

CITATION: Spina v. Shoppers Drug Mart Inc. 2013 ONSC 4675
COURT FILE NO.: 10-CV-414774 CP
DATE: July 9, 2013

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

GOIVANNI SPINA, JOHN SPINA
DRUGS LTD., ROMEO VANDENBURG,
AND ROMEO VANDENBURG DRUG
COMPANY LTD.

Plaintiffs

– and –

SHOPPERS DRUG MART INC.,
SHOPPERS DRUG MART
CORPORATON and 919979 ALBERTA
LTD.

Defendants

)
)
) *Kenneth T. Rosenberg, Odette Soriano and*
) *Michael Fenrick for the Plaintiffs*
)
)

)
) *Mark A. Gelowitz, Jennifer Dolman, and*
) *Evan Thomas for the Defendants*
)
)

Proceeding under the *Class Proceedings*
Act, 1992

) **HEARD:** June 3-6, 2013
)

REASONS FOR DECISION

PERELL, J.

A. INTRODUCTION

[1] The Plaintiffs Giovanni Spina, John Spina Drugs Ltd., Romeo Vandenburg, and Romeo Vandenburg Drug Company Ltd. sue Shoppers Drug Mart Inc. in a proposed national class action under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6.

[2] The Plaintiffs seek leave to discontinue their claims against Shoppers Drug Mart Corporation, which is the parent company of Shoppers, and against 919979 Alberta Ltd., which is an Alberta corporation that owns the trademarks associated with Shoppers' brands and branding. That part of the motion is unopposed, and the discontinuances should be granted because the claims in this action are not against these defendants.

[3] What remains of the motion is a continuation of a motion for certification that was heard in August 2012. At that time, the Defendants brought a cross-motion under Rule 21 to strike certain claims advanced by the Plaintiffs. In their cross-motion, the Defendants submitted that it

was plain and obvious that some of the claims in the proposed class action did not disclose a cause of action. Further, in their defence of the certification motion, the Defendants challenged several more causes of action, and then, as it does again now, Shoppers submitted that the remaining claims do not satisfy the criteria for certification as a class action.

[4] As I explained in my Reasons for Decision, for what I shall sometimes call the combined motion, reported *Spina v. Shoppers Drug Mart Inc.* 2012 ONSC 5563, the combined motion took several odd turns with the result that only the Rule 21 cross-motion and only one aspect of the certification motion, the cause of action criterion (s. 5(1)(a) of the Act), were determined. The balance of the certification motion was adjourned to await the outcome of the combined motion.

[5] For the combined motion, I concluded that it was indeed plain and obvious that some of the Plaintiffs' claims, including the claims about rebates and breaches of fiduciary duty, would fail, but that it was not plain and obvious that some of the Plaintiffs' claims, including the claim about professional allowances, would fail. I also concluded that some of the Plaintiffs' claims were legally tenable but redundant claims.

[6] In light of my decision on the combined motion and also an order I made that allowed further evidence to be filed for the certification motion, the Plaintiffs delivered an Amended Statement of Claim, and the parties delivered additional materials, engaged in new examinations, and delivered supplementary factums. The parties now return to court to complete the certification motion.

[7] As the certification motion now returns to the court, the overriding question is whether the Plaintiffs' action should be certified as a class action having regard to the various causes of action that survived the combined motion. However, Shoppers argues that the Plaintiffs revised pleading contains a new unjust enrichment claim that is legally untenable. The Plaintiffs deny that they have pleaded a new cause of action, and they submit that there is an issue estoppel and the court should not revisit the cause of action criterion for this unjust enrichment claim.

[8] As the discussion below will reveal, I do not need to discuss issue estoppel because I accept the newly pleaded unjust enrichment claim as satisfying the cause of action requirement for certification.

[9] Further, as the discussion below will reveal, once the Plaintiffs' action is broken down into its discrete claims that satisfy the cause of action criterion, then parts of the Plaintiffs' action also satisfy the other criteria for certification, but some claims are not suitable for certification as a class action. As the discussion below will reveal, although the Plaintiffs satisfy the cause of action criterion and the identifiable class criterion, nevertheless, some of their proposed common issues do not satisfy the common issues criterion and or the preferable procedure criterion.

[10] My ultimate conclusion is that subject to the terms and conditions described below, the Plaintiffs' action should be certified as a class action.

B. METHODOLOGY

[11] A broad brush painting of the Plaintiffs' action is that the Plaintiffs allege that Shoppers is pocketing money; i.e., professional allowances and overcharges for services that should be included in the revenue (gross sales) of the franchised stores, where after the payment of

expenses, the stores' profits would be shared among the franchisees, (the Associates) and Shoppers. The Plaintiffs submit that Shoppers is breaching its contracts and its statutory duties by not sharing properly the profits from its franchise system. Further, the Plaintiffs allege that Shoppers is systemically breaching its duty of good faith by imposing costs for mandatory inventory purchases and in its setting standards of performance for a profit sharing program in a way that harms the Associates.

[12] To be somewhat more legally precise, in their Amended Statement of Claim, the Plaintiffs allege that Shoppers is breaching its contracts with the Plaintiffs and other Associates. The Plaintiffs also allege that Shoppers is operating its franchise system in breach of its duty of good faith and fair dealing under the common law and under: (a) s. 3 of the *Arthur Wishart Act*; (b) s. 7 of the *Franchises Act*, R.S.A. 2000, c. F-23; (c) s. 3 of the *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1; (d) s. 3 of *The Franchises Act*, S.M., 2010, c. 13; (e) s. 3 of the *Franchises Act*, S.N.B. 2007, c. F-23.5, all of which require Shoppers to have due regard for the Associates' legitimate interests and reasonable expectations when it make decisions and takes actions. The Plaintiffs also make claims of unjust enrichment.

[13] Shoppers' defence is that it is not obliged to share any more than it has, and it is contractually and statutorily entitled to make its own profit. Shoppers pleads that it has the right to the professional allowances, and it denies that it has been unjustly enriched at the expense of the Associates.

[14] At the time of the combined motion, the Plaintiffs advanced six categories of claims against Shoppers; namely:

- The Professional Allowances Claim. This claim is based on Shoppers' alleged failure to account for and remit professional allowances to Ontario Associates. The causes of action associated with this claim are: breach of contract, breach of statutory duty of fair dealing and/or common law duty of good faith, breach of fiduciary duty, breach of duty as agent, and unjust enrichment.
- The Cost Recovery Fees Claim. This claim is based on Shoppers' alleged failure to act in good faith in connection with equipment rental, service and other charges to Associates. The associated causes of action are: breach of contract, and breach of statutory duty of fair dealing and/or common law duty of good faith, and unjust enrichment.
- The Budgeting Practices Claim. This claim is based on Shoppers' alleged systemic and punitive budgeting practices. The associated causes of action are: breach of contract, and breach of statutory duty of fair dealing and/or common law duty of good faith.
- The Inventory Practices Claim. This claim is based on Shoppers' alleged imposition of unfair inventory practices. The associated causes of action are: breach of contract, breach of statutory duty of fair dealing and/or common law duty of good faith, and unjust enrichment.
- The Advantages of Bulk Purchasing/Rebates Claim. This claim is based on Shoppers' alleged failure to account for and provide Associates with the advantages of bulk purchasing, including rebate revenues.

- The Interference with Association Claim. This claim is based on Shoppers' alleged interference with the Associates' right to organize or associate in an independent franchisee association.

[15] In my Reasons for Decision for the combined motion, I concluded that the Plaintiffs satisfied the s. 5 (1)(a) criterion for certification with respect to: (1) the professional allowances claim; (2) the costs recovery fees claims; (3) the budgeting practices claim; and (4) the inventory practices claim. It is these four categories of claim that must be assessed as to the suitability for certification. The unjust enrichment claim that Shoppers submits is new is an aspect of the professional allowances claim.

[16] In the combined motion, I concluded that it was plain and obvious that the Plaintiffs' claim for rebates, and interference with association were untenable. I also concluded that claims for breach of fiduciary duty and of an alleged duty of disclosure were untenable and all the untenable claims should be struck from the Amended Statement of Claim without leave to amend. It is no longer necessary to analyze whether these claims would satisfy the criterion for certification.

[17] It now remains to be determined whether the surviving causes of action satisfy the other criteria for certification as a class action. Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[18] To analyze what claims in the Plaintiffs' action should be certified as a class action and to explain why some claims should not be certified, I shall divide these Reasons for Decision into the following parts:

- Introduction
- Methodology
- Procedural and Evidentiary Background
- General Factual Background
 - The Parties
 - The Nature of the Business Arrangement between Shoppers and its Associates
- Background to the Professional Allowances Claim
- Discussion and Analysis
 - Introduction
 - Professional Allowance Claims
 - The Costs Recovery Fees Claim
 - The Budgeting Practices Claim
 - The Inventory Practices Claim

- Conclusion

[19] Under these headings, the methodology will be to begin by describing the general factual background to all of the claims. In that part of my Reasons, under the heading the Parties, I will conclude that the Plaintiffs have satisfied the class definition and the representative plaintiff criteria for a class action. Next, I will describe the factual and legislative background to the professional allowances claim, which concerns the subclass of Associates that carry on business in Ontario, where professional allowances were available until recently. Then, I will discuss the suitability for certification under the *Class Proceedings Act, 1992* of each of the four categories of claims, beginning with the professional allowance claim. During the discussion of each category of claim, I shall, where necessary for the analysis, add to the factual background. The conclusion section will be a brief summary and address the matter of costs.

C. PROCEDURAL AND EVIDENTIARY BACKGROUND

[20] The Plaintiffs commenced the proposed class action by Notice of Action on November 19, 2010. They delivered a Statement of Claim on December 20, 2010, which they subsequently amended on February 28, 2012.

[21] During the argument of the combined motion, the Plaintiffs delivered a compendium of documents that included documents incorporated by reference into the pleading.

[22] The claims against Shoppers were set out in the Plaintiffs' Amended Statement of Claim as augmented by the Compendium.

[23] After the combined motion, on March 15, 2013, the Plaintiffs delivered a Fresh as Amended Statement of Claim.

[24] Shoppers has not delivered a Statement of Defence.

[25] For the combined motion and for the resumption of the certification motion, the Plaintiffs delivered affidavits from Mr. Spina and Mr. Vandenburg, both of whom were cross-examined. The Plaintiffs also delivered an affidavit from Bob Ferguson, a chartered accountant with a specialty in forensic accounting to provide an expert's evidence about the damages calculations. He too was cross-examined.

[26] For the combined motion and for the resumption of the certification motion, Shoppers delivered affidavits from Angelo Mariano and Erik Botines, who are Shoppers' vice-presidents. Messrs. Mariano and Botines were cross-examined.

D. GENERAL FACTUAL BACKGROUND

1. The Parties

[27] The Plaintiffs are two Ontario residents and their respective Ontario corporations. Giovanni (John) Spina is a licensed pharmacist who owns John Spina Drugs Ltd. Romeo Vandenburg is a licensed pharmacist who owns Romeo Vandenburg Drug Company Ltd.

[28] The Defendant Shoppers Drug Mart Inc. ("Shoppers") is a wholly owned subsidiary of Shoppers Drug Mart Corporation, which is a public corporation trading on the Toronto Stock

Exchange. 911979 Alberta Inc. is an affiliated corporation that owns the trademarks associated with the network of franchised retail pharmacy stores operated by Shoppers under the name Pharmaprix in Québec and Shoppers Drug Mart across the rest of Canada.

[29] In February 1992, Mr. Spina and Spina Drugs Ltd. signed an Associate Agreement to franchise store #690 located in Whitby, Ontario. The Spina Plaintiffs now own franchise store #1224 in Ajax, Ontario. In March 2009, the Spina Plaintiffs signed a 2002 Associate Agreement.

[30] In August 1994, the Vandenburg Plaintiffs signed an Associate Agreement to franchise Shoppers Drug Mart store #962 located in Whitby, Ontario. The Vandenburg Plaintiffs now own franchise store #862 located in Toronto, Ontario. In December 2011, the Vandenburg Plaintiffs signed a 2010 Franchise Agreement.

[31] The qualifications of Messrs. Spina and Vandenburg to be representative plaintiffs were not seriously challenged. The main challenge to their satisfying the fifth criterion for certification was alleged deficiencies in the litigation plan. There are, however, no fatal flaws to the litigation plan, which, however, will now have to be adapted to the conclusions reached below in this certification motion. My overall conclusion is that the fifth criterion has been satisfied subject to a final version of the litigation plan being settled by the parties or at a case conference by the court if the parties cannot agree about the litigation plan.

[32] The Plaintiffs bring their proposed class action on behalf of the following class and subclass:

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

All current or former Shoppers Drug Mart Associates resident in Canada (save for Associates with franchised businesses located in Québec) who entered into an Associate Agreement with Shoppers Drug Mart dated on or after January 1, 2010 (the "2010 Agreement Class").

All current or former Shoppers Drug Mart Associates who performed direct patient care services (as defined in both the *Drug Interchangability 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").

[33] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[34] In my opinion, with the addition to the definition of a class closing date; i.e., the date of the certification of this action, the class definitions satisfy the class definition criterion for certification.

2. The Nature of the Business Arrangement between Shoppers and the Associates

[35] Shoppers was founded in 1962 by Toronto pharmacist Murray Koffler. It is one of the oldest franchise systems in Canada. There are now approximately 1,181 Shoppers Drug Mart and Pharmaprix stores. Approximately 50% of the stores are located in Ontario. The Shoppers' stores

sell pharmaceuticals and also consumer goods, including cosmetics, groceries, and toiletries. In 2009, the stores had sales of approximately \$10 billion.

[36] The Shoppers' stores operate as franchises. The franchisees, who are called "Associates" sign a franchise agreement, known as the "Associate Agreement." Under the franchise scheme, the pharmacists operate the Shoppers' Store, through a wholly or partially-owned corporation. both the Associate and his or her corporation sign the Associate Agreement. Associates are not employees. They are independent business owners operating the "Franchised Business" as governed by the Associate Agreement. An Associate can leave the franchise system whenever he or she chooses on short notice. An Associate may terminate his or her Associate Agreement without cause on 60 days' written notice at any time.

[37] The Associate Agreement is a standard form document. The Associate Agreement is updated periodically, and the currently operative agreements are the 2002 Associate Agreement and the 2010 Associate Agreement. With a few exceptions, the two agreements are substantively similar. The pertinent articles of the 2002 Associate Agreement and of the 2010 Associate Agreement are set out in Schedule A to this judgment.

[38] Under the Associate Agreement, Shoppers grants a license to an Associate to operate one or more franchised stores. Shoppers provides services to the Associates, who charge the expense to the operation of the store. The services include: operational support, marketing, advertising, purchasing, distribution, information technology, human resource services, loss prevention, insurance, and accounting.

[39] The Associate agrees to devote his or her full time and attention to the operation and management of the Store and to conduct the store's business in accordance with all specifications, standards, policies and operating procedures prescribed by Shoppers. The store must participate in the advertising programs prescribed from time to time by Shoppers. The store must deal only in products specified by Shoppers, and the store must purchase all products directly from Shoppers or from suppliers specified by Shoppers.

[40] Under the Associate Agreement and under Shoppers' franchise system, Associates are required: (a) to operate under a common form of Associate Agreement and Operations Manual; (b) to sell common goods; (c) to purchase goods only from a distribution centre owned and operated by Shoppers or from specific preferred suppliers; (d) to share common advertising; (e) to participate in the Optimum Program, a customer loyalty program; (f) to retain common accounting and bookkeeping services; and (g) to acquire common equipment, including computer equipment as directed by Shoppers.

[41] Shoppers acquires or leases the store's premises, and then Shoppers licenses the use of the premises to the Associate, and the occupancy charge is charged to the store's cost of doing business. Under the Associate Agreement, the payment of all rent and other occupancy costs under the lease is a cost of the business, and Shoppers charges a fee (the "Occupancy Charge") to each Associate for the amount of rent, common area maintenance and realty tax payable under the applicable lease for the store. Once again, these charges or expenses are run through the business.

[42] Shoppers purchases and installs the equipment for the store and then rents the equipment to the Associate, and this too is a charge against the operation of the store.

[43] Under the Associate Agreement, the Franchised Business is required to pay "Store Charges" to Shoppers on account of the services and programs that Shoppers provides to the stores. The Store Charges include: (a) Academy Fee, for training courses; (b) Retail Accounting Fee, for bookkeeping and accounting services; (c) Insurance Fee, for an insurance program obtained by Shoppers; (d) Loss Prevention Fee, for a loss prevention process; (e) IT Support Fee, for computer system technical support; (f) Dataline Communications Fee, for a technology communication system; (g) PIN Pad Fee, for the PIN pads used to process debit and credit card transactions; and (h) the Optimum Fee.

[44] The Optimum Fee is the expense of a loyalty points program that was introduced by Shoppers in 2000 allegedly pursuant to section 11.05 of the 2002 Associate Agreement or expressly pursuant to section 11.07 of the 2010 Associate Agreement. All these costs are expenses of the franchised store. The Plaintiffs dispute that the Optimum fee is authorized by the 2002 Associate Agreement.

[45] In support of their costs recovery fee claim, the Plaintiffs rely on a memorandum dated September 16, 1996, which they allege is part of the Manual that is part of the franchise system. The memorandum sets out the principle for fees and charges to stores. The memorandum states:

Many services and activities for the benefit of the stores are co-ordinated or performed centrally in order to obtain the advantages available by virtue of the size of our operations. These are activities which would otherwise have to be performed by the stores or a third party but where it benefits our overall operations to perform them centrally.

The advantages of size not only provide for substantially lower average costs for all stores, but allows for higher quality standards and the removal of some inconvenient administration activities from the store.

Fees and other charges to stores are intended to cover the cost of these services by central office without a profit element.

[46] There is a contentious issue about whether this memorandum a part of the Associate Agreement. The Plaintiffs acknowledge that what constitutes the manual is a disputed point, but they submit that this is a matter to be determined by the common issues judge, who may conclude that the communications relied on by the Plaintiffs are part of the manual notwithstanding an entire agreement clause contained in the Associate Agreement.

[47] It is the Plaintiff's position that Shoppers is breaching the Associate Agreement and its statutory or common law duties of good faith by making a profit from the Store Charges, which the Plaintiffs label as "Cost Recovery Charges." The Plaintiffs submit that Shoppers is not entitled to collect fees for providing services and equipment to the Associates with a profit element. In the alternative, if there is a profit element it must be set in good faith. Shoppers, however, says that it is entitled to add a profit element to its fees.

[48] Mr. Mariano, who was Shopper's deponent, testified that Shoppers' approach to Store Charges was to set them to recover the operating costs associated with the services plus its capital invested, including a reasonable return on capital.

[49] Another matter of dispute between the parties concerns two aspects of Shoppers inventory policy. The first inventory disputes concerns the circumstance that from time to time, Shoppers generates a mass order or "MOG," which is a term used to describe a mass delivery of

product from Shoppers' distribution centres to Associate stores. The Plaintiffs argue that Shoppers requires Associates to pay for inventory that they have not ordered and may not want or need.

[50] The second inventory dispute concerns Shoppers strict policy about product returns, which make it very difficult for an Associate to return unwanted or damaged goods or to receive compensation for unshipped goods. It is alleged that the inventory policies make it virtually impossible for the Associates to make a timely claim and that the policies have had an adverse impact on the profitability of the stores. For example, Mr. Spina's evidence was that in 2009, he tracked over \$10,000 in rejected claims and between January 2010 and July 2011, he traced over \$6,000 in rejected claims.

[51] Yet another area of dispute concerns Shopper's approach to setting budgets, which have a substantive role in the manner in which profits are shared between an Associate and Shoppers. The Plaintiffs allege that Shoppers has created a budgeting process that is inherently biased against the Associates and unlawfully increases the share of the profits received by Shoppers at the expense of the Associates.

[52] To understand the dispute between the parties, it is important to keep in mind that the scheme for setting budgets and for Shoppers charging a "Service Fee" ultimately determines the extent of profit sharing, and the scheme may or may not have aspects of an incentive program to motivate the Associates to greater productivity and store profits. The Plaintiffs however, deny that it is an incentive program, but rather the Plaintiffs submit that Shoppers systemically imposes unreasonable budget targets that the individual Associates are unlikely to meet with the consequence that Shoppers' share of the profits goes up at the expense of the Associate.

[53] Under the Associate Agreement, Shoppers sets a budget for the operation of the store. The budget guarantees every Associate minimum annual earnings. For example, the Associate Guarantee for Associates operating a single store (a "Single Store Associate") and Associates operating a 24-hour store (a "24-Hour Store Associate") is \$120,000 and \$170,000 per year, respectively.

[54] Under the Associate Agreement, Shoppers agrees to absorb any operating losses incurred by the store. In other words, if a store loses money, the Associate is guaranteed minimum annual earnings and the loss is not carried forward to the following year or charged back to the Associate's earnings. The risk of an operating loss is borne entirely by Shoppers. Thus, an Associate is guaranteed earnings of at least \$120,000 per year in return for operating the store and the risk of loss for the store is on Shoppers.

[55] The "Service Fee" is a fee charged by Shoppers based on the Gross Sales of the store and the profitability of the store's business based on the budget. The profits or losses are thus hypothetical profits or losses as determined by the budget and actual revenues. The amount of the Service Fee payable by the Associate is the most significant component in determining the annual earnings of the Associate. After accounting for all income from operations (Gross Sales) and after deductions for the cost of doing business, the net income is allocated in part to the Associate and in part to Shoppers based on a pre-determined formula, subject to the Minimum Guarantee.

[56] In 2006, Shoppers introduced a new model for determining Associate Earnings (the "New Financial Model"). Since 2006, Associate Earnings have been determined based upon a fee table. Under the New Financial Model, any variance between the store's actual profit and the planned profit is apportioned; that is: (a) where the profitability achieved is greater than planned, the Associate receives 30% of any overachievement in stores that exceed the budgeted profitability and 20% of any overachievement in new stores or stores that operate at a loss; and (b) where the profitability achieved is less than planned, the Associate is responsible for 30% of the underachievement in stores with profitability of \$600,000 or more per year and 20% in stores with profitability of less than \$600,000. The Plaintiffs submits that this new approach is unreasonable, biased, and unfair and Shoppers's specification of the profit targets penalizes the Associates.

[57] Shoppers counters by arguing that the Plaintiffs ignore the facts that: (i) Associates were actively involved in the creation of the budgeting process and the New Financial Model, (ii) the budgeting process has an objective component because are budgets are based on the actual results from the year prior, (iii) Associates frequently negotiate and refine their individual plan and re-open it during or at the end of the fiscal year, if the circumstances warrant. Shoppers submits that over 800 Associates had their plans re-opened and revised in a three year period at their request or at the request of a District Managers. SDMI recognizes that it is in its interests and the interests of the Associates to create a fair and achievable plan; and (iv) there is a formal process for the settlement of the projections and assumptions that go into a plan before the plan is finalized.

E. BACKGROUND TO THE PROFESSIONAL ALLOWANCES CLAIM

[58] The relevant sections of the Ontario legislation about pharmaceutical rebates and professional allowances are set out in Schedule "B" to these reasons.

[59] Before I describe the background to the Plaintiff's Professional Allowances claim, it is necessary to observe that there is a surreal or ethereal aspect to the factual background that arises from the circumstance that a Legislature - and for that matter contracting parties - have the freedom to define words and ideas in a way that does not accord to what goes on in the so-called real world. For example, as I remarked to the parties during the oral argument, in *Re Ontario Mushroom Co. Ltd. and Learie* (1977), 5 O.R. (2d) 639 (Div. Ct.), a majority of the Divisional Court held that mushrooms were vegetables for the purposes of a farming statute notwithstanding that in the real world mushrooms are an edible fungus and not a vegetable.

[60] As will seen shortly, this phenomenon of surreal definitions is present in the Ontario government's regulation of professional allowances, where, for instance, a pharmacist attending a continuing education conference to upgrade his or her professional skills is regarded as performing "direct patient care," which I suspect would be a surprise to the unidentified and unidentifiable patient who is the recipient of this direct care.

[61] In the case at bar, surreal definitions are also present in the parties' critical arguments about whether professional allowances are rebates. Under the statutes, rebates are defined by the Legislature to be a discount or refund from a pharmaceutical vendor; however, in Shoppers' factual circumstances, it turns out that a professional allowance is a charge that it, as pharmaceutical purchaser, makes and invoices to the pharmaceutical vendor. This may be a

rebate, but it is, at least, unusual when a purchaser charges the vendor for selling the goods and calls the charge a rebate.

[62] It will ultimately be for a trial judge to resolve these arguments about the legislative and contractual nature of rebates and professional allowances, and I should not be taken as deciding anything substantive as to describe the factual background to the professional allowances claim, but for present purposes, it is necessary to point out and to keep in mind that there seems to be an unavoidable artificial character in describing the factual background and the parties' arguments.

[63] Before I describe the background to the Plaintiff's professional allowances claim, it is also helpful to describe the general nature of the arguments and counterarguments about the claim. The Plaintiffs advance two theories for their claim for professional allowances. The first theory is that professional allowances are revenue of the drug store that Shoppers has unlawfully intercepted and thereby unjustly enriched itself. Shoppers counters that professional allowances are rebates permitted to be paid under the provincial legislation and that pursuant to the terms of the Franchise Agreement, it is entitled to keep them for itself.

[64] The Plaintiffs' second theory is that professional allowances are outside of the Franchise Agreement and professional allowances may be earned by pharmacists, and also by Shoppers, but Shoppers has taken more than its share and has been unjustly enriched by taking the pharmacists' share of the professional allowances. Shoppers's counterargument is again that professional allowances are rebates that it may keep under the Franchise Agreement, and it adds that, in any event, the Ontario pharmacists have no statutory entitlement or other entitlement to the professional allowances and that the second theory cannot satisfy the deprivation element of a claim for unjust enrichment.

[65] In the Discussion and Analysis portion of the Reasons, I will address how these arguments and counterarguments impact on the certification criteria, but with these preliminary observations, I turn now to describe the factual background to the professional allowances claim.

[66] Shoppers is a pharmaceutical drug wholesaler, and it purchases drugs from manufacturers and resells the drugs without a distribution mark-up to its Associates, who dispense the drugs to patients. Up until 2006, Shoppers purchased the drugs and kept rebates, as it was entitled to do under the Franchise Agreements. I understand that these rebates were conventional rebates in the sense that they emanated from the vendor.

[67] In 2006, the *Transparent Drug System for Patients Act, 2006*, S.O. 2006, c. 14 amended the *Ontario Drug Benefit Act* and the *Drug Interchangeability and Dispensing Fee Act*, and the effect of the amendments was to prohibit generic drug manufacturers from paying and pharmacy operators from receiving, "rebates," as defined in the legislation. Debates about the legislation indicate that the government wished to stop the manufacturers granting rebates, which ultimately increased the cost of the drugs to the ultimate consumer, including governments and hospitals. The government, however, apparently wanted to allow the manufacturers to subsidize patient care by pharmacists, and thus the Ontario government created and permitted a particular kind of payment by manufacturers, which it called a professional allowance and which it exempted from the prohibition of manufacturers paying rebates.

[68] The legislation expressly excluded "professional allowances" from the definition of "rebate." Under the legislation, "professional allowances" are defined as "a benefit, in the form

of currency, services or educational materials, that are provided by a drug manufacturer to operators of pharmacies for the purposes of direct patient care.”

[69] The legislation defines what is “direct patient care,” and, to me at least, some of the statutorily defined examples of direct patient care seems rather indirect and remote from the patient. Other examples, however, come closer to what in the world outside of the statute would resemble patient care. For example, professional allowances are for clinic days provided by pharmacists to disseminate disease or drug-related information including flu shot clinics, and asthma clinics.

[70] Subsequently, professional allowances were phased out and prohibited. As of July 1, 2010, professional allowances were prohibited for sales of generic drugs under the *Ontario Drug Benefit Act* (i.e., for sales in the public payor drug system). Recently, as of April 1, 2013, professional allowances were prohibited for sales of generic drugs under the *Drug Interchangeability and Dispensing Fee Act*; i.e., for sales in the private payor drug system.

[71] However, between 2006 and July 2010, Shoppers received professional allowances from generic drug manufacturers under both the private and public payor systems. After July 2010 and until April 1, 2013, Shoppers received professional allowances from manufacturers on generic drugs under private payor systems until April 1, 2013. These professional allowances were in the form of money paid by the generic drug manufacturers to Shoppers. The Associates knew that Shoppers received and did not pass on the professional allowances. It has always been well-known among Associates that Shoppers received professional allowances and did not share them with Associates.

[72] Typically, the professional allowance was invoiced by Shoppers and the amount of the invoice was based on a percentage of the price for the generic drugs and thus the amount of the professional allowance was not directly connected to the patient care services being performed to justify the payment of the professional allowances.

[73] As I understand it Shoppers would come to an agreement with a generic drug manufacturer to purchase a quantity of drugs at an agreed price and the drug manufacturer would agree to pay an invoice from Shoppers for the professional allowances associated with the as yet unperformed direct patient care that was a required part and purpose of the professional allowance. Under the legislation for the private payor system, the amount of professional allowances that a manufacturer could pay was capped at 20% of the prescription drug costs.

[74] As noted above, it is not for me to say whether professional allowances are a rebate under the legislation or under the Franchise Agreement, but whatever they are, they are surreal and ethereal. They have the appearance of being compensation for direct patient care, but they are calculated as a percentage of the quantity and price of the drugs sold. They are justified by so-called direct patient care, which has yet to be performed, and the direct patient care does not necessarily relate to the drugs being sold. That the professional allowances are capped has nothing to do with the amount of direct patient care.

[75] While in practice, the calculation of professional allowances was based on the drugs sold and not connected to calculating the work performed by the pharmacist or the pharmacy to qualify for a professional allowance, the legislation required Shoppers to report the amount of

professional allowances received by it from generic drug manufacturers and the amount expended for the purpose of providing direct patient care.

[76] Shoppers reported to the Ontario government the total amounts of expenditures it and the stores spent on direct patient activities. These amounts included the aggregate amount of the so-called direct patient care expenditures across all stores in Ontario and the total amount of expenditures in Ontario at the central office level.

[77] Shoppers did not report expenditures on direct patient care activities on a store-by-store basis. Rather, it identified store-level activities that would qualify as direct patient care, and it required each Associate to report time and expenses at the store for performing these activities.

[78] After collecting this information, Shoppers calculated the system-wide expenditures in Ontario for the purpose of providing direct patient care using: (i) the information provided by Associates, (ii) other information available to it (e.g., script counts), and (iii) reasonable assumptions about pharmacist and technician wage rates, the frequency of interactions with patients, and the amount of time required for certain activities (e.g., over-the-counter counselling). The standard wage rates were based on averages across all Shoppers Stores in Ontario.

[79] Shoppers did not audit or verify what Associates reported to it. Further, some Associates – approximately 10% in any given reporting period – did not complete their reports as required. The fact that store-level data was inaccurate or missing, however, was not of serious concern to Shoppers because it only had to show to the Ontario government that more had been expended on the so-called direct patient care than had been received in professional allowances, which was never a problem.

[80] The direct patient care activities reported by Associates to Shoppers were not new activities. All of the direct patient care activities reported by Associates were activities that Associates, or the pharmacists and technicians employed by Associates, performed before the introduction of the legislation regulating professional allowances.

[81] Shoppers submits that it incurred the vast majority of reported direct patient care expenses, either by absorbing store-level expenses or by making expenditures at the central-office level. In particular, it submits that for stores in a loss position, it would be Shoppers that would absorb the loss caused by the professional allowance expenditures.

[82] Between July 2007 and July 2010 alone, Shoppers submitted that it expended approximately \$37 million on direct patient care activities at the central office level.

F. DISCUSSION AND ANALYSIS

1. Introduction

[83] In the combined motion, I decided that the Plaintiffs had satisfied the cause of action criterion for certain causes of action, and earlier in this judgment, I have decided that the class definition and the representative plaintiff criterion have been satisfied.

[84] It remains now to discuss and to determine whether the Plaintiffs' alternative theory for their unjust enrichment claim satisfies the cause of action criterion and then whether there are

common issues, and finally I must decide whether a class action is the preferable procedure for the resolution of the common issues.

[85] In the following sections of the discussion and analysis, I will consider these remaining criteria for four types of claim; namely: (1) the Professional Allowance Claim; (2) the Cost Recover Fees Claim; (3) The Budgeting Practices Claim; and (4) the Inventory Practices Claim.

[86] To foreshadow my conclusions, the professional allowances claim, the cost recovery fees claim; and the inventory practices claim, should be certified as a class proceeding. The budgeting practices claim should not be certified.

2. Professional Allowance Claim

[87] The essence of the Plaintiffs' professional allowance claim under two theories is that Shoppers' has unjustly enriched itself by intercepting the professional allowances that the Plaintiffs submit should either: (1) fall into gross revenues; or (2) should be paid to the pharmacists directly. I have already held that the first theory, which also sounds in breach of contract, shows a cause of action. Despite the argument of Shoppers, I also conclude that the second theory satisfies the cause of action criterion.

[88] The first theory and the second theory have some similarities. Both are based on the undoubted facts that Shoppers receives professional allowances but does not remit any portion of them to the Associates. Notwithstanding Shoppers' argument, in my opinion, both theories also satisfy the deprivation element of the elements of an unjust enrichment claim, and both theories will fail if Shoppers establishes its defence that there is a contractual juristic reason for it keeping the professional allowances.

[89] The major difference between the two theories is that the second theory as a claim (but not in its defence) stands outside of the Franchise Agreement and is independent of any breach of contract claim. In this regard, unlike theory 1, where the breach of contract claim is redundant, the breach of contract claim is no alternative because theory 2 stands outside of the contract and assumes that professional allowances are an independent right of the pharmacists.

[90] For present purposes, I am satisfied that both theories satisfy the cause of action criterion for certification.

[91] I move on to consider the common issues criterion for the professional allowances claim.

[92] For an issue to be a common issue, it must be a substantial ingredient of each Class member's claim and its resolution must be necessary to the resolution of each Class member's claim: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 18.

[93] The fundamental aspect of a common issue is that the resolution of the common issue will avoid duplication of fact-finding or legal analysis: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39; *McCracken v. Canadian National Railway Co.* 2012 ONCA 445 at para. 183.

[94] With regard to the common issues, "success for one member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent." That is, the answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class:

Shopping Centres Inc. v. Dutton, *supra* at para. 40; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 32; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160; *McCracken v. Canadian National Railway Co.*, *supra*, at para. 183.

[95] Common issues should not be framed in overly broad terms. It does not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms because inevitably such an action would break down into inefficient individual proceedings: *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 29; *McCracken v. Canadian National Railway Co.* 2012 ONCA 445 at para. 183.

[96] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member: *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Div. Ct.) at paras. 3, 6. Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries: *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C.S.C.) at para. 51, var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.); *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.).

[97] An issue can satisfy the common issues requirement even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In determining the commonality of a question, the focus is on the commonality of the question, and it is an error to focus on those aspects of the claim that would require individual determination. The comparative extent of individual issues is not a consideration in the commonality inquiry although it is a factor in the preferability assessment. See *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 51 to 65, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[98] The common issue criterion presents a low bar: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General)* (2004), O.R. (3d) 401 (C.A.) at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. ref'd [2010] S.C.C.A. No. 348. An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General)* *supra*, at para. 53.

[99] The Plaintiffs propose the following common issues respecting the Professional Allowances Class:

- Q1. Did the Defendant breach its contractual obligations under the 2002 and 2010 Associate Agreements, its statutory obligations under section 3 of the *Arthur Wishart Act* ("AWA") and/or its 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 Interchangability 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?

- Q2. Was the Defendant unjustly enriched by retaining the Professional Allowances it 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?
- Q3. If the answer to 1 or 2 is yes, can the amount of damages owing to the Professional Allowance Class Members be assessed, in whole or in part, on an aggregate basis?
- Q4. If yes, in what amount?

[100] In my opinion, Q1 and Q2 satisfy the common issues criterion.

[101] In my opinion, Q3 and Q4 do not satisfy the common issues criterion because there is no basis in fact for concluding that an aggregate assessment is possible. In this regard, I understood that the Plaintiffs conceded that their breach of contract (theory 1) claim for unjust enrichment would require individual assessments of the flow of the professional allowances through the revenue stream of each Shoppers' store.

[102] The Plaintiffs argue, however, that under theory 2, there is a simple methodology, a top-down means, to calculate the professional allowances in the aggregate. The simple methodology is to calculate Shoppers' invoices for professional allowances and then deduct Shopper's own expenditures for direct patient care as that term is defined by the legislation. The remaining balance quantifies the class wide unjust deprivation and Shopper's unjust enrichment in the aggregate. With this sum calculated, it is no longer Shoppers' concern how the aggregate damages are allocated.

[103] This simple methodology is superficially attractive, but it does not survive closer analysis, and there is no basis in fact for another theory to calculate damages in the aggregate. The theory falls apart when its hidden assumption is exposed. The hidden assumption is that Shoppers does not now pay for professional allowance expenditures at the individual store level. Shoppers, however, has demonstrated that it does in fact pay for those expenses to the tune of 80% at least and more where the individual store fails to meet its revenue budget and the losses are absorbed by Shoppers.

[104] It follows that assuming that the Plaintiffs succeed on their breach of contract claim or their unjust enrichment claim on whatever theory that there will need to be individual trials to calculate the damages. Thus, Q3 and Q4 should not be certified.

[105] There are however, two useful questions that could and should be answered at the common issues trial that would advance the class members' individual claims. Those questions are designed to quantify the amount of professional allowances that Shoppers received and how much it expended itself on professional allowance expenditures. I suspect that the parties may even common to an agreed statement of fact about these issues, but if they do not, I certify the following questions Q3 and Q4:

- Q3. If the answer to 1 or 2 is yes, what is the amount that Shoppers received for professional allowances?
- Q4. If the answer to 1 or 2 is yes, what is the amount that Shoppers expended at the central office level for direct patient care?

[106] It remains to be determined whether a class action is the preferable procedure for the determination of these common issues.

[107] Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[108] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.) at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[109] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[110] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the Act; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the Act; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2001), 54 O.R. (3d) 520 (Div. Ct.) at para. 16, aff'd (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd, [2003] S.C.C.A. No. 106.

[111] Numerous cases have held that a class proceeding will not satisfy the requirement that it be the preferable procedure to resolve the common issues if the common issues are overwhelmed or subsumed by the individual issues such that the resolution of the common issues will, in substance, mark just the beginning of the process leading to a final disposition of the claims of class members: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at para. 39; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at paras. 134, 135; *Williams v. Mutual Life Assurance Co.*, [2000] O.J. No. 3821 (S.C.J.); *Zicherman v. Equitable Life Insurance Co. of Canada*, [2003] O.J. Nos. 1160 and 1161 (C.A.), aff'g [2001] O.J. No. 4952 (Div. Ct.), which aff'd (2000), 51 O.R. (3d) 54 (S.C.J.) and *Zicherman v. The Equitable Life Assurance Company of Canada*, [2000] O.J. No. 5144 (S.C.J.); *Garipey v. Shell Oil Co.*, [2002] O.J. No. 2766 (S.C.J.), aff'd [2004] O.J. No. 5309 (Div. Ct.).

[112] Based on these principles, I am satisfied that a class action is the preferable procedure for Q1, Q2, Q3, and Q4. A class action is the only realistic or sensible way to litigate the professional allowance claim of the Ontario Class Members.

3. Cost Recovery Fees Claim

[113] I have already determined that the costs recovery fees claim satisfy the first, second, and fifth criteria for certification. It remains to consider the common issues and preferable procedure criterion, for which I have already set out the applicable principles above.

[114] The Plaintiffs seek to certify the following common issues with respect to the cost recovery fees claim:

- Q5. Did the Defendant breach the Associate Agreements with the Class by charging the Class Cost Recovery Fees in excess of the actual costs it 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?
- Q6. Did the Defendant breach its statutory duty of fair dealing under s. 3 of the AWA (or under comparable provincial franchise legislation), or its common law duty of good faith by charging the Class Cost Recovery Fees in excess of the actual costs it 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?
- Q7. Has the Defendant been unjustly enriched by charging Cost Recovery Fees in excess of its 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?
- Q8. Has the Defendant breached Article 11.05 of the 2002 Associate Agreement or its 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?
- Q9. If so, can the damages owing to the 2002 Agreement Class for this breach of the 2002 Associate Agreement be assessed on an aggregate basis, and if so, in what amount?
- Q10. With respect to the fees charged to Class Members on account of the lease of their franchise premises, did the Defendant breach the Associate Agreements, its statutory duty of fair dealing under the AWA (or under comparable provincial franchise legislation) and/or its common law duty of good faith to the Class Members by:
 - (a) failing to provide copies of lease agreements with third party landlords to the Class Members?

- (b) failing to disclose the existence and amount of all third party landlord inducements to Class Members?
 - (c) failing to adjust the amount of lease payments charged to Class Members to include the benefit of the landlord inducements?
 - (d) charging Class Members a leasing fee in excess of the lease obligations incurred by the Defendant for the franchised premises, or in excess of a commercially reasonable rate for those franchised premises that are owned by the Defendant?
- Q11. With respect to the fees charged to Class Members for Equipment rental, did the Defendant breach its contractual obligations under the Associate Agreements, its statutory duty of fair dealing under the AWA (or under comparable provincial franchise legislation) and/or its common law duty of good faith to the Class Members by:
 - (a) unilaterally imposing Equipment leasing fees on Class Members without regard to its 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]”?
 - (b) charging Equipment leasing fees at a commercially unreasonable rate?
 - (c) profiting from the Equipment leasing fees, rather than setting the Equipment leasing fees at a cost recovery rate?

[115] In my opinion, Q5, Q6, Q7, Q8, Q10, and Q11 satisfy the common issues criterion.

[116] There is no commonality and no basis in fact for certifying Q9 (aggregate damages).

[117] If Q5, Q6, Q7, Q8, Q10, and Q11 are answered favourably for Shoppers, then there will be no individual issues trials. If these questions are answered favourable to the Plaintiffs, then those individual Class Members who suffered damages will have to proceed to prove and quantify those damages. I am satisfied that a common issues trial is the preferable procedure for the resolution of these claims.

4. The Budgeting Practices Claim

[118] I have already determined that the budgeting practices claim satisfies the first, second, and fifth criteria for certification. It remains to consider the common issues and preferable procedure criterion, for which I have already set out the applicable principles above.

[119] The Plaintiffs seeking to certify the following common issues with respect to the budgeting practices claim:

- Q12. Does the Common Year Plan process for setting profitability targets and/or the New Financial Model formulae and/or the process for implementing same breach the Associate Agreements, including Articles 11.01, 11.02 and 11.03 of the 2002 Associate Agreement and Articles 11.01, 11.02, 11.03 and 11.04 of the 2010 Associate Agreement, or does it result in a breach of its statutory duty of fair

dealing under the AWA (or under comparable provincial franchise legislation listed in Schedule A) and/or breach the Defendant's common law duty of good faith?

- Q13. In particular do the Common Year Plan process for setting profitability targets and/or the New Financial Model formulae and/or the process for implementing same breach the Associate Agreements and/or the duties under the AWA or at common law by mandatorily increasing the Profit Sharing Fee the Associate must pay to the Defendant pursuant to Article 11 of both forms of the Associate Agreement if the Associate fails to meet specified profitability targets?
- Q14. If so, does the Common Year Plan and/or New Financial Model impose a penalty on Class Members who fail to meet specified profitability targets?

[120] In my opinion, Q12, Q13, and Q14 do not satisfy the common issues or the preferable procedure criterion.

[121] The budgeting process is inherently individualistic, and the Plaintiffs have failed to show some basis in fact for their argument that Shoppers systemically imposes unreasonable, and biased budget targets across the class of Associates. The most that the Plaintiffs have shown is that it is possible for Shoppers to set targets that in hindsight seem unfair for a particular store and that the individual Associate may have been dealt with unfairly or that there has been an individual breach of contract. It obviously cannot be said that the contractually agreed budget process is itself a breach of the Associate Agreement and by arguably proving that it might be possible to implement the process in an unfair way for some does not produce anything meaningful for all class members in answering Q12, Q13, and Q14. The proof never moves from the particular to the common or general.

[122] The budgeting process claim is not akin to a systemic negligence claim where all class members would be potentially harmed by the systemic misconduct but an individual issues trial would be required to complete the class member's claim by his or her proving causation and the quantification of damages. The totality of the budgeting process claim requires an individual issues trial.

[123] If this analysis of commonality is incorrect, then I still would not certify Q12, Q13, and Q14 for the reason that they do not satisfy the preferable procedure criterion. Assuming that something useful emerged from the common issues trial, the Associate would be barely out of the starting gate and the proof of causation and the quantification of damages would replicate the work accomplished by the common issues trial.

[124] I do not accept the Plaintiffs argument that franchisees are a vulnerable group for which a class action must inevitably be the preferable procedure to provide access to justice, behaviour modification, and judicial economy against an oppressive and intimidating franchisor. The circumstances of each proposed class action are unique, and given how little would be accomplished at a common issues trial of the budgeting practices claim, a normal action is preferable.

[125] I conclude that Q12, Q13, and Q14 do not satisfy the common issues and the preferable procedure criteria.

5. The Inventory Practices Claim

[126] I have already determined that the inventory practices claim satisfies the first, second, and fifth criteria for certification. It remains to consider the common issues and preferable procedure criterion, for which I have already set out the applicable principles above.

[127] The Plaintiffs seeking to certify the following common issues with respect to the inventory practices claim:

- Q15. Did the Defendant breach its statutory duty of fair dealing under the AWA (or under comparable provincial franchise legislation) and/or its common law duty of good faith to the Class Members by unilaterally imposing procurement and inventory policies upon the Class, that:
 - (a) require Class Members to accept and pay for mass-order generated goods (“MOGs”) that they do not order;
 - (b) deny Class Members the right to make certain inventory adjustment claims; and/or
 - (c) direct Class Members not to receive inventory on an itemized basis?
- Q16. If so, has the Defendant been unjustly enriched through the imposition of the procurement and inventory policies, and if so, in what amount?
- Q17. If the Class Members are entitled to damages for any or all of the above claims, can the amount of damages owing to the Class Members be assessed, in whole or in part, on an aggregate basis?
- Q18. If yes, in what amount?

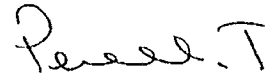
[128] In my opinion Q15 and an amended Q16 satisfy the common issues and the preferable procedure criteria but Q17 and Q18 do not.

[129] There is no basis in fact for an aggregate assessment and that circumstance disqualifies these questions. That circumstance also means that the words “and if so, in what amount” should be deleted from Q.16.

G. CONCLUSION

[130] For the above reasons, I certify the Plaintiffs’ action as a class proceeding for a common issues trial of Q1 to Q8 inclusive, Q10, Q11, Q15 and Q16.

[131] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Plaintiffs' submissions within 30 days of the release of these Reasons for Decision followed by Shoppers' submissions within a further 30 days.



Perell, J.

Released: July 9, 2013

Schedule "A"

Relevant Provisions of the 2002 and 2010 Associate Agreement

[changes between versions are underlined>

2002 Associate Agreement	2010 Associate Agreement
<p>Recitals</p> <p>WHEREAS as a result of the expenditure of time, effort and money in research and development, the Company directly and through its Affiliates has acquired unique experience, special techniques and knowledge with respect to the operation of retail drug stores (herein collectively referred to as "Know-how");</p> <p>AND WHEREAS, the Company is an Affiliate of 911979 Alberta Ltd. ("911979 Alberta") which owns various trade-marks and the Company has been authorized by 911979 Alberta to grant licenses for the use of the trade mark "SHOPPERS DRUG MART" and other trade marks by corporations operating retail drug stores under the auspices of the Company;</p> <p>AND WHEREAS, in connection therewith, 911979 Alberta and the Company have successfully established a reputation under the trade mark "SHOPPERS DRUG MART", which trade mark signifies to the public the highest standards of quality, service, merchandising and management;</p> <p>AND WHEREAS, by reason of the foregoing, amongst other things, 911979 Alberta, the Company, and the Company's associates have received and continue to receive favourable public recognition and by further reason of intensive advertisement and promotion thereof throughout Canada the trade mark "SHOPPERS DRUG MART" has achieved and is invested with substantial goodwill;</p> <p>AND WHEREAS, the Associate being fully cognizant of the value of the Company's Know-how and of the reputation of the <u>said</u> trade mark is desirous of obtaining a <u>franchise</u> to operate a retail drug store business utilizing the <u>Company's</u> Know-how and using in connection therewith the trade mark "SHOPPERS DRUG MART" and such other trade-marks as the Company generally makes available to its associates, upon the terms and conditions contained herein;</p> <p>NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the mutual covenants, conditions and agreements herein contained, the parties hereto do hereby each covenant and agree with the other as follows:</p>	<p>Recitals</p> <p>WHEREAS as a result of the expenditure of time, effort and money in research and development, the Company directly and through its Affiliates has acquired unique experience, special techniques and knowledge with respect to the operation of retail drug stores (herein collectively referred to as "Know-how");</p> <p>AND WHEREAS, the Company is an Affiliate of 911979 Alberta Ltd. ("911979 Alberta") which owns various trade-marks and the Company has been authorized by 911979 Alberta to grant licenses for the use of the trade-mark SHOPPERS DRUG MART and other trade-marks to corporations operating retail drug stores under licence from the Company;</p> <p>AND WHEREAS, in connection therewith, 911979 Alberta and the Company have successfully established a reputation under the trade-mark SHOPPERS DRUG MART, which trade-mark signifies to the public the highest standards of quality, service, merchandising and management;</p> <p>AND WHEREAS, by reason of the foregoing, amongst other things, 911979 Alberta, the Company, and the Company's <u>licensees (herein referred to as "Associates")</u> have received and continue to receive favourable public recognition and by further reason of intensive advertisement and promotion thereof throughout Canada the trade-mark SHOPPERS DRUG MART has achieved and is invested with substantial goodwill;</p> <p>AND WHEREAS, the Associate being fully cognizant of the value of the Company's Know-how and of the reputation of the trade-mark <u>SHOPPERS DRUG MART</u> is desirous of obtaining a <u>licence</u> to operate a retail drug store business utilizing the Know-how and using in connection therewith the trade-mark SHOPPERS DRUG MART and such other trade-marks as the Company generally makes available to its Associates, upon the terms and conditions contained herein;</p> <p>NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the mutual covenants, conditions and agreements herein contained, the parties hereto do hereby each covenant and agree with the other as follows:</p>
<p>Article 1.00 - Recitals</p> <p>1.01 The parties hereby acknowledge and declare that the foregoing recitals are true and correct in substance and in fact.</p>	<p>Article 1.00 - Recitals</p> <p>1.01 The parties hereby acknowledge and declare that the foregoing recitals are true and correct in substance and in fact.</p>
<p>Article 2.00 - Interpretation</p>	<p>Article 2.00 - Interpretation</p>

2.01 In this agreement or in any amendment hereto, the following terms shall have the following meanings:

(d) "Franchised Business" means the retail drug store business to be carried on by the Associate at the Premises pursuant to the provisions of this agreement;

(e) "Gross Sales" means the entire amount of the actual sale price, whether for cash, credit or otherwise, of all sales of merchandise, services and other receipts whatsoever, including receipts from coin or credit card operated vending or rental machines, and of all business conducted or originating in, upon or from the Premises, including personal, mail or telephone orders received or taken at the Premises and filled from the Premises or elsewhere, and including all deposits not refunded to purchasers, and sales by any permitted concessionaires, licensees and other persons on the Premises, or otherwise in or from the Premises. No deduction shall be allowed for uncollected or uncollectible credit accounts. Gross Sales does not include any sums collected by the Associate for any duly constituted governmental authority and paid out by it to such authority on account of any direct tax imposed by such authority directly upon any purchaser in respect of retail sales made or services provided for compensation by the Associate upon or from the Premises to any such purchaser, or to any goods and services taxes or value added taxes, whether or not paid out to such governmental authority, nor the amount of returns of merchandise to shippers or manufacturers, nor the sales price of merchandise returned or exchanged by customers for which a credit or refund is made; nor shall Gross Sales include monies collected or arising from the operation of a retail postal outlet (other than on account of the sale of stamps), if any, established on the Premises, monies collected as utility payments or monies arising from the sale of lottery tickets, or monies collected on account of sales to employees of the Associate working in the Premises for their own use;

(g) "Manual" means any book, pamphlet, memorandum or other publication prepared by the Company for use by its associates generally or the Associate in particular setting forth information, advice or instructions respecting the operation of the Franchised Business;

2.02 The division of this agreement into articles and sections, and the insertion of headings and marginal notes in this agreement are for convenience of reference only and shall not be construed so as to affect the interpretation or construction of this agreement.

2.04 This agreement shall be construed in accordance with the laws of the Province where the Premises are located.

2.01 In this agreement or in any amendment hereto, the following terms shall have the following meanings:

(j) "Franchised Business" means the retail drug store business to be carried on by the Associate at the Premises pursuant to the provisions of this Agreement;

(k) "Gross Sales" means the entire amount of the actual sale price, whether for cash, credit, debit or otherwise, of all sales of merchandise, services and other receipts whatsoever, including receipts from coin or credit or debit card operated vending or rental machines, and of all business conducted or originating in, upon or from the Premises, including personal, mail, facsimile, electronic mail, telephone, or other orders received or taken at the Premises and filled from the Premises or elsewhere, and including all deposits not refunded to purchasers, and sales by any permitted concessionaires, licensees and other persons on the Premises, or otherwise in or from the Premises. No deduction shall be allowed for uncollected or uncollectible credit or debit accounts. Gross Sales does not include any sums collected by the Associate for any duly constituted governmental authority and paid out by it to such authority on account of any direct tax imposed by such authority directly upon any purchaser in respect of retail sales made or services provided for compensation by the Associate upon or from the Premises to any such purchaser, or to any goods and services or harmonized sales taxes or value added taxes, whether or not paid out to such governmental authority, nor the amount of returns of merchandise to shippers or manufacturers, nor the sales price of merchandise returned or exchanged by customers for which a credit or refund is made; nor shall Gross Sales include monies collected or arising from the operation of a retail postal outlet (other than on account of the sale of stamps and other related products or services), if any, established on the Premises, monies collected as utility payments, monies arising from the sale of lottery tickets, monies collected on account of sales to employees of the Associate working in the Premises for their own use, or monies collected or arising from such other items as may be designated by the Company from time to time as being excluded from Gross Sales;

(m) "Manual" means any book, pamphlet, bulletin, directive, memorandum or other document or communication prepared in written or electronic format by the Company for use by its Associates generally or the Associate in particular setting forth information, advice, instructions, specifications, standards, rules, policies or procedures respecting the operation of the Franchised Business;

2.02 The division of this Agreement into articles and sections, and the insertion of headings and marginal notes in this Agreement are for convenience of reference only and shall not be construed so as to affect the interpretation or construction of this Agreement.

2.04 This Agreement shall be construed in accordance with the laws of the province where the Premises are located.

<p>Article 3.00 - Grant of Licence</p> <p>3.01 The Company hereby grants to the Associate the right, licence and privilege for the period specified in Article 4.00 hereof to operate a retail drug store at the Premises, subject to the terms and conditions hereinafter set forth.</p>	<p>Article 3.00 - Grant of Licence</p> <p>3.01 The Company hereby grants to the Associate the right, licence and privilege for the period specified in Article 4.00 hereof to operate a retail drug store at the Premises <u>in accordance with the Know-how and in association with the Shoppers Marks</u>, subject to the terms and conditions hereinafter set forth. <u>The Associate expressly acknowledges and agrees that the right, licence and privilege granted to the Associate hereunder is non-exclusive, that no exclusive or protected area or territory has been granted to the Associate, and that the Company expressly reserves to itself and its Affiliates the right to establish or operate, or grant to any other person the right or license to establish or operate, any business, including a Shoppers Drug Mart store, at or from any location outside the Premises.</u></p>
<p>Article 5.00 - Company's Covenants</p> <p>5.01 The Company, <u>in consideration of this agreement</u>, agrees that it will render to the Associate the following services and assistance pertaining to the Franchised Business:</p> <p>(a) assistance in store planning and store design;</p> <p>(b) the acquisition and installation, on the Premises, of all furnishings, leasehold improvements, fixtures and equipment (hereinafter collectively referred to as the "Equipment") as the Company deems appropriate for the conduct of a Franchised Business, it being understood and agreed that such Equipment shall at all times be and remain the property of the Company or its Affiliates, as the case may be. Only the Equipment as specified by the Company shall be used in the conduct of the Franchised Business and the Associate agrees that it will not enter into any lease for Equipment with any person, firm or corporation other than the Company. All Equipment shall be leased to the Associate upon terms and conditions to be mutually agreed upon between the parties <u>from time to time</u>. For greater certainty, it is acknowledged and agreed that all Equipment presently located on the Premises is the exclusive property of the Company or its Affiliates, as the case may be. The Associate further agrees that any asset (including but not limited to computer software) purchased for the Franchised Business and which has previously been classified as an expense of the Franchised Business in accordance with generally accepted accounting principles shall automatically be acquired by the Company under the terms of Section 13.06 hereof upon any termination of this agreement without any additional compensation being due to the Associate pursuant to Section 13.07.</p> <p>(c) the seeking out of sources of supply of merchandise and the provision of the advantages of bulk purchasing, where practical;</p> <p>(d) the provision of efficient systems for bookkeeping and stock controls;</p> <p>(e) the provision of advertising programs;</p> <p>(f) the arrangement of certain insurance;</p>	<p>Article 5.00 - Company's Covenants</p> <p>5.01 The Company agrees that it will render or cause to be rendered to the Associate the following services and assistance pertaining to the Franchised Business:</p> <p>(a) assistance in store planning and store design;</p> <p>(b) the acquisition and installation, on the Premises, of all furnishings, leasehold improvements, fixtures and equipment (hereinafter collectively referred to as the "Equipment") as the Company deems appropriate for the conduct of the Franchised Business, it being understood and agreed that such Equipment shall at all times be and remain the property of the Company or its Affiliates, as the case may be. Only the Equipment as specified by the Company shall be used in the conduct of the Franchised Business and the Associate agrees that it will not enter into any lease for Equipment with any person, firm or corporation other than the Company <u>or its Affiliates</u>. All Equipment shall be leased to the Associate upon terms and conditions to be mutually agreed upon between the Associate and the Company <u>or its Affiliates</u>. For greater certainty, it is acknowledged and agreed that all Equipment presently located on the Premises is the exclusive property of the Company or its Affiliates, as the case may be. The Associate further agrees that any asset (including but not limited to computer software) purchased for the Franchised Business and which has previously been classified as an expense of the Franchised Business in accordance with generally accepted accounting principles shall automatically be acquired by the Company under the terms of Section 13.06 hereof upon any termination of this Agreement without any additional compensation being due to the Associate pursuant to Section 13.07;</p> <p>(c) the seeking out of sources of supply of merchandise and the provision of the advantages of bulk purchasing, where practical;</p> <p>(d) the provision of efficient systems for bookkeeping and stock controls;</p> <p>(e) the provision of advertising programs;</p> <p>(f) the arrangement of certain insurance;</p>

<p>(g) the provision of training programs for staff;</p> <p>(h) the provision <u>of results of</u> research on market trends of product lines;</p> <p>(i) the provision of counseling with respect to merchandising and in respect of the operation and promotion of the Franchised Business;</p> <p>(j) assistance regarding the Associate's dealings with the Provincial College of Pharmacy or other similar body having jurisdiction in the Province in which the Franchised Business is carried on;</p> <p>(k) financial advice and consultation;</p> <p>(l) consultations with the Associate regarding the establishment of an appropriate security program for the Franchised Business.</p>	<p>(g) the provision of training programs for staff;</p> <p>(h) the provision of research on market trends of product lines;</p> <p>(i) the provision of counseling with respect to merchandising and in respect of the operation and promotion of the Franchised Business;</p> <p>(j) assistance regarding the Associate's dealings with the Provincial College of Pharmacy or other similar body having jurisdiction in the province in which the Franchised Business is carried on;</p> <p>(k) financial advice and consultation; and</p> <p>(l) consultations with the Associate regarding the establishment of an appropriate security program for the Franchised Business.</p>
<p>Article 6.00 - Associate's and Pharmacist's Covenants</p> <p>6.01 Throughout the term of this agreement <u>and any renewal thereof</u>, the Associate and the Pharmacist jointly and severally agree:</p> <p>(a) to devote their entire time, labour, skill, effort and attention to the Franchised Business and the management, conduct and operation thereof. It is understood and agreed that subject to the provisions of Section 12.01, nothing in this Section shall be deemed to prevent or prohibit the Associate or the Pharmacist from investing their funds in such form of purely passive investments as they consider appropriate, unless the making of such investment is to a degree or of a type as to conflict with the efficient performance of this agreement or with any other obligations to the Company herein contained;</p> <p>(b) to conduct the Franchised Business in an orderly and business-like manner, in compliance with all laws, rules, regulations and orders as are applicable to the Associate, to the Pharmacist and to the Franchised Business, and strictly in conformity with all specifications, standards, policies and operating procedures from time to time prescribed by the Company relating to the operation of the Franchised Business (including without limitation the nature, type and quality of goods and services offered for sale by the Franchised Business and the maximum sale prices established for such goods and services, the safety, maintenance, cleanliness, function and appearance of the Premises and its contents, the general appearance, dress and use of prescribed uniforms and name badges by all employees, the use of the Shoppers Marks, hours during which the Franchised Business is open for business, and the use and retention of standard forms). Specifications, standards, policies and operating procedures prescribed from time to time by the Company in the Manual, or otherwise communicated to the Associate in writing, shall constitute provisions of this agreement as if fully set forth herein, and all references herein to this agreement shall include all such specifications, standards, policies and <u>operating</u> procedures. The Associate acknowledges that changes in such specifications, standards, policies and <u>operating</u> procedures will be necessary from time to time and agrees that the Company may at its option from time to time add to, subtract from, or otherwise modify the Manual and any specifications,</p>	<p>Article 6.00 - Associate's and Pharmacist's Covenants</p> <p>6.01 Throughout the Term of this Agreement, the Associate and the Pharmacist jointly and severally agree:</p> <p>(a) to devote their entire time, labour, skill, effort and attention to the Franchised Business and the management, conduct and operation thereof. It is understood and agreed that subject to the provisions of Section 12.01, nothing in this Section shall be deemed to prevent or prohibit the Associate or the Pharmacist from investing their funds in such form of purely passive investments as they consider appropriate, unless the making of such investment is to a degree or of a type as to conflict with the efficient performance of this Agreement or with any other obligations to the Company herein contained;</p> <p>(b) to conduct the Franchised Business in an orderly and business-like manner, in compliance with all laws, rules, regulations and orders as are applicable to the Associate, to the Pharmacist and to the Franchised Business, and strictly in conformity with all specifications, standards, <u>rules</u>, policies and procedures from time to time prescribed by the Company relating to the operation of the Franchised Business (including without limitation the nature, type and quality of goods and services offered for sale by the Franchised Business and the maximum sale prices established for such goods and services, the safety, maintenance, cleanliness, function and appearance of the Premises and its contents, the general appearance, dress and use of prescribed uniforms and name badges by all employees, the use of the Shoppers Marks, hours during which the Franchised Business is open for business, and the use and retention of standard forms. Specifications, standards, <u>rules</u>, policies and procedures prescribed from time to time by the Company in the Manual, or otherwise communicated to the Associate in writing, shall constitute provisions of this Agreement as if fully set forth herein, and all references herein to this Agreement shall include all such specifications, standards, <u>rules</u>, policies and procedures. The Associate acknowledges that changes in such specifications, standards, <u>rules</u>, policies and procedures will be necessary from time to time and agrees that the Company may at its option from time to time add to, subtract from, or otherwise modify the Manual and any specifications, standards, <u>rules</u>, policies and</p>

standards, policies and operating procedures. The master copy of the Manual maintained by the Company shall govern if there is a dispute relating to the contents of the Manual. The Associate acknowledges and agrees that the uniform application of such specifications, standards, policies and operating procedures is vitally important to the preservation of the goodwill and prestige which the Company enjoys with the public and to the collective success of all associates. The Associate hereby acknowledges receipt and loan of a copy of the Manual and it undertakes not to disclose the same or its contents to any person, except insofar as it may be necessary in the conduct of the Franchised Business or make any reproductions or copies thereof, in whole or in part, without the prior written approval of the Company. The Manual, together with any copies or reproductions thereof, shall at all times remain the sole property of the Company and shall promptly be returned to it upon the termination of this agreement;

c) to perform and observe all of the covenants on the part of the lessee contained in the lease of the Premises the particulars of which are set forth in Schedule "A" hereto, including the payment of all amounts reserved thereby and to indemnify and save the Company and its Affiliates harmless of and from any and all claims which may arise or be asserted against them or any of them by reason of the said lease during the term of this agreement;

(d) recognizing that variations and additions to the Shoppers Drug Mart Associate system may be required from time to time in order to preserve and enhance the public image of such system, in order to accommodate changing consumer wishes, and in order to ensure the continuing efficiency of Shoppers Drug Mart stores generally, the Associate agrees that the Company may from time to time hereafter, upon written notice to the Associate and acting reasonably, add to, subtract from, or otherwise change in any way such system (including without limitation the adoption and use of new or modified trademarks, new fixtures, furnishings, equipment and signs, new products and services, and new techniques relating to the sale, promotion and marketing thereof). The Associate agrees to promptly accept, implement, use and display all such changes in the conduct of the Franchised Business, at the sole cost and expense of the Associate;

(f) to participate in the advertising programs prescribed from time to time by the Company for national and regional advertising and promotion, including without limitation adopting, implementing and using all marketing and promotional programs which are designated as "Core Marketing Programs" by the Company from time to time. All local advertising media and promotions to be employed independently by the Associate shall be submitted to and approved in writing by the Company prior to the use thereof;

(j) to advertise and sell in connection with the Franchised Business only such goods and to provide only such services as are approved by the Company in writing from time to time and

procedures. The master copy of the Manual maintained by the Company shall govern if there is a dispute relating to the contents of the Manual. The Associate acknowledges and agrees that the uniform application of such specifications, standards, rules, policies and procedures is vitally important to the preservation of the goodwill and prestige which the Company enjoys with the public and to the collective success of all Associates. The Associate hereby acknowledges receipt and loan of a copy of the Manual in written or electronic format and it undertakes not to disclose the same or its contents to any person, except insofar as it may be necessary in the conduct of the Franchised Business or make any reproductions or copies thereof, in whole or in part, without the prior written approval of the Company. The Manual, together with any copies or reproductions thereof, including any copies stored in electronic format, shall at all times remain the sole property of the Company and shall promptly be returned to it upon the termination of this Agreement;

(c) to perform and observe all of the covenants on the part of the lessee contained in the lease of the Premises the particulars of which are set forth in Schedule "A" hereto, including the payment of all amounts reserved thereby and to indemnify and save the Company and its Affiliates harmless of and from any and all claims which may arise or be asserted against them or any of them by reason of the said lease during the Term of this Agreement;

(d) recognizing that variations and additions to the Shoppers Drug Mart Associate system may be required from time to time in order to preserve and enhance the public image of such system, in order to accommodate changing consumer trends, and in order to ensure the continuing efficient operation of Shoppers Drug Mart stores generally, the Associate agrees that the Company may from time to time hereafter, add to, subtract from, or otherwise change in any way such system (including without limitation the adoption and use of new or modified trade-marks, new fixtures, the Premises, furnishings, equipment and signs, new products and services, and new techniques relating to the sale, promotion and marketing thereof). The Associate agrees to promptly accept, implement, use and display all such changes in the conduct of the Franchised Business, at the sole cost and expense of the Associate;

(f) to participate in the programs prescribed from time to time by the Company for national and regional advertising, marketing and promotion including, without limitation, adopting, implementing and using all programs which are designated by the Company from time to time, whether such programs are intended for advertising, marketing, promotion or other purposes. All local advertising and marketing media and promotions to be employed independently by the Associate shall be submitted to and approved in writing by the Company prior to the use thereof;

(j) to advertise and sell in connection with the Franchised Business only such goods and to provide only such services as are approved by the Company in writing from time to time and

are not thereafter disapproved.

The Associate agrees that the maintenance of the standards of quality and uniformity of goods sold or merchandised in Shoppers Drug Mart stores is essential to the goodwill, success and continued public acceptance of the Shoppers Drug Mart system, for the benefit of the Company, the Associate and all other associates licensed by the Company to operate a retail store using the Shoppers Drug Mart system and the Shoppers Marks. Accordingly, the Associate agrees to (A) sell, merchandise, promote or otherwise deal in products specified from time to time by the Company to be offered in the operation of the Franchised Business and provide only such services specified from time to time by the Company to be offered in the operation of the Franchised Business; (B) purchase all materials and supplies needed for the operation of the Franchised Business, and all products specified from time to time by the Company to be offered in the operation of the Franchised Business, either directly from the Company or from such other suppliers specified from time to time by the Company, which may include an Affiliate.

If:

(A) the Company establishes a Distribution Centre or Centres (which may be owned and managed by the Company, an Affiliate or a third party designated by the Company) for certain of the products specified from time to time by the Company to be offered in the operation of the Franchised Business, the Associate shall purchase all of its requirements of these items solely from the Distribution Centre(s). The prices charged by the Distribution Centre(s) will, when assessed as a whole over a reasonable period of time, be competitive. Despite anything contained in this agreement, the Company will not be liable for any delay or failure to supply these items due to any circumstances beyond its control;

(B) the Distribution Centre(s) choose not to carry certain of the products specified from time to time by the Company to be offered in the operation of the Franchised Business, the Associate shall purchase such products directly from suppliers which are designated by the Company to be part of a specialized supplier distribution network ("Direct Suppliers");

(C) the Distribution Centre(s) established by the Company (i) are incapable of supplying to the Associate its total requirements of any products specified from time to time by the Company to be offered in the operation of the Franchised Business, or (ii) do not supply or carry certain products which are approved by the Company for sale in the Franchised Business, or (iii) if certain products are not available from either the Distribution Centre(s) or a Direct Supplier, then the Associate shall purchase such products from a secondary supplier designated in writing by the Company for the Franchised Business ("Secondary Supplier"); and

(D) the Associate wishes to sell certain products to meet the particular customer needs of the Franchised Business, which

are not thereafter disapproved.

The Associate agrees that the maintenance of the standards of quality and uniformity of goods sold or merchandised and services provided, at or from Shoppers Drug Mart stores is essential to the goodwill, success and continued public acceptance of the Shoppers Drug Mart system, for the benefit of the Company, the Associate and all other Associates licensed by the Company to operate a retail store using the Shoppers Drug Mart system and the Shoppers Marks. Accordingly, the Associate agrees to (A) sell, merchandise, promote or otherwise deal in products specified from time to time by the Company to be offered in the operation of the Franchised Business and provide only such services specified from time to time by the Company to be offered in the operation of the Franchised Business; (B) purchase all materials and supplies needed for the operation of the Franchised Business, and all products specified from time to time by the Company to be offered in the operation of the Franchised Business, either directly from the Company or from such other suppliers specified from time to time by the Company, which may include an Affiliate.

So long as the Company has established a Distribution Centre or Centres (which may be owned and managed by the Company, an Affiliate or a third party designated by the Company) for certain of the products specified from time to time by the Company to be offered in the operation of the Franchised Business, the Associate shall purchase all of its requirements of these items solely from the Distribution Centre(s). The prices charged by the Distribution Centre(s) will, when assessed as a whole over a reasonable period of time, be competitive. Despite anything contained in this Agreement, the Company will not be liable for any delay or failure to supply these items due to any circumstances beyond its control.

If:

(A) the Distribution Centre(s) choose not to carry certain of the products specified from time to time by the Company to be offered in the operation of the Franchised Business, the Associate shall purchase such products directly from suppliers which are designated by the Company to be part of a specialized supplier distribution network ("Direct Suppliers");

(B) the Distribution Centre(s) established by the Company (i) are incapable of supplying to the Associate its total requirements of any products specified from time to time by the Company to be offered in the operation of the Franchised Business, or (ii) do not supply or carry certain products which are approved by the Company for sale in the Franchised Business, or (iii) if certain products are not available from either the Distribution Centre(s) or a Direct Supplier, then the Associate shall purchase such products from a secondary supplier designated in writing by the Company for the Franchised Business ("Secondary Supplier"); and

(C) the Associate wishes to sell certain products to meet the particular customer needs of the Franchised Business, which products are not otherwise specified by the Company to be offered in the operation of the Franchised Business, the

products are not otherwise specified by the Company to be offered in the operation of the Franchised Business, the Associate may purchase these items from other suppliers so long as the products:

- (i) are of a similar or superior quality than the type of products specified from time to time by the Company to be offered in the operation of the Franchised Business;
- (ii) will not result in a violation of any agreement which the Company may have with its suppliers (including Direct and Secondary Suppliers);
- (iii) comply with all current packaging and labeling legislation;
- (iv) are legitimate products not in violation of the trade- marks, trade dress or proprietary rights of any third party; and
- (v) do not conflict with any products carried or offered for sale by the Distribution Centre(s) in the case of products which are "discontinued" or "close-out product lines".

The Associate acknowledges that the Company may add to or remove from the products or services specified from time to time by the Company that will be provided or sold in connection with the Franchised Business, in which event the Associate will promptly conform to any such changes.

(k)

(i) to maintain and preserve, for at least three (3) years from the date of preparation full, complete and accurate books, records and accounts in respect of the Franchised Business in accordance with generally accepted accounting principles and otherwise in the form and manner prescribed by the Company from time to time. The Company or its agents shall have the right at any time during normal business hours, and without prior notice to the Associate, to inspect and audit or to cause to be inspected and audited the business records, bookkeeping and accounting records, cash register tapes, invoices, purchase orders, payroll records, cheque stubs and bank deposit receipts of the Franchised Business and the business records (including tax returns) of the Associate relating thereto. If any such inspection or audit discloses an understatement of Gross Sales for any period then the Associate shall pay to the Company all sums due on account of such understatement, together with interest thereon as provided in Section 17.09, within fifteen (15) days after receipt of the inspection or audit report.

Further, and in addition to the Company's right of termination as provided in Article 13.00, if any such inspection or audit is made necessary because of a failure of the Associate to furnish reports, financial statements or any other documentation required under this agreement, or if the Associate fails to furnish the same at the times specified herein, or if any

Associate may purchase these items from other suppliers so long as the products:

- (i) are of a similar or superior quality to the type of products specified from time to time by the Company to be offered in the operation of the Franchised Business;
- (ii) will not result in a violation of any agreement which the Company may have with its suppliers (including Direct and Secondary Suppliers);
- (iii) comply with all current packaging, labeling and language legislation;
- (iv) are legitimate products not in violation of the trade-marks, trade dress, copyright, industrial design, patent, or other proprietary rights of any third party; and
- (v) do not conflict with any products carried or offered for sale by the Distribution Centre(s) in the case of products which are "discontinued" or "close-out product lines".

The Associate acknowledges that the Company may add to or remove from the products or services specified from time to time by the Company that will be provided or sold in connection with the Franchised Business, in which event the Associate will promptly conform to any such changes.

(k)

(i) to maintain and preserve, for at least six (6) years from the date of preparation full, complete and accurate books, records and accounts in respect of the Franchised Business in accordance with generally accepted accounting principles and otherwise in the form and manner prescribed by the Company from time to time. The Company or its agents shall have the right at any time during normal business hours, and without prior notice to the Associate, to inspect and audit or to cause to be inspected and audited the business records, bookkeeping and accounting records, cash register tapes, invoices, purchase orders, payroll records, cheque stubs and bank deposit receipts of the Franchised Business and the business records (including tax returns) of the Associate relating thereto, including any copies stored in any electronic medium. If any such inspection or audit discloses an understatement of Gross Sales for any period then the Associate shall pay to the Company all sums due on account of such understatement, together with interest thereon as provided in Section 17.09, within fifteen (15) days after receipt of the inspection or audit report.

Further, and in addition to the Company's right of termination as provided in Article 13.00, if any such inspection or audit is made necessary because of a failure of the Associate to furnish reports, financial statements or any other documentation required under this Agreement, or if the Associate fails to furnish the same at the times specified herein, or if any

understatement of Gross Sales for any period is determined by any such inspection or audit to be greater than three percent (3%), or if the Associate has misrepresented or has misled the Company as to the amount of Gross Sales, gross profit or other receipts or expenses of the Franchised Business for any period, or has attempted to falsify or conceal any of the books and records of the Franchised Business, or has engaged in misleading business practices or in business practices which are specifically forbidden in the Manual or by the Company's policies, then the Associate shall promptly reimburse the Company for the cost of such inspection or audit including without limitation the charges of any independent accountant and the travel expenses, room, board and compensation of employees of the Company engaged in performing such inspection or audit.

(ii) (A) As soon as practicable and in any event within seventy (70) days after the end of the first six (6) month period in each fiscal year of the Franchised Business, to submit to the Company a balance sheet for the Franchised Business as at the close of such six (6) month period together with a statement of earnings and retained earnings and if requested by the Company, a statement of changes in financial position for such period, all in reasonable detail (but not necessarily audited) and signed and verified by the Pharmacist; and

(B) As soon as practicable and in any event within ninety (90) days after the end of each fiscal year of the Franchised Business, to submit to the Company a balance sheet as at the close of such fiscal year together with a statement of earnings and retained earnings and if requested by the Company, a statement of changes in financial position for such fiscal year setting forth, in each case, in comparative form, the corresponding figures for the same period in the previous fiscal year, all in reasonable detail and audited by a firm of independent chartered accountants acceptable to the Company.

(iii) to take actual physical inventories semi-annually or at more frequent intervals as required by the Company which inventories will be used in preparing the financial statements referred to in subparagraph (ii) above. The said physical inventories shall be taken by representatives of the Company and the Associate and the expense of same shall be considered as an expense of carrying on the Franchised Business.

(l) if requested by the Company, to prepare and submit a set of monthly unaudited financial statements in such form as the Company may require, together with such supporting information as the Company in the exercise of its reasonable business judgment may require.

understatement of Gross Sales for any period is determined by any such inspection or audit to be greater than three percent (3%), or if the Associate has misrepresented or has misled the Company as to the amount of Gross Sales, gross profit or other receipts or expenses of the Franchised Business for any period, or has attempted to falsify or conceal any of the books and records of the Franchised Business, or has engaged in misleading business practices or in business practices which are specifically forbidden in the Manual or by the Company's policies, then the Associate shall promptly reimburse the Company for the cost of such inspection or audit including without limitation the charges of any independent accountant and the travel expenses, room, board and compensation of employees of the Company engaged in performing such inspection or audit.

(ii) (A) If requested, as soon as practicable and in any event within seventy (70) days after the end of the first six (6) month period in each Fiscal Year of the Franchised Business, to submit to the Company a balance sheet for the Franchised Business as at the close of such six (6) month period together with a statement of earnings and retained earnings and if requested by the Company, a statement of changes in financial position for such period, all in reasonable detail (but not necessarily audited) and signed and verified by the Pharmacist; and

(B) As soon as practicable and in any event within ninety (90) days after the end of each Fiscal Year of the Franchised Business, to submit to the Company a balance sheet as at the close of such Fiscal Year together with a statement of earnings and retained earnings and if requested by the Company, a statement of changes in financial position for such Fiscal Year setting forth, in each case, in comparative form, the corresponding figures for the same period in the previous Fiscal Year, all in reasonable detail and audited by a firm of independent chartered accountants acceptable to the Company.

(iii) to take actual physical inventories annually or at more frequent intervals as required by the Company. The said physical inventories shall be taken by representatives of the Company and the Associate and the expense of same shall be considered as an expense of carrying on the Franchised Business;

(l) if requested by the Company, to prepare and submit a set of unaudited financial statements for each Accounting Period in such form as the Company may require, together with such supporting information as the Company in the exercise of its reasonable business judgment may require; and

(m) to adopt and maintain the Fiscal Year as the fiscal year of the Associate and the Franchised Business for accounting and tax purposes, unless otherwise directed by the Company.

6.02 Recognizing the continuing need to optimize procedures for recording and reporting financial information, for merchandise reordering, for labour scheduling, for inventory control, and for otherwise operating the Franchised Business, the Associate agrees that the Company may from time to time require the Associate to introduce and utilize in the operation of the Franchised Business information systems and technology specified by the Company, including without limitation computerized bookkeeping, accounting, point-of-sale and inventory control systems. The Associate agrees on request of the Company to promptly purchase or otherwise obtain, implement and use any such system specified by the Company. All components of any such system may be purchased, leased or licensed only from sources of supply authorized in writing by the Company. The Associate agrees that it will not utilize in connection with the Franchised Business any computer hardware, application software, operating software, supplies or services that have not previously been approved by the Company in writing. The Associate further agrees, that upon request by the Company, it will execute any license agreements, confidentiality agreements, user agreements, letters or other documents whatsoever which the Company deems necessary in order to protect the said information systems and technology.

The Associate may not enhance or modify any such system without the Company's prior written approval. The Associate is solely responsible for paying all amounts owing to suppliers for any such system and in respect of the maintenance, service and support of any such system. The Associate shall follow all procedures established from time to time by the Company with respect to the use of such system, including without limitation, procedures for off-site back-up and implementation and use of new releases and updates. The Associate shall at its own expense obtain and maintain maintenance and support for all such information systems and technology, for the minimum hours of coverage specified from time to time by the Company, and from suppliers approved by the Company. The Associate agrees that it will not relocate any computer hardware forming a part of such information systems and technology without the prior written consent of the Company.

6.03 At such time as the Company provides a centralized bookkeeping and accounting service to the Associate and other associates of the Company, the Associate agrees to appoint the Company to act as its agent to provide such bookkeeping and accounting services and to cooperate with the Company in the implementation and use of such centralized bookkeeping and accounting services. The Associate will pay to the Company such fee as may be determined by the Company from time to time in respect of the centralized bookkeeping and accounting services, and will be released from its obligation to itself prepare and furnish reports, books, records, accounts and statements as provided for in Sections 6.01(k) and (l). The Associate acknowledges that the centralized bookkeeping and accounting services will be comprehensive and may include supervision of banking, payment of accounts payable, the collection of accounts receivable and the preparation of statements, balance sheets and other reports of the financial

6.02 Recognizing the continuing need to optimize procedures for recording and reporting financial information, for merchandise reordering, for labour scheduling, for inventory control, and for otherwise operating the Franchised Business, the Associate agrees that the Company may from time to time require the Associate to introduce and utilize in the operation of the Franchised Business information systems and technology specified by the Company, including without limitation computerized or electronic bookkeeping, accounting, point-of-sale and inventory control systems. The Associate agrees on request of the Company to promptly purchase, lease, license or otherwise obtain, implement and use any such system specified by the Company. All components of any such system may be purchased, leased, licensed or otherwise obtained only from sources of supply authorized in writing by the Company. The Associate agrees that it will not utilize in connection with the Franchised Business any computer hardware, application software, operating software, supplies or services that have not previously been approved by the Company in writing. The Associate further agrees, that upon request by the Company, it will execute any license agreements, confidentiality agreements, user agreements, letters or other documents whatsoever which the Company deems necessary in order to protect the said information systems and technology.

The Associate may not enhance or modify any such system without the Company's prior written approval. The Associate is solely responsible for paying all amounts owing to suppliers for any such system and in respect of the use, maintenance, service and support of any such system. The Associate shall follow all procedures established from time to time by the Company with respect to the use of such system, including without limitation, procedures for off-site back-up and implementation and use of new releases and updates. The Associate shall at its own expense obtain and maintain maintenance and support for all such information systems and technology, for the minimum hours of coverage specified from time to time by the Company, and from suppliers approved by the Company. The Associate agrees that it will not relocate any computer hardware forming a part of such information systems and technology without the prior written consent of the Company.

6.03 So long as the Company provides or arranges to provide a centralized bookkeeping and accounting service to the Associate and other Associates of the Company, the Associate agrees to and does hereby retain the Company to provide or arrange to provide such bookkeeping and accounting services and to cooperate with the Company in the implementation and use of such centralized bookkeeping and accounting services. The Associate will pay to the Company or the service provider (the "Service Provider") such fee as may be determined by the Company from time to time in respect of the centralized bookkeeping and accounting services, and will be released from its obligation to itself prepare and furnish reports, books, records, accounts and statements as provided for in Sections 6.01(k) and (l). The Associate acknowledges that the centralized bookkeeping and accounting services will be comprehensive and may include supervision of banking, payment of accounts payable, the collection of accounts

<p>status of the Associate. The Associate and the Pharmacist will cooperate fully with the Company and provide to it all information required by the Company in order to perform the centralized bookkeeping and accounting service.</p> <p>The services provided as part of the centralized bookkeeping and accounting service to the Associate will be as outlined in <u>the bookkeeping and accounting manual to be provided by the Company to the Associate</u> and the Associate agrees to comply with all of the policies and operating procedures prescribed from time to time by the Company <u>in the bookkeeping manual</u> or otherwise communicated to the Associate in writing.</p> <p>The fee or fees to be charged to the Associate for the provision of a centralized bookkeeping and accounting service shall be such amount or amounts as the Company shall, in the good faith exercise of its judgment, determine, and shall be charged on a basis consistent with the basis on which such fees are determined for other associates <u>in the Shoppers Drug Mart system</u>.</p>	<p>receivable and the preparation of statements, balance sheets and other reports of the financial status of the Associate. The Associate and the Pharmacist will cooperate fully with the Company or the Service Provider and provide to it all information required by the Company in order to perform the centralized bookkeeping and accounting service.</p> <p>The services provided as part of the centralized bookkeeping and accounting service to the Associate will be as outlined in the Manual and the Associate agrees to comply with all of the policies and procedures prescribed from time to time by the Company in the Manual or otherwise communicated to the Associate in writing.</p> <p>The fee or fees to be charged to the Associate for the provision of a centralized bookkeeping and accounting service shall be such amount or amounts as the Company shall, in the good faith exercise of its judgment, determine, and shall be charged on a basis consistent with the basis on which such fees are determined for other Associates <u>of the Company</u>.</p>
<p>Article 11.00 - Payment By Associate</p> <p>11.01 In return for the rights and privileges granted to the Associate under this agreement, the Associate agrees to pay to the Company throughout the term of this agreement a service fee (the "fee") based on Gross Sales <u>established as hereinafter set forth</u>. Within a reasonable period of time after the commencement <u>of each twelve (12) month period ending on the anniversary of the date hereof</u>, the Company shall fix the fee payable by the Associate for such period and <u>subject to the provisions of Sections 11.02 and 11.03 hereof such fee shall remain unchanged throughout the ensuing twelve (12) month period</u>, unless the parties shall otherwise mutually agree in writing.</p>	<p>Article 11.00 - Payments By Associate</p> <p>11.01 In return for the rights and privileges granted to the Associate under this Agreement, the Associate agrees to pay to the Company throughout the Term of this Agreement a service fee (the "Fee") <u>established as hereinafter set forth</u> based on Gross Sales <u>collected by the Associate (and/or the profitability of the Franchised Business)</u>. <u>Prior to or within a reasonable period of time after the commencement of each Fiscal Year, the Company shall by means of the Manual or otherwise fix the Fee payable by the Associate for such period and the times for payment of the Fee. Subject to the provisions of Sections 11.03 and 11.04 hereof, the Fee and the times for payment of the Fee shall remain unchanged throughout the ensuing Fiscal Year, unless the parties shall otherwise mutually agree in writing.</u></p>
	<p>11.02 For each Fiscal Year of the Associate, the Company shall provide to the Associate a forecast of the projected Gross Sales, earnings before taxes and profitability of the Franchised Business for the next following Fiscal Year which will set out details for the expected financial performance for the Franchised Business for that Fiscal Year. The forecast shall include information provided by the Associate to the Company and shall take into account such factors as past over-performance or under-performance, local market conditions, competitive activity, economic environment, retail drug store trends, hours of operation of the Franchised Business, multi-store operations, relocations and expansions and such other factors as the Company in its judgment considers relevant. The forecast shall include the Fee referred to in Section 11.01 for that Fiscal Year.</p> <p>The Pharmacist and the Associate acknowledge and agree that in preparing and providing any such forecast, the Company makes no representation, warranty or guarantee, express, implied or collateral, with regard to the Franchised Business or its likelihood of success or profitability, including possible Gross Sales, expenses or profits or any subsidy that the Company may pay to the Associate and that such forecast may be subject to change in accordance with the rights granted to</p>

	the Company under this Agreement.
<p>11.02 It is understood and agreed that if the Associate can demonstrate to the reasonable satisfaction of the Company that circumstances beyond its reasonable control materially adversely affected the profitability of the Franchised Business during any twelve (12) month period for which payment of fees under Section 11.01 hereof has been made or is payable, the Company will reduce the fee payable for such period by an amount equal to the lesser of:</p> <p>(a) one hundred percent (100%) of such fee; or</p> <p>(b) the net loss incurred by the Associate for such twelve (12) month period, as disclosed by the audited financial statements of the Associate for such period prepared in accordance with the provisions of Section 6.01(k)(ii)(B) hereof, after deduction of the aggregate of all amounts paid or payable by the Associate, during such twelve (12) month period, to or for the benefit of the Pharmacist and/or any other person or persons not dealing at arm's length (as that term is defined in the Income Tax Act (Canada) as amended from time to time) with the Associate or the Pharmacist.</p> <p>11.03 It is also understood and agreed that if the Company determines that the total profitability of the Franchised Business during any twelve (12) month period referred to in Section 11.01 is materially greater than that which was projected by the Company at the time that it fixed the fee payable by the Associate for such period under Section 11.01, then the Company may increase the fee payable for such period by such amount as the Company in the good faith exercise of its reasonable business judgment determines is fair and equitable in the circumstances.</p> <p>11.04 In addition to the compensation provided for in Section 11.01 hereof and to contribute to the Company's cost of providing national and/or regional advertising and/or promotion and/or merchandising, and the development and marketing of house brand products, the Associate shall pay to the Company an additional amount as determined by the Company's marketing department not to exceed in any year two percent (2%) of Gross Sales. The Company reserves the right to place and develop advertising as agent for and on behalf of the Associate. The Associate and Pharmacist acknowledge and agree that the Company shall be entitled to the benefit of any and all discounts, volume rebates, advertising allowances or other similar advantages that the Company or its Affiliates may obtain from any person, firm or corporation by reason of its supplying merchandise or services to the Associate or to associates of the Company or its Affiliates.</p>	<p>11.03 It is understood and agreed that if the Company determines that the profitability of the Franchised Business during any Fiscal Year referred to in Sections 11.01 and 11.02 is materially greater or less than that which was projected by the Company at the time that it fixed the Fee payable by the Associate for such period under Sections 11.01 and 11.02, then, at the end of each Fiscal Year, the Company may increase or decrease the Fee payable by the Associate or any subsidy that the Company may pay to the Associate for such period by such amount as the Company in good faith and in accordance with reasonable commercial standards determines in the circumstances.</p> <p>11.04 The parties acknowledge that further details, including standards and procedures for determining the matters set forth in Sections 11.01, 11.02 and 11.03 above may be set out in the Manual or otherwise.</p> <p>11.05 In addition to the Fee payments provided for in Sections 11.01, 11.02 and 11.03 above, and to contribute to the Company's cost of providing national and/or regional advertising and/or promotion and/or merchandising, and the development and marketing of house brand products, the Associate shall pay to the Company an additional amount (the "Advertising Contribution") as determined by the Company in the Manual or otherwise. The Company reserves the right to place and develop or cause to be placed or developed advertising as agent for and on behalf of the Associate.</p> <p>11.06 All Fees and Advertising Contributions shall be due at the end of the respective periods provided for herein, and shall be payable and collected at such time and in such manner as the Company may determine from time to time in the Manual or otherwise.</p>
11.05 The Associate acknowledges and agrees that the	11.07 The Associate acknowledges and agrees that the

<p>payments from time to time required of the Associate on account of the rental of the Equipment or the lease of the Premises or on account of services rendered by the Company in respect of (i) the establishment of a security program for the Franchised Business, (ii) training programs from time to time provided by the Company, (iii) taking of inventory, and (iv) other services from time to time rendered by the Company to the Associate that are not included in the services furnished by the Company to associates generally at the present time, shall be in addition to the fees payable by the Associate from time to time under Section 11.01 hereof. The fee or fees to be charged to the Associate for any such additional services shall be such amount or amounts as the Company shall, in the good faith exercise of its judgment, determine.</p>	<p>payments from time to time required of the Associate on account of the rental of the Equipment or the lease of the Premises or on account of services <u>or programs</u> rendered <u>or made available</u> by the Company <u>or its Affiliates</u> in respect of (i) the establishment of a security program for the Franchised Business, (ii) training programs from time to time provided by the Company or its Affiliates, (iii) taking of inventory, (iv) <u>loyalty programs from time to time developed by the Company or its Affiliates</u>, and (v) other services <u>or programs</u> from time to time rendered <u>or made available</u> by the Company <u>or its Affiliates</u> to the Associate that are not included in the services or programs furnished by the Company or its Affiliates to Associates generally at the present time, shall be in addition to the Fee and other amounts payable by the Associate from time to time under this Agreement. The fee or fees to be charged to the Associate for any such additional services or programs shall be such amount or amounts as the Company shall determine in the good faith exercise of its judgment.</p>
<p><u>11.06</u> The Associate shall maintain an accurate record of Gross Sales and will submit on or before the second (2nd) business day after the end of <u>each calendar month</u> a signed statement of Gross Sales for the last <u>preceding calendar month</u>. At the time the aforementioned statement of Gross Sales is due, the Associate will remit to the Company all monies required to be paid under <u>Sections 11.01 and 11.04 for the preceding month</u>. Failure by the Associate to abide by the terms and conditions of this Section shall, without prejudice to other remedies, be sufficient cause for the Company to immediately terminate this agreement. The Associate shall also if requested by the Company, submit <u>on a weekly basis</u> a statement of Gross Sales for the preceding week and if requested by the Company, shall on the monthly statement of Gross Sales indicate sales by the week.</p>	<p><u>11.08</u> The Associate shall maintain an accurate record of Gross Sales and will submit on or before the second (2nd) business day after the end of <u>each Accounting Period</u> a signed statement of Gross Sales for the last preceding <u>Accounting Period</u>. At the time the aforementioned statement of Gross Sales is due, the Associate will remit to the Company all monies required to be paid under <u>Sections 11.01, 11.03 and 11.05 for the preceding Accounting Period</u>. Failure by the Associate to abide by the terms and conditions of this Section 11.08 shall, without prejudice to other rights or remedies, be sufficient cause for the Company to immediately terminate this Agreement <u>and the rights granted to the Associate hereunder</u>. The Associate shall also if requested by the Company, submit <u>on a Period basis</u> a statement of Gross <u>Sales for the preceding Period</u> and if requested by the Company, shall on the Statement of Gross Sales indicate sales by the week.</p>
<p><u>11.07</u> If the total payments required of the Associate under Sections 11.01 and 11.04 hereof in respect of any <u>twelve (12) month period</u> is greater or less than the amount actually paid by the Associate to the Company <u>for such period</u>, an adjustment shall be made between the parties to the end that the amount of such excess or deficiency, if any, shall forthwith be paid in cash to the Company or the Associate as the case may be.</p>	<p><u>11.09</u> If the total payments required of the Associate under Sections 11.01, <u>11.03 and 11.05</u> hereof in respect of any <u>Fiscal Year</u> is greater or less than the amount actually paid by the Associate to the Company <u>for such Fiscal Year</u>, an adjustment shall be made between the parties to the end that the amount of such excess or deficiency, if any, shall forthwith be paid in cash to the Company or the Associate, as the case may be.</p>
	<p><u>11.10</u> The Associate and the Pharmacist acknowledge and agree that the Company shall be entitled to the benefit of any and all discounts, rebates, advertising or other allowances, concessions, or other similar advantages obtainable from any person by reason of the supply of merchandise or services to the Company, the Associate or to Associates of the Company or its Affiliates.</p>
<p>Article 16.00 - Relationship Of Parties</p> <p>16.01 The Associate agrees that it is not an agent of the Company, but is an independent contractor completely separate from the Company, and that the Associate has no authority to bind or attempt to bind the Company in any manner or form whatsoever or to assume or incur any obligation or responsibility, express or implied, for or on</p>	<p>Article 16.00 - Relationship Of Parties</p> <p>16.01 The Associate agrees that it is not an agent of the Company, but is an independent contractor completely separate from the Company, and that the Associate has no authority to bind or attempt to bind the Company in any manner or form whatsoever or to assume or incur any obligation or responsibility, express, implied <u>or collateral</u>, for</p>

<p>behalf of, or in the name of the Company. This agreement shall not be construed so as to constitute the Associate a partner, joint venturer, agent or representative of the Company for any purpose whatsoever. The Associate shall use its own name in obtaining credit or when executing contracts or making purchases, so that the transaction shall clearly indicate that the Associate is acting as an associate and is not acting for the Company.</p>	<p>or on behalf of, or in the name of the Company. This Agreement shall not be construed so as to constitute the Associate and/or Pharmacist as a partner, employee, joint venturer, agent or representative of the Company for any purpose whatsoever, <u>or to create any such relationship or any trust or fiduciary relationship.</u> The Associate shall use its own name in obtaining credit or when executing contracts or making purchases, so that the transaction shall clearly indicate that the Associate is acting as an Associate and is not acting for the Company. <u>The Associate agrees that the employees of the Associate shall not, because of this Agreement, or because of their employment with the Associate, be constituted as employees of the Company. In addition, the Associate shall not represent or assert to any person or in any forum, that any employee of the Associate is, because of this Agreement, or because of their employment with the Associate, an employee of the Company</u></p>
<p>Article 17.00 - General Contract Provisions</p> <p>17.01 This agreement constitutes the entire agreement between the parties and supersedes all previous agreements and understandings in any way relating to the subject matter hereof between the parties. It is expressly understood and agreed that no representations, inducements, promises or agreements oral or otherwise between the parties not embodied herein shall be of any force and effect. No failure of the Company to exercise any right given to it hereunder, or to insist upon strict compliance by the Associate of any obligation hereunder, and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of the Company's rights to demand exact compliance with the terms hereof. Waiver by the Company of any particular default by the Associate shall not affect or impair the Company's right in respect of any subsequent default of the same or of a different nature, nor shall any delay or omission of the Company to exercise any rights arising from such default affect or impair the Company's rights as to such default or any subsequent default.</p>	<p>Article 17.00 - General Contract Provisions</p> <p>17.01 This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements and understandings in any way relating to the subject matter hereof between the parties. It is expressly understood and agreed that no representations, <u>warranties</u>, inducements, promises or agreements oral or otherwise between the parties not embodied herein shall be of any force and effect. No failure of the Company to exercise any right given to it hereunder, or to insist upon strict compliance by the Associate of any obligation hereunder, and no custom or practice of the parties at variance with the terms hereof shall constitute a waiver of the Company's rights to demand exact compliance with the terms hereof. Waiver by the Company of any particular <u>breach</u>, default <u>or violation</u> by the Associate shall not affect or impair the Company's right in respect of any subsequent <u>breach</u>, default <u>or violation</u> of the same or of a different nature, nor shall any delay or omission of the Company to exercise any rights arising from such default affect or impair the Company's rights as to such default or any subsequent default.</p>

Schedule "B"

Pharmaceutical Rebates and Professional Allowance Legislation

Ontario Drug Benefit Act, R.S.O. 1990, c. O-10

Rebates, etc.

11.5 (1) A manufacturer shall not provide a rebate to wholesalers, operators of pharmacies, or companies that own, operate or franchise pharmacies, or to their directors, officers, employees or agents,

(a) for any listed drug product or listed substance; or

(b) for any drug in respect of which the manufacturer has made an application to the executive officer for designation as a listed drug product, while that application is being considered.

Extended definition of "manufacturer"

(2) For the purposes of this section and in section 11.6, unless the context requires otherwise, and in section 13.1 and subsection 14 (3),

"manufacturer" includes a supplier, distributor, broker or agent of a manufacturer, except in,

(a) clause (1) (b) of this section,

(b) subsection (6) of this section,

(c) paragraph 2 of subsection (9) of this section, and

(d) subsection (11) of this section.

May not accept rebate

(3) No wholesaler, operator, company, director, officer, employee or agent mentioned in subsection (1) shall accept a rebate that is mentioned in subsection (1), either directly or indirectly.

...

Code of conduct

(15) The executive officer shall establish a Code of Conduct respecting professional allowances under this Act and the *Drug Interchangeability and Dispensing Fee Act* in consultation with the pharmacy and drug manufacturing industries, and shall update the Code of Conduct from time to time in consultation with those industries. 2006, c. 14, s. 19.

[Subsection (15) was replaced by the following by 2010, c.1 Sched. 21, s. 1:

(15) In this section,

"rebate", subject to the regulations, includes, without being limited to, currency, a discount, refund, trip, free goods or any other prescribed benefit, but does not include something provided in accordance with ordinary commercial terms.]

Publication [Repealed: 2010, c. 1, Sched. 21, s. 1.]

(16) The executive officer shall publish the Code of Conduct on the website of the Ministry and may publish it in any other format that the executive officer considers advisable.

Where conflict [Repealed: 2010, c. 1, Sched. 21, s. 1.]

(17) In the event of conflict between what is published on the Ministry's website under subsection (15) and what is published in another format, the Ministry's website prevails.

Definition [Repealed: 2010, c. 1, Sched. 21, s. 1.]

(18) In this section,

"rebate", subject to the regulations, includes, without being limited to, currency, a discount, refund, trip, free goods or any other prescribed benefit, but does not include,

- (a) a discount for prompt payment offered in the ordinary course of business, or
- (b) a professional allowance.

Ontario Drug Benefit Act, O. Reg. 201/96

s. 1(8) For the purposes of section 11.5 of the Act,

"professional allowance", in the definition of "rebate", means, subject to subsections (9) and (10), a benefit, in the form of currency, services or educational materials that are provided by a manufacturer to persons listed in subsection 11.5 (1) of the Act for the purposes of direct patient care as set out in paragraphs 1 to 8 of this subsection:

1. Continuing education programs that enhance the scientific knowledge or professional skills of pharmacists, if held in Ontario.
2. Continuing education programs for specialized pharmacy services or specialized certifications, if held in North America.
3. Clinic days provided by pharmacists to disseminate disease or drug-related information targeted to the general public including flu shot clinics, asthma clinics, diabetes management clinics, and similar clinics. For this purpose, a "clinic day" includes any additional staff to support the clinic day or the regular pharmacy business while the pharmacist is hosting a clinic day, during that day.
4. Education days provided by pharmacists that are targeted to the general public for health protection and promotion activities. Such education days must be held in the pharmacy, or a school, long-term care home, community centre, place of worship, shopping mall, or a place that is generally similar to any of these. For this purpose, an "education day" includes any additional staff to support the education day or the regular pharmacy business while the pharmacist is hosting an education day, during that day.
5. Compliance packaging that assists their patients with complicated medication regimes.
6. Disease management and prevention initiatives such as patient information material and services, blood pressure monitoring, blood glucose meter training, asthma management and smoking cessation, used in their pharmacy. For this purpose, "disease management and prevention initiatives" includes any additional staff required to support these initiatives or the regular pharmacy business while the pharmacist is hosting a disease management and prevention initiative, during the time it is being held.

7. Private counselling areas within their pharmacy.

8. Hospital in-patient or long-term care home resident clinical pharmacy services, such as medication reconciliation initiatives or other hospital or long-term care home-identified clinical pharmacy priorities. For this purpose, "clinical pharmacy services" includes the costs of any additional staff required to support these services or the regular pharmacy business while the pharmacist is hosting a clinical pharmacy service, during the time it is being held.

s. 1(10) A benefit is not a professional allowance if the contents of the Code of Conduct established under subsection 11.5 (15) of the Act, and as set out in Schedule 3, are not complied with.

CODE OF CONDUCT (Schedule 1 to both R.R.O. Reg. 935 & O. Reg. 201/96)

The Code of Conduct is intended to establish system-wide guidance governing the use of professional allowances to be paid by manufacturers to operators of pharmacies, or companies that own, operate or franchise pharmacies, or to their directors, officers, employees or agents.

Where the term "representative" is used in this Code of Conduct, it means an officer, director, employee, or agent.

Fundamental Principles

1. Payments from manufacturers to operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents, in the form of a professional allowance must be used only for any or all of the activities set out in paragraphs 1 to 8 of the definition of "professional allowance" in subsection 2 (1) of the regulation.

2. All persons involved in the drug distribution system must operate transparently. To act transparently, manufacturers, operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents must make the executive officer and other stakeholders knowledgeable of, and fully understand, the flow of funds in the drug products supply chain. This includes recording and reporting all such payments as required by the executive officer, and being subject to audit by the Ministry or a third party.

3. All suppliers of drug products as well as operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents, must commit to abide by this Code of Conduct. Any breach of the Code will be subject to enforcement as set out in the Ontario Drug Benefit Act and the Drug Interchangeability and Dispensing Fee Act.

Use of Professional Allowances

Operators of pharmacies or companies that own, operate or franchise pharmacies may use professional allowances. Programs and information contained in educational materials must be full, factual and without intent to mislead.

Professional allowances may never be used for:

1. Advertising or promotional materials, such as store flyers, except in association with clinic days, education days, disease management and prevention initiatives and clinical pharmacy services mentioned in paragraphs 3, 4, 6 and 8 of the definition of "professional allowance" in subsection 2 (1) of the regulation.

2. Entertainment, social and sporting events.

3. Meals and travel not directly associated with a program referred to in paragraphs 1 to 4 of the definition of "professional allowance" in subsection 2 (1) of the regulation.

4. Convention displays.
5. Personal gifts provided to operators of pharmacies, or companies that own, operate or franchise pharmacies, including their directors, officers, employees or agents.
6. Revoked: O. Reg. 558/06, s. 4 (3).
7. Packaging costs and delivery services in respect of a prescription and dispensing fees.
8. Taxes.
9. Inventory costs.
10. Fees or penalties for inventory adjustments.
11. Purchases of sales and prescription-related data.
12. Fees for listing products in inventory.
13. Renovations, leasehold improvements and similar matters, except as directly related to a private counselling area mentioned in paragraph 7 of the definition of "professional allowance" in subsection 2 (1) of the regulation.
14. Store fixtures.
15. Real estate purchases or sales, encumbrances, leases or rent.

Professional allowances are to be calculated based on the following criteria:

1. Reasonable costs to provide direct patient care as set out in paragraphs 1 to 8 of the definition of "professional allowance" in subsection 2 (1) of the regulation.
2. Reasonable frequency of providing direct patient care as set out in paragraphs 1 to 8 of the definition of "professional allowance" in subsection 2 (1) of the regulation.
3. A reasonable number of patients per pharmacy.

Manufacturers' Representatives

Manufacturers' representatives shall conduct business ethically and in a manner that is in the best interest of patients.

Any information provided by manufacturers' representatives, whether written or oral, must be full, factual and without misrepresentation.

Manufacturers shall be held responsible for the behaviour of their representatives.

Pharmacy Representatives

Pharmacy representatives shall conduct business ethically and in a manner that is in the best interest of their patients.

Pharmacies must not make procurement and purchasing decisions based solely on the provision of professional allowances.

Reporting

Manufacturers will report to the executive officer the amount of professional allowance paid to each operator of a pharmacy, or company that owns, operates or franchises pharmacies, including their directors, officers, employees or agents, in as much detail as is required by the executive officer and at times required by the executive officer. The report must be signed by two officers of the manufacturer or by the manufacturer's auditors, as may be required by the executive officer.

Operators of pharmacies, or companies that own, operate or franchise pharmacies will report to the executive officer the amount of professional allowance received from each manufacturer in as much detail as is required by the executive officer and at times required by the executive officer. The report must be signed by two officers of the operator of the pharmacy, or company that owns, operates or franchises pharmacies, or by their auditors, as may be required by the executive officer. (This requirement only applies with respect to professional allowances received before July 1, 2010.)

Drug Interchangeability and Dispensing Fee Act, R.S.O. 1990, c. P. 23

12.1 (1) A manufacturer shall not provide a rebate to wholesalers, operators of pharmacies, or companies that own, operate or franchise pharmacies, or to their directors, officers, employees or agents,

(a) for any interchangeable product; or

(b) for any product in respect of which the manufacturer has made an application to the executive officer for designation as an interchangeable product, while that application is being considered.

Extended definition of "manufacturer"

(2) For the purposes of this section and in section 12.2, unless the context requires otherwise,

"manufacturer" includes a supplier, distributor, broker or agent of a manufacturer, except in,

(a) clause (1) (b) of this section,

(b) paragraph 2 of subsection (8) of this section,

(c) subsection (10) of this section, and

(d) clauses (b) and (c) of the definition of "drug benefit price" in subsection (14) of this section.

May not accept rebate

(3) No wholesaler, operator, company, director, officer, employee or agent mentioned in subsection (1) shall accept a rebate that is mentioned in subsection (1), either directly or indirectly.

Definitions

(14) In this section,

"drug benefit price" means, with respect to a product,

(a) its drug benefit price under the Ontario Drug Benefit Act,

(b) in the case of a product that is not a benefit under the Ontario Drug Benefit Act, a price submitted by the manufacturer under the regulations that has been posted by the executive officer in the Formulary, or

(c) in the case of a product mentioned in clause (1) (b), the price submitted by the manufacturer;

"rebate", subject to the regulations, includes, without being limited to, currency, a discount, refund, trip, free goods or any other prescribed benefit, but does not include,

(a) a discount for prompt payment offered in the ordinary course of business, or

(b) a professional allowance.

Regulations

(15) The Lieutenant Governor in Council may make regulations clarifying the definition of "rebate" in this section, including providing that certain benefits are not rebates, prescribing benefits for the purpose of that definition, clarifying how the calculations are to be made in this section and defining "professional allowance" for the purposes of that definition, including governing how professional allowances are to be calculated, setting limits on professional allowances and incorporating the content of the Code of Conduct referred to in subsection 11.5 (15) of the *Ontario Drug Benefit Act* as amended from time to time.

Drug Interchangeability and Dispensing Fee Act, R.R.O. 1990, Reg. 935

s. 2(1) For the purposes of section 12.1 of the Act, "professional allowance", in the definition of "rebate", means, subject to subsection (2), a benefit, in the form of currency, services or educational materials that are provided by a manufacturer to persons listed in subsection 12.1 (1) of the Act for the purposes of direct patient care as set out in paragraphs 1 to 8 of this subsection:

1. Continuing education programs that enhance the scientific knowledge or professional skills of pharmacists, if held in Ontario.
2. Continuing education programs for specialized pharmacy services or specialized certifications, if held in North America.
3. Clinic days provided by pharmacists to disseminate disease or drug-related information targeted to the general public including flu shot clinics, asthma clinics, diabetes management clinics, and similar clinics. For this purpose, a "clinic day" includes any additional staff to support the clinic day or the regular pharmacy business while the pharmacist is hosting a clinic day, during that day.
4. Education days provided by pharmacists that are targeted to the general public for health protection and promotion activities. Such education days must be held in the pharmacy, or a school, long-term care home, community centre, place of worship, shopping mall, or a place that is generally similar to any of these. For this purpose, an "education day" includes any additional staff to support the education day or the regular pharmacy business while the pharmacist is hosting an education day, during that day.
5. Compliance packaging that assists their patients with complicated medication regimes.
6. Disease management and prevention initiatives such as patient information material and services, blood pressure monitoring, blood glucose meter training, asthma management and smoking cessation, used in their pharmacy. For this purpose, "disease management and prevention initiatives" includes any additional staff required to support these initiatives or the regular pharmacy business while the pharmacist is hosting a disease management and prevention initiative, during the time it is being held.
7. Private counselling areas within their pharmacy.

8. Hospital in-patient or long-term care home resident clinical pharmacy services, such as medication reconciliation initiatives or other hospital or long-term care home-identified clinical pharmacy priorities. For this purpose, "clinical pharmacy services" includes the costs of any additional staff required to support these services or the regular pharmacy business while the pharmacist is hosting a clinical pharmacy service, during the time it is being held.

s. 2(2) A benefit is not a professional allowance if the contents of the Code of Conduct set out in Schedule 1 are not complied with.

CITATION: Spina v. Shoppers Drug Mart Inc. 2013 ONSC 4675

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

GOIVANNI SPINA, JOHN SPINA DRUGS
LTD., ROMEO VANDENBURG, AND ROMEO
VANDENBURG DRUG COMPANY LTD.

Plaintiff

- and -

SHOPPERS DRUG MART INC., SHOPPERS
DRUG MART CORPORATON and 919979
ALBERTA LTD.

Defendants

REASONS FOR DECISION

Perell, J.

Released: July 9, 2013.

