

AMENDED ANNEXURE A: COMMISSION'S PROPOSED AMENDMENTS

7. Ad paragraph 10 of the amended founding affidavit

7.1 By deleting the existing paragraph 10 and replacing it with the following paragraph 10:

'10. The Commission seeks relief against all of the respondents in terms of the amended notice of motion.'

8. Ad amended founding affidavit

8.1 By adding a new paragraph 29.10 as follows:

'The conduct of fixing the selling prices of foam and of allocating customers between Loungefoam and Vitafoam and/or Gommagomma started even before the formation of the Foam Forum. It started around 1999 or 2000. The Foam Forum merely formalised what was already happening.'

9 Ad paragraphs 8 and 9 of the amended supplementary affidavit

9.1 By deleting the second sentence in paragraph 8.

9.2 By deleting the existing paragraph 9 and replacing it with the following:

'9. The allegations made in paragraph 8 above should be read with the allegations made in paragraph 29.10 of the amended founding affidavit.'

10 Ad amended founding affidavit

10.1 By adding new paragraphs 30.8 to 30.14 as follows:

'30.8 Further and/or alternatively to paragraphs 29.5 and 29.6, Loungefoam, Vitafoam and/or Gommagomma and Feltex colluded in respect of the procurement of chemicals used to produce polyurethane foam. They jointly set a

benchmark price, which they then used to negotiate the purchase prices for the chemicals with the suppliers.

30.9 The firms, i.e. Loungefoam, Vitafoam and/or Gommagomma and Feltex, provided forecasts of their tonnage requirements to a joint purchasing team.

30.10 Alternatively to paragraphs 30.8 to 30.9 above, Loungefoam, Vitafoam and/or Gommagomma and Feltex, discussed and agreed prices for the purchasing of the chemicals used to produce polyurethane foam. These discussions enabled them to have a joint approach in negotiating the prices of the chemicals with chemical suppliers.

30.11. The practice described in paragraphs 30.8 and 30.9 started around 2003 or 2004. The joint purchasing team comprised of Mr Jack du Pisane and Mr Troy Carelse, both of whom represented Loungefoam; Mr Albert Rapp and Mr Hein Odendaal, both of whom represented Steinhoff; Mr Richard Copley and Mr Nick Hammersely ('Hammersely'), both of whom represented Vitafoam and/or Gommagomma; and Mr Ugo Frigerio ('Frigerio') who represented Feltex.

30.12. The practice described in paragraph 30.10 started before 2004. Hammersely, Frigerio and Mr Wessel Jacobs ('Jacobs') representing Loungefoam, were involved in the discussions.

30.13 The conduct described in paragraphs 30.8 to 30.12 above constitutes a contravention of section 4(1)(b)(i) of the Act in that it amounts to an 'agreement' or 'concerted practice' by Loungefoam, Vitafoam and/or Gommagomma and Feltex which involves the fixing of selling and/or purchase prices for chemicals by parties in

a horizontal relationship (i.e. in the same line of business) or other trading conditions related to the purchase by them of chemicals.

30.14 Daun has a significant interest and influence through companies that he controls (or personally), alternatively in which he has a significant interest and influence, in both Loungefoam and Feltex. In accordance with the provisions of section 4(2) of the Act there is a presumption that Loungefoam and Feltex colluded.'

11 Ad amended founding affidavit

11.1 By deleting the existing paragraph 32 and inserting the following new paragraph 32:

'32. The Commission disputes the contention that Loungefoam and Vitafoam (or Gommagomma) were at all relevant times part of a single economic entity and could not have contravened section 4(1)(b) of the Act. The Commission contends that Loungefoam and Vitafoam or Gommagomma were not constituent firms within a single economic entity similar in structure to a company contemplated in section 4(5)(a). Alternatively, any sole control that Steinhoff might have enjoyed over Loungefoam (which is not conceded) was as a consequence of a wider cooperation or collusion between firms in the Steinhoff group of companies and those controlled by Daun or in which Daun had a significant interest and influence (which for convenience I refer to as the Kap group of companies). Loungefoam and Vitafoam were a manifestation of this wider cooperation or collusion. Whist in strict formalism, which is also not conceded, it may appear that Steinhoff controlled Loungefoam sufficiently for purposes of section 4(5)(b)-

because of this wider cooperation or collusion – any such control was rooted in a stratagem to achieve what section 4(1)(b) prohibits and cannot be permitted to benefit the Steinhoff group of companies and/or the Kap group of companies. The Commission relies on inter alia the following material facts and contentions of law for its submissions:

- 32.1. *Proof of joint control of Loungefoam by Steinhoff and another firm or other firms is not sufficient for purposes of section 4(5)(b).*
- 32.2 *As appears below, at all times material to the complaint referral Loungefoam was controlled by firms other than Steinhoff, alternatively was jointly controlled by Steinhoff and another firm or other firms.*
- 32.3 *During 1994 to 1995 a company controlled by Mr Claus Edmund Daun ('Daun') called Daun et Cie AG acquired a controlling interest in inter alia Gommagomma Holdings (Pty) Ltd ('Gommagomma Holdings').*
- 32.4 *During 1997 the Steinhoff family acquired a 35% interest in Gommagomma Holdings from Daun et Cie AG.*
- 32.5 *Gommagomma Holdings subsequently changed its name to Steinhoff Africa Holdings (Pty) Ltd ('Steinhoff Africa'). This history is reflected on the Website of Steinhoff.*
- 32.6 *Gommagomma, i.e. the sixth respondent, is controlled by Steinhoff Africa.*

- 32.7 *Daun or Kap, i.e. the fifth respondent and which is a company in which Daun has a significant interest and influence, is a shareholder in Steinhoff Africa and/or Steinhoff, i.e. the fourth respondent. Daun is a non-executive director of Steinhoff, i.e. the fourth respondent. This position has prevailed at all times material to this complaint.*
- 32.8 *Steinhoff Africa or Steinhoff, i.e. the fourth respondent, is a significant shareholder in Kap and has representation on the board of directors of Kap. This position has prevailed at all times material to this complaint.*
- 32.9 *There are a range of cross-directorships that prevail across the Steinhoff group of companies and Kap. For example, the Kap and Steinhoff 2005 annual reports reflect that Dr. Deenadayalen Konar was a non-executive director of Steinhoff and was an ‘Officer’ of Kap. Jooste, in 2005, was an executive director of Steinhoff and was a non-executive director of Kap. Also in 2005, Mr. Johannes Henoeh Neethling Van Der Merwe was an executive director of Steinhoff and an ‘Officer’ of Kap. In the same period, Daun was a non-executive director of Steinhoff and was the non-executive chairman of Kap. Again, in 2005, Mr. Daniel Maree van der Merwe was an executive director of Steinhoff and a non-executive director of Kap. Cross-directorships such as these prevailed at all times material to this complaint. Indeed, according to the 2005 Kap annual report, Steinhoff Africa possessed ‘significant influence’ over Kap.*

- 32.10 *Feltex is a wholly owned subsidiary of Kap.*
- 32.11 *Prior to 1 July 1997 Loungefoam had 100 issued shares. The shareholders were Majestic Spring Industries (Pty) Ltd ('Majestic') or IB Investment Holdings (Pty) Ltd ('IB Investment Holdings'), holding 50% of the issued shares, and The Iqbal Bam Family Trust ('the Trust'), holding the other 50% of the shares on behalf of Jacobs.*
- 32.12 *In a subscription agreement concluded in April 1998, effective from 1 July 1997, Gommagomma Holdings acquired shares equal to 51% of Majestic. A copy of the subscription agreement is attached marked '**NNA1**'.*
- 32.13 *At the time of the conclusion of the subscription agreement, Loungefoam still had 100 issued shares. Majestic held 50% of the issued shares in Loungefoam and the Trust held the other 50%. The Trust held the 50% shares on behalf of Jacobs.*
- 32.14 *Gommagomma Holdings, the Trust and Majestic concluded a shareholders' agreement, a copy of which is '**NNA2**'. The shareholders agreement was also concluded in April 1998, effective from 1 July 1997. As appears from what is stated below, the shareholders agreement entrenched joint control of Majestic by the shareholders of the company.*
- 32.15 *In terms of the shareholders agreement, the board of directors of Majestic was to be constituted of four directors, of which two were appointed by Gommagomma Holdings and two by the Trust.*

For the time being the four directors were agreed to be Mr Iqbal Mohammed Essop Bam ('Iqbal Bam'), Mr Ridwaan Raheem, both of whom represented the Trust (and in other words Jacobs); Mr Markus Johannes Jooste ('Jooste') and Mr Jan Adriaan Opperman, both of whom represented Gommagomma Holdings.

32.16 *The parties had joint control of the board of directors of Majestic.*

32.17 *Iqbal Bam acted as the Managing Director of Majestic and attended to the day to day management of the company.*

32.18 *In the event of deadlock in the board of directors of Majestic in respect of matters specified in clauses 3.8.1 to 3.8.3 of the shareholders agreement, such a matter would be referred for a decision by Iqbal Bam, failing him the chairman of the board of trustees of the Trust and Jooste (or, failing Jooste, the chief executive officer or managing director of Gommagomma Holdings).*

32.19 *The Trust, Majestic, Loungefoam and Gommagomma Holdings also concluded an investment agreement. A copy of the investment agreement is 'NNA3'. The investment agreement was also concluded in April 1998, effective from 1 July 1997.*

32.20 *In terms of the investment agreement Gommagomma Holdings subscribed to a further 50 shares in Loungefoam. There was an additional issue of 50 shares in Loungefoam, which brought the issued shares in Loungefoam to 150.*

- 32.21 *Thus after the issue of the additional 50 shares in Loungefoam, Majestic held 50 shares, the Trust (on behalf of Jacobs) held 50 shares and Gommagomma Holdings held the remaining 50 shares. The 50 shares held by Majestic were jointly controlled by the shareholders of Majestic in terms of their shareholders agreement as described above. The remaining 100 shares were controlled independently (50 shares each) by the Trust (on behalf of Jacobs) and Gommagomma Holdings.*
- 32.22 *In terms of the investment agreement, Gommagomma Holdings would be entitled to appoint two representatives to the board of directors of Loungefoam upon the approval of the existing directors of Loungefoam and subject to compliance with the other requirements of clause 10 of the investment agreement.*
- 32.23 *Loungefoam in general meeting could, with an ordinary majority, approve of the sale of the business of the company or a greater part of the assets of the company.*
- 32.24 *Gommagomma Holdings did not in terms of the agreements described above, which were concluded in April 1998, acquire sole control of Loungefoam.*
- 32.25 *The position described above regarding the shareholding in Loungefoam remained unchanged until 1 July 1999.*
- 32.26 *In a merger filing in April 1999 involving the acquisition by Steinhoff of the Cornick Group*

Limited, which controlled Vitafoam, Steinhoff stated *inter alia* the following:

2.1.4.5 **Bedding**

Steinhoff Africa holds a 50% interest in Iqbal Bam Investment Holdings, which in turn holds an interest in - ...

(b) LOUNGEFOAM

a small plant in Isithebe, Durban, which produces foam and related products predominantly for inter company use; ...'

32.27 *In the merger filing referred to above it was not a position adopted by Steinhoff, or expressly or impliedly stated by it, that Steinhoff Africa had a direct interest in Loungefoam or that it controlled Loungefoam at all, let alone in a structure similar to that contemplated in section 4(5)(a) of the Act.*

32.28 *In paragraph 30.2 of the founding affidavit I described an agreement concluded between Loungefoam and Feltex Limited for the sale of Feltex's furniture and bed division to Loungefoam. It was agreed between Jooste and Daun that Loungefoam should be the party that purchases Feltex and this gave rise to the sale agreement. The sale agreement is annexure 'N4' to the founding affidavit. The purchase price for the business was fixed at R12 million and as further*

described in clause 3. Loungefoam was to discharge the purchase price by way of the issue of the 'consideration shares' to Feltex Limited and the balance in an amount of R9 million on an interest free loan account. The 'consideration shares' are defined in the sale agreement as 150 ordinary shares with a par value of R1,00 each in the share capital of Loungefoam issued in accordance with clause 6 at a premium of R19 999,00.

32.29 To fulfil its obligations under the sale agreement, Loungefoam issued 150 additional shares, bringing its total issued shares to 300. Feltex Limited was issued the 150 additional shares with effect from 1 July 1999. The other 150 shares were held by Majestic (or IB Holdings) (50 shares), the Trust (on behalf of Jacobs (50 shares) and Gommagomma Holdings (50 shares, and which had changed its name to Steinhoff Africa). Again, Steinhoff Africa did not acquire sole control of Loungefoam in terms of this shareholding.

32.30 The shareholding of Steinhoff in Loungefoam remained unchanged until September 2003. The only changes which are reflected in information provided by Mr Albert Rapp of Steinhoff ('Rapp') are the following:

32.30.1 Tachelle Family Trust (representing Jacobs) replaced the Trust as the shareholder holding shares on behalf of Jacobs in Loungefoam as from 30 July 1999.

32.30.2 *The shares initially issued to Feltex Limited were subsequently transferred to Daun et Cie AG and then to Courthiel Holdings Ltd, both of which are or were firms controlled by Daun.*

32.30.3 *The total shares held by the Tachelle Family Trust increased to 100 out of the 300 shares in Loungefoam with effect from 7 September 2001. This further diluted the shareholding by Steinhoff Africa in Loungefoam.*

32.31 *The Commission has failed to obtain a register of members of Loungefoam (in respect of any period up to the present) from the respondents in order to verify the information provided by Rapp. The respondents say that such a register is not available even though section 105 of the Companies Act, 61 of 1973 requires that it be kept.*

32.32 *In September 2003 the shareholding in Loungefoam changed. Majestic (or IB Holdings), Steinhoff Africa and Steinhoff Manufacturing held 47,5% of the issued shares; Phaello Mattress and Bedding Corporation (Pty) Ltd ('Phaello'), a wholly owned trading subsidiary of Restonic SA (Pty) Ltd ('Restonic'), and which is generally described as a company controlled by Daun¹ held 47,5%; and the Du Pisani Family Trust held 5%.*

¹ Phaello has now been closed down but the Commission does not have evidence that it has been deregistered. Phaello was a wholly owned trading subsidiary of Restonic SA (Pty) Ltd. Restonic is wholly owned by Metz Industries (Pty) Ltd via its 100% shareholding in Metz Industrial Holdings (Pty)

- 32.33 *Until September 2003 Jacobs was the managing director of Loungefoam. He, together with his management team, controlled the day to day management of Loungefoam. The board of directors of Loungefoam controlled Loungefoam. In general meeting other firms controlled Loungefoam or did so jointly with Steinhoff Africa.*
- 32.34 *Subsequent to September 2003 Loungefoam was subject to the joint control of the two shareholders (i.e. the Steinhoff group and Phaello) each with 47,5% of the shares in the company. Its management was still controlled by its board on which Phaello or Daun had representation. The board of Loungefoam made important strategic decisions regarding Loungefoam. These decisions were made independently of Vitafoam or Gommagomma or the Raw Materials Division of Steinhoff. If there has been any change to this position, such a change would have occurred recently during the currency of this complaint.*
- 32.35 *In its annual reports from 1999 onwards Steinhoff, i.e. the fourth respondent, described Loungefoam as an 'associate', i.e. a company which it defines as an enterprise over which the group is in a position to exercise significant influence through participation in its financial and operating policy decisions but which it does not control. Also as a company in which it had a minority interest until September 2003. Steinhoff consistently declined suggestions to merge Loungefoam and Vitafoam*

Ltd which is in turn controlled by Geros Beteiligungsverwaltung GmbH which is in turn controlled by Daun.

and make Loungefoam part of the Raw Materials Division of Steinhoff. Steinhoff did not consolidate the financials of Loungefoam and those of the other Steinhoff group of companies in its annual reporting. If this position has changed it also changed recently during the currency of this complaint.

32.36 *The minutes of meetings of the board of Loungefoam show that even after September 2003 significant decisions were taken with the concurrence of a representative of Phaello or Daun on the board of Loungefoam.*

32.37 *The minutes of meetings of the board of directors of Steinhoff Africa show that the closure of Loungefoam in around 2008 was preceded by the purchase by Steinhoff Africa of Phaello's or Daun's shareholding in Loungefoam.*

32.38 *Loungefoam paid the salaries of its staff and directors even though this was administered through Steinhoff in terms of a management agreement or arrangement with Loungefoam. Loungefoam paid Steinhoff for the administration or other services rendered to it by Steinhoff in terms of the management agreement or arrangement. The administration and other services are no different from services that Loungefoam could have obtained for a fee from third parties other than Steinhoff. The Commission has not been furnished with any written management agreement in this regard between Steinhoff and Loungefoam which would contradict the Commission's submission – i.e. one which*

details powers on the part of Steinhoff which show that it alone had control of the management of Loungefoam other than in the sense simply of providing services and looking after its interests as a shareholder.

32.39 *[Deleted]*

32.40 *As stated above, the cooperation between Loungefoam and Vitafoam and/or Gommagomma is the result of a close relationship and cooperation between the Steinhoff group of companies and companies in which Daun has a material interest, in which he is a director or which he controls or is able to materially influence (i.e. the Kap group of companies). Jooste and Daun play an important role in this relationship of cooperation. The cross-directorships and cross-shareholdings across the Steinhoff group of companies and the companies in which Daun has a material interest facilitate this co-operation.'*

12 Ad amended founding affidavit

12.1 By adding the following new paragraphs 35:

'35. *In the event that the Tribunal finds that Loungefoam and Vitafoam and/or Gommagomma were at all material times part of a single economic entity, then the first, second, fourth and sixth respondents and Steinhoff Africa (as an economic unit) should be held liable for any administrative penalty that is imposed by the Tribunal in respect of the alleged prohibited conduct involving Feltex.*

13 Ad paragraph 11.2 of the replying affidavit

13.1 By deleting paragraph 11.2 (including the sub-paragraphs) and replacing it with the following paragraph 11.2:

'11.2 I refer to what is stated in the founding affidavit regarding the shareholding of Steinhoff Africa in Loungefoam over time which reflects the fluctuation.'

Ad Notice of Motion

- '1. Declaring that the first, second, third and/or sixth respondents have contravened section 4(1)(b)(i) and (ii) of the Competition Act, 89 of 1998 (*'the Act'*);
2. Interdicting the first, second, third and/or sixth respondents from continuing the prohibited practices set out in paragraph 1 above;
3. Imposing administrative penalties as follows:
 - 3.1. *In respect of the prohibited conduct involving the first, second and/or sixth respondents only, an administrative penalty against the first and sixth respondents in an amount equal to 10% of the first and sixth respondents' annual turnovers in the Republic and their exports from the Republic during the preceding financial year;*
 - 3.2. *In respect of the prohibited conduct involving the first, second, third and/or sixth respondents, an administrative penalty against the first, third and sixth respondents in an amount equal to 10% of the first, third and sixth respondents' annual turnovers in the Republic and their exports from the Republic during the preceding financial year;²*
 - 3.3. *The administrative penalty in respect of the first and sixth respondents in terms of paragraph 3.2 above to be paid by the fourth and sixth*

² The only correction to this paragraph is its renumbering from 3.3 to 3.2.

*respondents and Steinhoff Africa if it is found that the first, second, fourth and/or sixth respondents and Steinhoff Africa form part of a single economic entity, the one paying the others to be absolved.*³

³ The only corrections to this paragraph are: renumbering from 3.4 to 3.3; taking out second respondent in the second line (at page 141) to make the paragraph harmonious with 3.3; changing the reference from 3.3 to 3.2 and including the sixth respondent in the line that reads 'if it is found that the first, second, fourth and/or sixth respondents and Steinhoff Africa ...'.