

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE
JUSTICE PERELL

) TUESDAY, THE 9th DAY
) OF JULY, 2013
)

B E T W E E N:

GIOVANNI SPINA, JOHN SPINA DRUGS LTD.,
ROMEO VANDENBURG and ROMEO VANDENBURG DRUG COMPANY LTD.

Plaintiffs

AND

SHOPPERS DRUG MART INC., SHOPPERS DRUG MART
CORPORATION and 911979 ALBERTA LTD.

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT*, 1992

**ORDER
(Certification Motion)**

THIS MOTION, made by the Plaintiffs for an order certifying this action pursuant to section 5 of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("*CPA*") was heard on August 27-30, 2012 and June 3-6, 2013 at Toronto, Ontario.

ON READING the Plaintiffs' Consolidated Certification Motion Record (Volumes 1-7), Compendium of the Plaintiffs (dated August 28, 2012), Plaintiffs' Compendium for Oral Argument (dated June 3, 2013), Responding Motion Record of the Defendants (Volumes 1 & 2), Supplementary Responding Motion Record of the Defendants, Second

Supplementary Responding Motion Record of the Defendants, facts and supplementary facts of the parties, filed, and on hearing submissions of counsel for the parties, and on being advised by counsel that the parties and Shoppers Drug Mart (London) Limited consent to adding Shoppers Drug Mart (London) Limited as a defendant and revising the class definition and certified common issues accordingly,

1. **THIS COURT ORDERS** that leave is granted to discontinue the action as against Shoppers Drug Mart Corporation and 911979 Alberta Ltd.
2. **THIS COURT ORDERS** that Shoppers Drug Mart (London) Limited is added as a defendant.
3. **THIS COURT ORDERS** that the title of proceedings in the action shall be amended as follows and all pleadings delivered after the date of this Order shall bear this amended title of proceedings:

B E T W E E N:

GIOVANNI SPINA, JOHN SPINA DRUGS LTD.,
ROMEO VANDENBURG and ROMEO VANDENBURG DRUG COMPANY LTD.

Plaintiffs

AND

SHOPPERS DRUG MART INC. and SHOPPERS DRUG MART (LONDON) LIMITED

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT*, 1992

4. **THIS COURT ORDERS** that this action is certified as a class proceeding pursuant to section 5 of the *CPA*.

5. **THIS COURT ORDERS** that the Class is defined as follows:

All current or former Shoppers Drug Mart Associates resident in Canada (save for Associates with franchised businesses located in Quebec) who entered into an Associate Agreement with Shoppers Drug Mart Inc. and/or Shoppers Drug Mart (London) Limited dated between January 1, 2002 and January 1, 2010 (the "2002 Agreement Class"), and

All current or former Shoppers Drug Mart Associates resident in Canada (save for Associates with franchised businesses located in Quebec) who entered into an Associate Agreement with Shoppers Drug Mart Inc. and/or Shoppers Drug Mart (London) Limited dated between January 1, 2010 and July 9, 2013 (the "2010 Agreement Class").

6. **THIS COURT ORDERS** that a sub-class is defined as follows:

All current or former Shoppers Drug Mart Associates who performed direct patient care services (as defined in both the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23, R.R.O. 1990, reg. 935, s. 2(1) and the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10, O. Reg. 201/96, s. 1(8) for the period since October 1, 2006 (the "Professional Allowance Class").

7. **THIS COURT ORDERS** that Giovanni Spina, John Spina Drugs Ltd., Romeo Vandenburg and Romeo Vandenburg Drug Company Ltd. are appointed as the representative plaintiffs for the Class and the Professional Allowance Class.

8. **THIS COURT DECLARES** that the claims asserted on behalf of the Class as against the Defendants are as follows, in respect of which declaratory relief and damages are sought:

- (a) the Cost Recovery Fees Claims, asserting causes of action for breach of contract, breach of statutory duty of fair dealing and/or common law duty of good faith, and unjust enrichment; and
- (b) the Inventory Practices Claims, asserting causes of action for breach of contract, breach of statutory duty of fair dealing and/or common law duty of good faith, and unjust enrichment.

9. **THIS COURT DECLARES** that the claims asserted on behalf of the Professional Allowance Class, in respect of which declaratory relief and damages are being sought, are the Professional Allowances Claims, asserting causes of action for breach of contract, breach of the statutory duty of fair dealing and/or common law duty of good faith, and unjust enrichment.

10. **THIS COURT ORDERS** that the following issues are certified as common issues for the entire Class:

- (a) Did the Defendants, or either of them, breach the Associate Agreements with the Class by charging the Class Cost Recovery Fees in excess of the actual costs they incurred for the services and programs enumerated in Article 11.05(i) – (iv) of the 2002 Associate Agreement and/or Article 11.07(i) – (v) of the 2010 Associate Agreement?
- (b) Did the Defendants, or either of them, breach their statutory duty of fair dealing under s. 3 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 ("AWA") (or under comparable provincial franchise legislation), or their common law duty of good faith by charging the Class Cost Recovery Fees in excess of the actual costs they incurred for the services and programs enumerated in Article 11.05(i) – (iv) of the 2002 Associate Agreement and/or Article 11.07(i) – (v) of the 2010 Associate Agreement, or by charging Cost Recovery Fees in excess of commercially reasonable rates for these services and programs?
- (c) Have the Defendants, or either of them, been unjustly enriched by charging Cost Recovery Fees in excess of their actual costs incurred in providing the services and programs to Class Members pursuant to Article 11.05(i) – (iv) of the 2002 Associate Agreement and Article 11.07(i) – (v) of the 2010 Associate Agreement?
- (d) Have the Defendants, or either of them, breached Article 11.05 of the 2002 Associate Agreement or their duty of good faith and duty of fair dealing under the AWA (or under comparable provincial franchise legislation), by charging the 2002 Agreement Class an Optimum Program Fee?
- (e) With respect to the fees charged to Class Members on account of the lease of their franchise premises, did the Defendants, or either of them, breach the Associate Agreements, their statutory duty of fair dealing under

the AWA (or under comparable provincial franchise legislation) and/or their common law duty of good faith to the Class Members by:

- (i) failing to provide copies of lease agreements with third party landlords to the Class Members?
 - (ii) failing to disclose the existence and amount of all third party landlord inducements to Class Members?
 - (iii) failing to adjust the amount of lease payments charged to Class Members to include the benefit of the landlord inducements?
 - (iv) charging Class Members a leasing fee in excess of the lease obligations incurred by the Defendants for the franchised premises, or in excess of a commercially reasonable rate for those franchised premises that are owned by the Defendants?
- (f) With respect to the fees charged to Class Members for Equipment rental, did the Defendants, or either of them, breach their contractual obligations under the Associate Agreements, their statutory duty of fair dealing under the AWA (or under comparable provincial franchise legislation) and/or their common law duty of good faith to the Class Members by:
- (i) unilaterally imposing Equipment leasing fees on Class Members without regard to their obligation under Article 5.01(b) of the Associate Agreements to lease Equipment to the Class Members on "terms and conditions to be mutually agreed upon between the Associate and [SDM]"?
 - (ii) charging Equipment leasing fees at a commercially unreasonable rate?
 - (iii) profiting from the Equipment leasing fees, rather than setting the Equipment leasing fees at a cost recovery rate?
- (g) Did the Defendants, or either of them, breach their statutory duty of fair dealing under the AWA (or under the comparable provincial franchise legislation) and/or their common law duty of good faith to the Class Members by unilaterally imposing procurement and inventory policies upon the Class, that:
- (i) require Class Members to accept and pay for mass-order generated goods ("MOGs") that they do not order;
 - (ii) deny Class Members the right to make certain inventory adjustment claims; and/or

- (iii) direct Class Members not to receive inventory on an itemized basis?
- (h) If so, have the Defendants, or either of them, been unjustly enriched through the imposition of the procurement and inventory policies?

11. **THIS COURT ORDERS** that the following issues are certified as common issues in respect of the Professional Allowance Class:

- (a) Did the Defendants, or either of them, breach their contractual obligations under the 2002 and 2010 Associate Agreements, their statutory obligations under section 3 of the AWA and/or their common law duty of good faith to the Professional Allowance Class Members by retaining Professional Allowances and failing to remit Professional Allowances that relate to direct patient care services (as defined in both the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23, R.R.O. 1990, Reg. 935, s. 2(1) and the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10, O.Reg. 201/96, s. 1(8)) that were performed by the Professional Allowance Class Members to the Professional Allowance Class Members?
- (b) Were the Defendants, or either of them, unjustly enriched by retaining the Professional Allowances they received that relate to the direct patient care services (as defined in both the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23, R.R.O. 1990, reg. 935, s. 2(1) and the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10, O. Reg. 201/96, s. 1(8)) that were performed by the Professional Allowance Class Members?
- (c) If the answer to (a) or (b) is yes, what is the amount that the Defendants received for professional allowances?
- (d) If the answer to (a) or (b) is yes, what is the amount that the Defendants expended at the central office level for direct patient care?

12. **THIS COURT ORDERS** that notice of certification and the right to opt out (the "Notice") shall be given to the Class:

- (a) substantially in the form attached as Schedule "A" hereto in the following manner:
 - (i) By direct mail, using (i) the last known email address for each Class Member and (ii) the last known mailing address for each Class

Member, which email addresses and mailing addresses shall be provided in native excel format by the Defendants to Class Counsel on or before November 29, 2013. Promptly after receipt of this data from the Defendants, Class Counsel shall arrange for the direct mailing, the cost of which shall be at the Plaintiffs' expense;

- (ii) in a press release from Class Counsel in a form to be approved by Justice Perell;
- (iii) on Class Counsel's website;
- (iv) via email from Class Counsel to the United Association of Pharmacist Franchisees ("UAPF") with a request that it be posted on the UAPF website, and
- (v) to the extent Class Counsel have direct email addresses for members of the Class, via direct email.

- (b) substantially in the form attached as Schedule "B" hereto, in the print version of the industry publication Drugstore News, in the earliest possible issue to be published after the final form of the Notice is approved by the Court, at the Plaintiffs' expense.

13. **THIS COURT ORDERS** that the Notices substantially in the form of Schedules "A" and "B" are hereby approved.

14. **THIS COURT ORDERS** that the opt out period shall expire at 5:00 pm E.S.T on Friday, February 21, 2014 (the "Opt Out Deadline") and that Class Members may only opt out by sending to Class Counsel in the manner stipulated in the Notice on or before the date of the Opt Out Deadline either:

- (a) a signed letter stating that they are opting out of the class action, including their full name and address, and the name and address of their professional corporation; or
- (b) a completed opt out form which is available on Class Counsel's website as indicated on the Notice.

15. **THIS COURT ORDERS** that Class Counsel shall advise the Defendants' counsel of any Notices returned as undeliverable, either by mail or e-mail, within 15 business days after return of the Notice, after which the Defendants shall make best efforts to provide Class Counsel with updated contact information for the affected Class Members so that the Notice can be re-sent to such Class Members.

16. **THIS COURT ORDERS** that Class Counsel shall serve upon the Defendants, within 30 days of the Opt-Out Deadline, an affidavit containing a list of Class Members that have opted out of the class proceeding.

THIS COURT ORDERS that costs of this motion and the Rule 21 motion by Shoppers Drug Mart Inc. are fixed at \$420,000.00, plus applicable taxes, in the total amount of \$474,600.00.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

OCT 28 2013

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
Doc 982208-1
PER / PAR: *C. Vinnich*

Perell J.

P. Perell J.

SCHEDULE "A"

Attention: All Current and Former Shoppers Drug Mart Associates
NOTICE OF CERTIFICATION OF A CLASS PROCEEDING
This Notice may affect your rights. Please read carefully.

THE CLASS ACTION

A class proceeding has been certified by the Ontario Superior Court of Justice against Shoppers Drug Mart Inc. and Shoppers Drug Mart (London) Limited (together, "Shoppers") on behalf of the following Class:

All current or former Shoppers Drug Mart Associates resident in Canada (save for Associates with franchised businesses located in Quebec) who entered into an Associate Agreement with Shoppers Drug Mart Inc. and/or Shoppers Drug Mart (London) Limited dated between January 1, 2002 and January 1, 2010 (the "2002 Agreement Class"), and

All current or former Shoppers Drug Mart Associates resident in Canada (save for Associates with franchised businesses located in Quebec) who entered into an Associate Agreement with Shoppers Drug Mart Inc. and/or Shoppers Drug Mart (London) Limited dated between January 1, 2010 and July 9, 2013 (the "2010 Agreement Class").

In addition, the class proceeding has been certified on behalf of the following Ontario sub-class:

All current or former Shoppers Drug Mart Associates who performed direct patient care services (as defined in both the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23, R.R.O. 1990, reg. 935, s. 2(1) and the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10, O. Reg. 201/96, s. 1(8) for the period since October 1, 2006 ("Professional Allowance Class").

The plaintiffs claim compensation for the Class for losses they are alleged to have suffered because Shoppers allegedly breached the Associate Agreements in the way it has carried out its inventory practices, and by charging allegedly excessive cost recovery fees. The action also seeks compensation for the Professional Allowance Class for losses suffered by them because Shoppers' has not paid professional allowances that it allegedly received on behalf of the Professional Allowance Class.

Shoppers denies all the claims made against it. By certifying this action as a class proceeding, the court has not decided if any of the allegations are true. The plaintiffs will be required to prove their claims at a trial.

THE CERTIFICATION ORDER

On July 9, 2013, the Ontario Superior Court of Justice certified an action (Court file No. CV-10-414774-00CP) as a class proceeding and appointed Giovanni Spina, John Spina Drugs Ltd., Romeo Vandenburg and Romeo Vandenburg Drugs Ltd. as the representative plaintiffs on behalf of the Class and Professional Allowance Class (the "Class Action").

If you are a member of the Class or Professional Allowance Class, your rights will be affected.

Each Class Member who does not opt out of the Class Action will be bound by the terms of any settlement, or any judgment, whether favourable or not. Each Class Member who does not opt out may be entitled to share in the amount of any monetary settlement reached in the Class Action.

LEGAL FEES AND DISBURSEMENTS

Class Members do not have to pay any court costs for the common issues phase of the Class Action. This action has received funding from the Ontario Class Proceedings Fund. The Class Proceedings Fund will pay any adverse costs awards. It will also pay some of the expenses that will be incurred to prosecute the Class Action. In return, it will receive 10% of any monetary settlement or any monetary judgment made in favour of the Class.

Class Members will not have to pay any legal fees directly in connection with the common issues phase of the Class Action. The Lawyers for the Class ("Class counsel") have entered into a contingency fee agreement with the representative plaintiffs. Class counsel and the Class Proceedings Fund will pay for the expenses incurred in prosecuting the Class Action. Class counsel will not be paid for their work unless the Class Action is successful either by a judgment against Shoppers, or by completing a settlement with Shoppers that is approved by the court. Any court costs received from the defendants will be used to pay part of Class counsel's fees and to pay for expenses. The contingency fee agreement provides for Class counsel to be paid a contingency fee of 33 1/3% of the amount recovered in the Class Action, if any. Before Class Counsel are paid any fees, the fees must be approved by the court.

CLASS MEMBERS WHO WISH TO PARTICIPATE IN THE CLASS ACTION: You do not need to do anything at this time. You are automatically included in the Class Action.

CLASS MEMBERS WHO DO NOT WISH TO PARTICIPATE IN THE CLASS ACTION: If you do not want to be a part of the Class Action, and do not want to be bound by any judgment or settlement, then you must send either of the following to Class Counsel at the address below, on or before 5:00 pm E.S.T. on February 21, 2014(a) a written and signed letter indicating your election to opt-out, including your full name and address, and the name and address of your professional corporation, OR (b) a completed and signed opt out form which can be downloaded from [INSERT URL FOR OPT OUT NOTICE]

No Class Member will be permitted to opt out after 5:00 pm E.S.T. on February 21, 2014 without the consent of the representative plaintiffs and Shoppers or with leave of the court.

ADDITIONAL INFORMATION

Any questions about this notice or requests for more information about the Class Action should be directed to:

Shoppers Drug Mart Class Action
Paliare Roland Rosenberg Rothstein LLP
155 Wellington St. W.
35th Floor
Toronto, ON, M5V 3H1
Fax: 416-646-4301
email: info@Shoppersclassaction.com

The certification order and other information are available to be viewed on the website <http://www.paliareroland.com/Shoppers-Drug-Mart-Class-Action.asp> or may be obtained by calling: 1-877-203-2866.

INTERPRETATION

This notice is a summary of the terms of the certification order. If there is a conflict between the provisions of this notice and the terms of the certification order, the certification order prevails. This notice was approved by the Ontario Superior Court of Justice.

Schedule "B"

Attention: All Current and Former Shoppers Drug Mart Associates
NOTICE OF CERTIFICATION OF A CLASS PROCEEDING
This Notice may affect your rights. Please read carefully.

A class proceeding has been certified by the Ontario Superior Court of Justice against Shoppers Drug Mart Inc. and Shoppers Drug Mart (London) Limited (together, "Shoppers") on behalf of certain current and former Shoppers' Associates (the "Class Members") (the "Class Action").

The plaintiffs are seeking compensation from Shoppers for its alleged breaches of the Associate Agreement, as well as losses suffered by certain current and former Shoppers' Associates in Ontario because Shoppers' has not paid professional allowances that it allegedly received on behalf of them. Shoppers denies all the claims made against it. By certifying this action as a class proceeding, the court has not decided if any of the allegations are true. The plaintiffs will be required to prove their claims at a trial.

If you are a Class Member, your rights will be affected. Each Class Member who does not opt out of the Class Action will be bound by the terms of any settlement, or any judgment, whether favourable or not. Each Class Member who does not opt out may be entitled to share in the amount of any monetary settlement reached in the Class Action.

This is an abbreviated notice. If you are a current or former Shoppers' Associate, you should review the complete notice available at [*INSERT URL FOR NOTICE].

If you have any questions, please contact Class Counsel, Paliare Roland Rosenberg Rothstein LLP, by email at info@shoppersclassaction.com or by telephone, toll free, at 1-877-203-2866.

GIOVANNI SPINA et al. vs. **SHOPPERS DRUG MART INC. et al.**
Plaintiff(s) Defendant(s)

Court File No. CV-10-414774-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceedings commenced at
TORONTO

ORDER

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**
Barristers
155 Wellington Street, 35th Floor
Toronto, ON M5V 3H1

Ken Rosenberg (LSUC #2102H)
Tel: (416) 646-4304
ken.rosenberg@paliaroland.com

Odette Soriano (LSUC #37326J)
Tel.: 416.646.4306
odette.soriano@paliaroland.com

Fax: 416.646.4301

Lawyers for the Plaintiffs