plaintiffs plead and rely upon the *Business Practices Act*, R.S.P.E.I. 1988, c. B-7, ss. 2 and 3, and plead:

- (a) it is an unfair practice contrary to the *Business Practices Act* to make a false, misleading or deceptive consumer representation, including a representation that goods are of a particular standard, quality, grade, style or model if they are not.

**Saskatchewan Consumer Protection Legislation**

36. The Plaintiffs plead and rely upon the *Consumer Protection Act*, R.S.S. 1996, c. C-30.1, ss. 1 and 5, and plead:

- (a) it is an unfair practice contrary to the Consumer Protection Act for a supplier to do or say anything, if as a result a consumer might reasonably be deceived or misled, to make a false claim, representing that goods are of a particular standard, quality, grade, style or model if they are not. A supplier includes a person who carries on the business of manufacturing, importing, producing or assembling goods.

**BREACHES OF THE CONSUMER PROTECTION LEGISLATION**

37. The Plaintiffs plead that the Defendants are in breach of the above-listed consumer legislation in that:

- (a) the Kitec Plumbing System was not of merchantable quality, reasonably fit for the intended purpose or durable for a reasonable period of time having regard to the use to which it would normally be put; and
- (b) the Defendants engaged in unfair practices by making false, misleading and deceptive representations, by representing that the Kitec Plumbing System was of a particular standard, quality and grade, which they were

not, by failing to disclose that the Kitec Plumbing System was defective and prone to early failure, and by making representations about the performance, capability or length of life of the Kitec Plumbing System that were not based on adequate and proper independent testing that was done before the representation was made and that were not substantiated by the testing. The representations were made with the intention that consumers, including the Plaintiffs, would rely upon them and consumers, including the Plaintiffs, reasonably relied on these representations when purchasing Kitec Plumbing System.

#### **WARRANTY**

38. The Defendants provide an express 30-year warranty for Kitec Plumbing System that was relied upon by the Plaintiffs and the Class Members. The Defendants have refused and/or failed to honour the terms of its expressed warranty.

39. During the first several years that the Defendants marketed the Kitec Plumbing System, it was expressly marketed as being able to tolerate “aggressive” water. Thereafter, the warranty for the Kitec Plumbing System was changed to expressly limit the type of water that could be run through the Kitec Plumbing System. Those limitations included a provision that allowed IpeX to void the warranty if the water supply was “aggressive”. However, the warranty still expressly stated that the warranty would be honoured provided the Kitec Plumbing Products are connected to a potable water supply. Neither the warranty nor IpeX's literature informs the buyer that although the water supply to their homes or other building structures is potable (which apparently satisfies the terms of the warranty), IpeX could later deny warranty coverage on the basis that the potable water supply was too “aggressive”.

40. The Plaintiffs plead that to the extent that the warranty provided by the Defendants purports to limit the obligations of the Defendants it is invalid in that:

- (a) the terms of the expressed warranty are unreasonable, unconscionable and were not agreed to by the Plaintiffs or other members of the Class at the time that the Kitec Plumbing System was purchased; and
- (b) the Defendants knew that the Kitec Plumbing System would fail before the expiry of the warranty period as a result of the defects, or in the alternative, acted recklessly or negligently in failing to ascertain this fact.

#### **DAMAGES**

41. The Plaintiffs plead that they and the other Class Members would not have had the Kitec Plumbing System installed in their properties had the Defendants not acted negligently, not breached applicable consumer protection legislation, and had they disclosed the defects that were known to them in a timely manner.

42. As a result of the acts and omissions particularized above, the Plaintiffs and the other Class Members suffered damage and loss and will continue to suffer damage and loss, including:

- (a) the cost of installing the Kitec Plumbing System;
- (b) the cost of removing and replacing the Kitec Plumbing System;
- (c) consequential damage as a result of a failure of the Kitec Plumbing System; and
- (d) the cost of relocation while any remedial work is carried out.

43. The Defendants, or any one of them, are liable to pay damages to the Plaintiffs and to the other Class Members.

44. The Plaintiffs assert that their damages and the damages of the other Class Members are capable of being quantified, in part, on an aggregate basis.

**PUNITIVE DAMAGES**

45. The Plaintiffs plead that the conduct of the Defendants was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, willful and motivated by economic considerations. Such conduct renders the Defendants liable to pay punitive damages.

**REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO**

46. The plaintiffs plead that this action has a real and substantial connection with Ontario because, among other things:

- (a) the Defendants maintain offices and carry on business in Ontario;
- (b) the Defendants marketed and sold the Kitec Plumbing System in Ontario;
- (c) the Kitec Plumbing System was manufactured, at least in part, in Ontario;
- (d) the Defendants derived substantial revenue from the sale and installation of the Kitec Plumbing System to Ontario residents; and
- (e) the Plaintiffs' damages were sustained in Ontario.

**SERVICE OUTSIDE OF ONTARIO**

47. This originating process may be served without court order outside Ontario because the claim is:

- (a) in respect of a tort committed in Ontario (rule 17.02(g));
- (b) in respect of damages sustained in Ontario arising from a tort or breach of contract however committed (rule 17.02(h));
- (c) against a person outside Ontario who is a necessary and proper party to this proceeding properly brought against another person served in Ontario (rule 17.02(o)); and
- (d) against a person carrying on business in Ontario (rule 17.02(p)).

**RELEVANT LEGISLATION**

48. The Plaintiffs plead and rely on the provisions of the *CJA*, the *CPA*, the *Competition Act*, R.S., 1985, c. C-34, the *Consumer Protection Act*, 2002, S.O. 2002, c. 30, Sched. A, s. 9, the *Business Practices Act*, R.S.O. 1990, c. B.18, the *Fair Trading Act*, R.S.A. 200, c. F-2, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, the *Trade Practice Act*, R.S.B.C. 1996, c. 457, *The Business Practices Act*, S.M. 1990-91, c. 6, *Trade Practices Act*, R.S.N.L. 1990, c. T-7, *Business Practices Act*, R.S.P.E.I. 1988, c. B-7 and *Consumer Protection Act*, R.S.S. 1996, c.C-30.1.

**PLACE OF TRIAL**

49. The Plaintiffs propose that this action be tried in the City of Windsor, in the Province of Ontario.

August 18, 2009

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v. IPEX USA LLC et al.

Defendants

Court File No. CV-09-13459

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDINGS COMMENCED AT WINDSOR

**FRESH STATEMENT OF CLAIM**

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