

CITATION: Spina v. Shoppers Drug Mart Inc. 2012 ONSC 5563
COURT FILE NO.: 10-CV-414774 CP
DATE: October 3, 2012

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
GOIVANNI SPINA, JOHN SPINA)	<i>Ken Rosenberg, Lily Harmer, and Denise</i>
DRUGS LTD., ROMEO VANDENBURG,)	<i>Sayer for the Plaintiffs</i>
AND ROMEO VANDENBURG DRUG)	
COMPANY LTD.)	
)	
Plaintiffs)	
)	
– and –)	
)	
SHOPPERS DRUG MART INC.,)	<i>Mark A. Gelowitz, Jennifer Dolman, and</i>
SHOPPERS DRUG MART)	<i>Evan Thomas for the Defendants</i>
CORPORATON and 919979 ALBERTA)	
LTD.)	
)	
Defendants)	
)	
)	
Proceeding under the <i>Class Proceedings</i>)	HEARD: August 27, 28, 29, and 30, 2012
<i>Act, 1992</i>)	

REASONS FOR DECISION

PERELL, J.

A. INTRODUCTION AND METHODOLOGY

[1] The Plaintiffs Goivanni Spina, John Spina Drugs Ltd., Romeo Vandenburg, and Romeo Vandenburg Drug Company Ltd. sue Shoppers Drug Mart Inc. (“Shoppers”), Shoppers Drug Mart Corporation, and 919979 Alberta Ltd. in a proposed national class action under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. The Plaintiffs Amended Statement of Claim contains a matrix of claims and causes of action. The causes of action include breach of contract, unjust enrichment, breach of fiduciary duty, breach of a common law duty of good faith, and breach of statutory duties of good faith and fair dealing under the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3.

[2] The Plaintiffs claim compensatory damages or equitable damages of up to approximately \$1 billion. In terms of their monetary value, the Plaintiffs’ two largest

claims are claims to rebates and so-called professional allowances that have been collected by Shoppers.

[3] The Plaintiffs bring a motion for certification of their action as a class action, and the Defendants bring a cross-motion under Rule 21. In their cross-motion, the Defendants submit that it is plain and obvious that some of the claims in the proposed class action do not disclose a cause of action. In their defence of the certification motion, the Defendants challenge several more causes of action, and they submit that the remaining claims do not satisfy the criteria for certification as a class action.

[4] The hearing of the motion and the cross-motion took several odd turns with the result that only the Rule 21 cross-motion and only one aspect of the certification motion are now to be determined. For the certification motion, only the cause of action criterion is to be determined.

[5] The first odd turn was that during argument, it became clear that the Plaintiffs and the Defendants did not have a common understanding about what documents constituted the contract(s) between the parties, notwithstanding that the Defendants had attempted to pin this down by a Demand for Particulars. I, therefore, directed the Plaintiffs to specify the documents that they relied on as being part of the contract(s) between the parties. The result was that the Plaintiffs delivered a Compendium with copies of the documents that they relied on and that were to be taken as incorporated into their Amended Statement of Claim.

[6] This odd turn produced another. The Defendants sought leave to withdraw concessions that they had made during the run-up to the certification motion. The Plaintiffs responded by seeking an adjournment of the hearing. These requests and the outcome of them are perhaps easiest explained by setting out the endorsements I made on August 28 and 29, 2012, which stated:

August 28, 2012

The Defendants have brought a cross-motion under Rule 21 to oppose this certification motion. For the certification motion, the Defendants agreed that if their Rule 21 motion failed, they would consent to the certification of certain causes of action and certain common issues. The Defendants now wish to withdraw their agreement. The Plaintiffs wish to hold the Defendants to their agreement. In the alternative, the Plaintiffs request an adjournment of the certification motion if the court allows the Defendants to withdraw their conditional consents to certain aspects of the certification motion.

The Defendants' conditional consent was based on their understanding that the Plaintiffs were not relying on any documents other than the 2002 and 2010 Associates Agreement. This understanding is incorrect, and I see no purpose in deciding whether the Defendants were simply mistaken or taken by surprise. The fact is that the Plaintiffs do rely on certain additional documents that can be identified. I, therefore, allow the Defendants to withdraw their conditional consent.

It is, however, premature to grant an adjournment. The Rule 21 motion and the s. 5 (1)(a) criterion for certification do not require an evidentiary record and are based solely on the

pleadings and the documents incorporated by reference into the pleadings, which documents can be identified. Accordingly, the Rule 21 motion and the certification motion insofar as section 5 (1)(a) is concerned shall proceed. When the certification motion resumes, after I rule on the Rule 21 motion and the s. 5 (1)(a) criterion, the Defendants are at liberty to oppose certification on any of the remaining criterion. Prior to the resumption of the certification motion, the Plaintiffs are at liberty to resume the cross-examination of the Defendants' deponents. Order accordingly.

August 29, 2012

In light of submissions made today, I clarify yesterday's endorsement to explain that prior to the resumption of the certification motion, the Plaintiffs may file additional affidavit material as they may be advised. Similarly, the Defendants may file additional material as they may be advised. In any event, the cross-examinations of the Defendants' deponents are to recommence. These orders may be varied in accordance with the exigencies.

[7] The result of the Defendants' request to withdraw their concessions and the Plaintiffs' request for an adjournment was that the Rule 21 motion and the certification motion with respect to the cause of action criterion (s. 5 (1)(a) of the *Class Proceedings Act, 1992*) went ahead, but the balance of the certification motion was adjourned to await the outcome of the Rule 21 motion and the determination of the cause of action criterion.

[8] On the third day of the hearing, there was another unexpected turn. The Plaintiffs announced that they were discontinuing their claims against Shoppers Drug Mart Corporation, which is the parent company of Shoppers. The Plaintiffs also discontinued their claims against 919979 Alberta Ltd., which is an Alberta corporation that owns the trademarks associated with Shoppers' brands and branding. The costs consequences of these discontinuances remain to be determined.

[9] With the truncated motions and with the discontinuances, the Plaintiffs' action was left with Shoppers as the only defendant, and I was left with the task of determining whether it was plain and obvious that several impugned claims in the Amended Statement of Claim disclosed a reasonable cause of action.

[10] One practical outcome of these odd turns is that in order to determine the Rule 21 motion and the cause of action criterion of the certification motion, there is no evidence to consider. Rather, the motions have become pure pleading motions, and the facts contained in the Amended Statement of Claim are assumed to be true.

[11] Another practical outcome is that the determination of the pleadings motions has largely become a matter of contract interpretation because most of the impugned claims involve the 2002 Associates Agreement and the 2010 Associates Agreement, which are the contracts between the Plaintiffs and Shoppers.

[12] The basic premise of Shoppers' Rule 21 motion is that once the contracts are interpreted, it is plain and obvious that the Plaintiffs' claims must fail. Shoppers' position, metaphorically speaking, is that most of the Plaintiffs' claims came up against

the brick wall of the Associates Agreement and thus it is plain and obvious these claims cannot succeed.

[13] Shoppers challenged the legal tenability of most of the Plaintiffs' causes of action. The Plaintiffs' response is the two-branched submission that: (a) it is premature and inappropriate to decide the contract interpretative issues; and (b) it is not plain and obvious that their claims will not succeed.

[14] The Plaintiffs submit that the interpretation of a contract is a matter of mixed fact and law that cannot be accomplished by a motion under Rule 21 and that more facts are required. They submit that more facts are required because the scope of the contracts is uncertain, since the contracts between Shoppers and the Plaintiffs incorporate other documents. The Plaintiffs submit that the interpretation of the contract will be helped by facts that would emerge by the discovery process, and they submit that there is a factual dispute about whether rebates include professional allowances.

[15] As I will explain below, my own view is that: (a) it is not premature and inappropriate to decide the interpretative issues; (b) it is plain and obvious that some of the Plaintiffs' claims, including the claims about rebates and breaches of fiduciary duty, will fail; (c) it is not plain and obvious that some of the Plaintiffs' claims, including the claim about professional allowances, will fail; and (d) some of the Plaintiffs' claims are legally tenable but redundant.

[16] As a matter of methodology, to explain my conclusions, after this introduction, under several headings, I will set out the factual background as pleaded in the Amended Statement of Claim. I will describe the Associates Agreements, including the documents incorporated by reference. The discussion of the pleaded factual background will also identify the Plaintiffs' various claims and their associated causes of action.

[17] Next, I will discuss the tests used for the Rule 21 motion and for the s. 5 (1)(a) criterion for certification. In this part of my reasons, I will consider the Plaintiffs' argument that it is premature to decide contract interpretation issues at this juncture of the proceedings.

[18] Then, I will describe the principles of contract interpretation that are applicable.

[19] The contract law discussion will be followed by a discussion of the statutory duty of fair dealing and the common law duty of good faith in the context of a franchisor and franchisee relationship.

[20] Next, in the discussion portion of the reasons, under several headings, I will discuss the matrix of claims and causes of action to identify which of the Plaintiffs' claims are tenable and which claims are untenable. As already noted above, some claims are untenable and these claims should be struck from the pleading without leave to amend.

[21] I will conclude with a summary.

[22] In note here that the relevant sections of the Ontario legislation about pharmaceutical rebates and professional allowances are set out in Schedule “A” to these reasons. The pertinent articles of the 2002 Associate Agreement and the 2010 Associate Agreement are set out in Schedule B.

[23] The organization of these Reasons is as follows:

- Introduction and Methodology
- Pleaded Factual Background
 - The Parties
 - The Pleaded Claims against Shoppers
 - The Advantages of Bulk Purchasing/Rebates Claim
 - The Professional Allowances Claim
 - The Cost Recovery Fees Claim
 - The Budgeting Practices Claim
 - The Inventory Practices Claim
 - The Interference with Association Claim
- The Plain and Obvious Test
- Principles of Contract Interpretation
- Statutory Duty of Fair Dealing and the Common Law Duty of Good Faith
- Discussion
 - Introduction
 - The Cost Recovery Fees Claim/The Budgeting Practices Claim/The Inventory Practices Claim
 - The Unjust Enrichment Claims
 - The Breach of Fiduciary Duty Claim
 - The Interference with Association Claim
 - The Breach of Statutory and Common Law Duties of Good Faith
 - The Duty of Disclosure Claims
 - The Advantages of Bulk Purchasing/Rebates Claim
 - The Professional Allowances Claim
- Summary and Conclusion
- Schedule “A” - Pharmaceutical Rebates and Professional Allowance Legislation
- Schedule “B” – Associates Agreements

B. PLEADED FACTUAL BACKGROUND

1. The Parties

[24] 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.

[25] 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.

[26] 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.

[27] The Shoppers' stores operate as franchises. The franchisees, who are called "Associates" sign a franchise agreement, referred to as the "Associate Agreement." It 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. As will be seen from the discussion later, with a few exceptions, the two agreements are substantively similar.

[28] Associates are not employees. They are independent business owners operating the "Franchised Business" as governed by the Associates Agreement. Associates are responsible for their own debts, which are not on the account of Shoppers.

[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 #8621 located in Toronto, Ontario. In December 2011, the Vandenburg Plaintiffs signed a 2010 Franchise Agreement.

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

All current and former Shoppers Associates resident in Canada, save for Associates with franchised businesses located in Québec.

All current and former Shoppers Associates who provided direct patient- care services which are or were eligible under applicable Ontario law for professional allowances (the "Professional Allowance Class").

2. The Pledged Claims against Shoppers

[32] 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. During the argument of this motion, as already noted above, the Plaintiffs delivered a Compendium of documents.

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

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

[35] In their statement of claim, the Plaintiffs allege that Shoppers is breaching its contracts with the Plaintiffs and other Associates.

[36] 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 (not yet in force); (e) s. 3 of the *Franchises Act*, S.N.B. 2007, c. F-23.5 (not in force), all of which require Shoppers to have due regard for the Associates' legitimate interests and reasonable expectations when it make decisions and takes actions.

[37] The Plaintiffs also make claims of unjust enrichment and breach fiduciary duty.

[38] A broad brush painting of the Plaintiffs' claim is that they allege that Shoppers is pocketing money (rebates, professional allowances, overcharges for services) that should be included in the revenue (gross sales) of the franchised stores, where after the payment of expenses, the money would be shared among the franchisees (Associates) and Shoppers. Put even more simply, the Plaintiffs submit that Shoppers is breaching its contracts and its statutory duties by not sharing the growing profits from its franchise system. 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.

[39] More precisely, as taken from the Amended Statement of Claim and the Compendium, the factual background to the Plaintiffs' causes of action is as follows.

[40] Under the standard form Associate Agreement, Shoppers grants a license to an Associate to operate one or more franchised stores. Shoppers provides services to the Associates. These services include: operational support, marketing, advertising, purchasing, distribution, information technology, human resource services, loss prevention, insurance, and accounting.

[41] 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.

[42] Article 6 of the 2002 and 2010 Associate Agreement sets out an Associate's promises. The Associate Agreement requires the Associate to conduct the Franchised Business strictly in accordance with all specifications, standards, policies and operating procedures prescribed by Shoppers.

[43] Article 6.01 (b) of both agreements contains a provision that makes obligations contained in the "Manual" part of the Associate Agreement. Using the definitions of manual from both agreements and Article 6.01 (b) of the 2010 Agreement, the pertinent provisions about the Manual are set out below:

2002 Associate Agreement - "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;

2010 Associate Agreement - "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;

2010 Associates Agreement - Article 6.01 (b) - Specifications, standards, rules, 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, rules, policies and procedures. The Associate acknowledges that changes in such specifications, standards, rules, 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, rules, policies and procedures.

[44] In accordance with Article 11 of the Associate Agreement, Associates agree to pay Shoppers a form of profit sharing and to pay for certain services and to pay cost recovery fees. Under the Associate Agreement, Associates agree to pay: (1) the "Service Fee," which is based on "gross sales" (a defined term) and which is a profit sharing fee; (2) "Advertising Contribution;" (3) "Store Charges;" (4) "Occupancy Charge;" and (5) "Equipment Rental Fee."

[45] Based on these agreements to pay, the Plaintiffs allege that Associates pay three types of fee: (a) a profit sharing fee; (b) an advertising contribution fee; and (c) other cost recovery fees.

[46] The Plaintiffs allege that while percentages vary, in a typical year, for profitable stores, the profit sharing formula produces an approximate profit split of 80% to Shoppers and 20% to the Associate. The Profit Sharing fee is based on a budget that

Shoppers sets at the beginning of each fiscal year for the store. The Plaintiffs allege that the budget is settled without meaningful consultation with Associates.

[47] As will be explained in more detail below, the Plaintiffs allege that the advertising contribution fee imposes a cap or ceiling on Shopper's right to claim rebates and what are called professional allowances.

[48] The Plaintiffs allege that Shoppers does not provide Associates with any disclosure regarding how the cost recovery fees are determined, and that the cost recovery fees were never intended to be a source of profit for Shoppers.

[49] The Plaintiffs allege that Shoppers has made a systematic attempt to increase its share of the profits at the expense of and to the detriment of the Associates, including by: (a) failing to remit Professional Allowances to the Professional Allowance Class Members; (b) charging the Advertising Contribution Fee and the Cost Recovery Fees in amounts in excess of those permitted by the Associate Agreement to profit at the Associates' expense; (c) systematically manipulating the procurement and inventory policies in a way that shifts the cost of stale merchandise and shipping errors from Shoppers to the Associates; (d) imposing unreasonably onerous obligations on Associates without consideration for their legitimate interests or the intent of the Associate Agreement; and (e) interfering with the Associates' right to associate.

[50] The Plaintiffs alleged that Shoppers is the agent for the Associates in collecting refunds and professional allowances and, therefore, Shoppers owes the Associates a fiduciary duty.

[51] The Plaintiffs allege that pursuant to Shoppers' contractual duties, its common law and statutory duties of good faith and fair dealing, and its duty as a fiduciary, Shoppers has breached a duty to provide the Associates with sufficient disclosure to permit them to verify that: (a) Shoppers is abiding by its obligations under the Associate Agreement; or (b) Shoppers is concealing from the Associates' claims that they may have or have had against Shoppers.

[52] As detailed further below, the Plaintiffs advance six categories of claims against Shoppers; namely:

- 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 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 Duty as Agent, and Unjust Enrichment.
- 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 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. The associated cause of action is Breach of Statutory Right to Associate and/or Common Law Right to Associate.

3. The Advantages of Bulk Purchasing/Rebates Claim

[53] The Plaintiffs submit that Shoppers receives rebates from product suppliers, including pharmaceutical companies, and these rebates should be included in the gross sales of the Shoppers' stores.

[54] Shoppers submits, however, that under the Associate Agreement, it is entitled to the rebates. This interpretation of the Associate Agreement is disputed by the Plaintiffs, who submit that the Associates are entitled to share in the rebates as the advantage of bulk purchasing contractually promised to them.

[55] The Plaintiffs allege that under Article 5.01(c) of the Associate Agreement, Shoppers is obliged to seek out sources of supply of merchandise and to provide each Associate with the advantages of bulk purchasing. The term "advantages of bulk purchasing" is not defined in the Associate Agreement, and the Plaintiffs submit that it includes discounts, volume rebates, advertising allowances or other similar advantages.

[56] The Plaintiffs further allege that as agent for the Associates, Shoppers collect all discounts, volume rebates, advertising allowances or other similar advantages, including rebates on drugs. The Plaintiffs thus claim that the Associates are entitled to a share of the rebates, which would become revenue as an item of "gross sales" as defined in the Associate Agreements.

[57] In support of their claim for a share of the rebates, as a matter of contract interpretation, the Plaintiffs submit that under Article 11.04 of the 2002 Associate Agreement and Article 11.05 of the 2010 Associate Agreement, Shoppers may collect an Advertising Contribution Fee. They submit that the Advertising Contribution Fee is made up of three parts: (a) a flat fee for advertising; (b) rebates from manufacturers and collected for Advertising Costs and (c) an Optimum Program fee. The Plaintiffs submit that the Advertising Contribution Fee imposes a limit or cap on the amount of rebates, Shoppers' can keep without sharing.

[58] The Plaintiffs submit that for Associates governed by the 2002 Associate Agreement Shoppers may only retain a limited portion of the Rebates as a contribution from the Associates to the Advertising Costs; namely, up to a maximum of 2% of gross sales (in combination with the Flat Fee and the Net Optimum Program Fee.). Although the comparable language of the 2010 Agreement is differently configured or located, the Plaintiffs submit that the 2010 agreement operates in the same way as the 2002 Associates Agreement.

[59] The Plaintiffs allege that Shoppers breaches the Associate Agreements by collecting an Advertising Contribution Fee that exceeds 2% of gross sales and for purposes other than as a contribution to Advertising Costs. The Plaintiffs allege that the Flat Fee, the Rebates and or the net Optimum Program Fee taken by Shoppers exceed the 2% of gross sales cap on the Advertising Contribution Fee payable to the Shoppers by each of the Associates. The Plaintiffs allege that Shoppers has been unjustly enriched by the amounts in excess of 2% of gross sales that Shoppers has collected from Associates as an Advertising Contribution Fee.

[60] The Plaintiffs allege that Shoppers' common law duty of good faith and, where applicable, statutory duty of fair dealing requires it to exercise its powers and discretion over the Associates fairly, in good faith and in a commercially reasonable manner when collecting rebates and when charging the Advertising Contribution Fee.

[61] In support of their claim for a sharing of the rebates, the Plaintiffs also rely a document that was provided to the Associates as a part of Project Eagle Vision 97, which was the project that introduced Shoppers' Distribution Centre into the franchise system. The Plaintiffs allege that this document is part of the Manual, which, as noted above, is part of the Associate Agreement.

[62] The Eagle Vision 97 document states:

The impact of Eagle is also intended to not distort store level profitability in that the distribution centre will not be a profit centre.

Q. How will purchase discounts which are earned by the D.C. end up benefitting the store?
Under the current system these purchase discounts go to the store.

A. Purchase discounts on warehouse purchases will lower the D.C. operating costs. Since the D.C. will operate on a break-even basis, the benefit will accrue to the store in the form of lower product cost.

[63] Further, in support of their claim for a sharing of the rebates, the Plaintiffs rely on a memorandum entitled “Changes to Store Charges” dated November 24, 1998, which the Plaintiffs again submit is part of the Manual. The 1998 Memorandum states:

Front Store Distribution Centre Cash Discounts - All of the cash discounts earned on front store purchases into the Distribution Centre are retained in a pool for the benefit of Associates. While we have been very conscientious in ensuring that we get all cash discounts available to us on these DC purchases, over time the mix of suppliers coming into the DC evolves as our business evolves. Depending upon whether or not those suppliers who are increasing their volume to us have cash discounts or not, the front shop cash discount can move slightly higher or lower. The front store cash discount began at 1.00 % in 1997, and was moved to 1.10 % for 1998. For 1999, the cash discount will increase a further .05% to 1.15 %. This is a very significant level, since most cash discounts from vendors are lower than pre-Vision rates due to lower interest costs. With interest rates being relatively stable and tending to drop lower over time, cash discounts for both the front shop and Rx are under some pressure. Therefore, it is not clear that we will always be able to hold this rate. However, we will adjust it over time to ensure that all cash discounts collected on the front shop are distributed to Associates. No Distribution Centre cash discounts accrue to the Corporation.

[64] As part of their bulk purchasing claim, which includes a share of rebates, the Plaintiffs also have a discrete complaint about the Optimum Program, which is a customer loyalty award program. Through the Optimum Program, customers collect points based on the dollar value of their purchases. This promotional program allows customers to collect points on their purchases that can be redeemed for free goods. Shoppers charge the Associates an annual fee, based on the number of points collected at an Associate's store. The Plaintiffs allege that the Optimum Program Fee is not specifically contemplated in the 2002 Associate Agreement. The 2010 Associate Agreement includes loyalty programs as part of the Cost Recovery Fees.

[65] The Plaintiffs allege that the Optimum Program Fee collected is greater than the cost of the Optimum Program and greater than the amounts redeemed at each of the stores and is, therefore, to the detriment of the Associates.

[66] Shoppers denies that the so called Optimum Fee is part of the advertising fee. Rather, it submits that it is charged to the Associates under article 11.05 of the 2002 Associate Agreement or article 11.07 of the 2010 Associate Agreement, which relate to Store Charges.

[67] The Plaintiffs also allege that Shoppers has breached its common law duty of good faith and, where applicable, statutory duty of fair dealing by failing to provide sufficient financial information to the Associates that would allow the Associates to verify that they have not been charged amounts in excess of the 2% gross sales cap, and to verify that the amounts charged have been properly used for Advertising Costs, voluntarily and on a regular basis as part of the standard financial reconciliation process.

4. The Professional Allowances Claim

[68] The Plaintiffs submit that Shoppers is unlawfully retaining professional allowances that should be included in the gross profits of the Shoppers' stores. The Plaintiffs submit that professional allowances were intended to compensate pharmacies for the provision of direct patient care, which is provided exclusively and or primarily by the Associates.

[69] In Ontario, between 2006 and July 1, 2010, under the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O-10 and the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23, pharmacies were not entitled to collect rebates on drugs, but were entitled to claim "professional allowances" from drug manufacturers for the provision of specific direct patient care services.

[70] On July 1, 2010, the regulations in Ontario were amended, which in the case of the *Ontario Drug Benefit Act* eliminated professional allowances in the public sector entirely, and, in the case of *Drug Interchangeability and Dispensing Fee Act* placed limits in the private sector on the amounts that can be collected from drug manufacturers as professional allowances.

[71] For present purposes, the relevant provisions of the *Ontario Drug Benefit Act*, *Drug Interchangeability and Dispensing Fee Act*, and the associated regulation, O.Reg. 201/96, are set out in Schedule "A" to these reasons.

[72] The Plaintiffs allege that Shoppers collected the professional allowances on behalf of the Ontario Associates but unlawfully retained the allowances. Further, it is alleged that Shoppers make procurement and purchasing decisions for generic drugs to bypass the statutory scheme in Ontario and has denied the Associates their fair share of professional allowances.

[73] The Plaintiffs allege that the Associate Agreement does not permit Shoppers to retain the professional allowances, and by doing so Shoppers has breached the contract. Further, it is alleged that by retaining the professional allowances, Shoppers has been unjustly enriched and has breached its common law duty of good faith, its statutory duty of fair dealing, and its fiduciary duty as the agent for the Professional Allowance Class Members.

[74] The Plaintiffs allege that Shoppers has failed to meet its reporting obligations and has failed to provide the Professional Allowance Class Members with information regarding the collection of professional allowances, including any reports made to relevant provincial authorities, and to disclose the funds and or benefits that Shoppers has collected or received as professional allowances.

[75] In support of their claim that the Associates are entitled to the Professional Allowances, the Plaintiffs rely on a document entitled Professional Allowance Reporting Requirements, which they allege is part of the Manual. This document states:

Shoppers Drug Mart will collect and report these activities on each Associate's behalf in a summary report provided to the MOHLTC as per the new 2008 reporting guidelines.

[76] The Plaintiffs also allege that Shoppers' failure to disclose information regarding their reporting and collection of Professional Allowances is a breach of Shoppers' contractual duties, its common law duty of good faith, and its statutory duty of fair dealing, as well as a breach of fiduciary duty.

5. The Cost Recovery Fees Claim

[77] Article 11.05 of the 2002 Associate Agreement and Article 11.07 of the 2010 Associate Agreement authorizes Shoppers to collect Cost Recovery Fees in the good faith exercise of its judgment.

[78] The Plaintiffs allege that in breach of the Associate Agreement, the common law duty of good faith, and the statutory duty of fair dealing, Shoppers has been using the Cost Recovery Fees as a way to earn additional profits beyond those contemplated in the Associate Agreement.

[79] In particular, the Plaintiffs allege that, in breach of contract and illegally, Shoppers has earned profits from: (a) an accounting fee for the centralized bookkeeping system; (b) an equipment rental fee; and (c) an occupancy charge for the leased premises.

[80] The Plaintiffs allege that in breach of the Associate Agreement, Shoppers does not negotiate with the Associates regarding the terms and conditions of the leases for their equipment and rather presents the equipment leases on a "take it or leave it" basis.

[81] The Plaintiffs allege that Shoppers receives substantial inducements from landlords to enter into retail leases, which are not disclosed to the Associates. The Plaintiffs allege that Shoppers do not set off these inducements against the Occupancy Charge or otherwise pass the advantages of these inducements on to Associates.

[82] The Plaintiffs allege that Shoppers has been unjustly enriched by collecting and retaining the Cost Recovery Fees from the Associates in excess of the cost of providing these services or because Shoppers is not lawfully entitled to collect or retain certain Cost Recovery Fees at all.

[83] 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. 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.

[84] The Plaintiffs also have a grievance about the charges for the Optimum Program. As I understand their argument, it is that although this charge is expressly provided for under Article 11.07 of the 2010 Associate Agreement, there is no basis for this charge under the 2002 Associates Agreement. In this regard, the Plaintiffs deny that a charge for the Optimum Program comes within the fees provided for under Article 11.05 of the 2002 Associate Agreement in relation to “other services from time to time rendered by [Shoppers] to the Associate that are not included in the services furnished by [Shoppers] to associates generally at the present time” because Shoppers was already charging the Optimum Program Fee at the time the 2002 Associate Agreement was introduced.

[85] And as noted above, the Plaintiffs also complain that the total amount Shoppers receives for the Optimum Program Fee, the rebates and advertising flat Fee will exceed 2% of any given Associates’ Gross Sales.

[86] The Plaintiffs further allege that Shoppers has breached its duty of good faith and where applicable, statutory duty of fair dealing by failing to provide sufficient financial information to the Associates that allows them to verify that the Cost Recovery Fees are in proportion to the actual costs incurred to provide these services and equipment, voluntarily and on a regular basis as part of the standard financial reconciliation process.

6. The Budgeting Practices Claim

[87] The Plaintiffs advance several claims based on Shoppers’ alleged misconduct in setting the budgets upon which the determination of the profit sharing arrangement depends.

[88] Before 2002, Shoppers and each Associate would negotiate the Associate's remuneration where the store did not meet its targeted profitability. In circumstances where an Associate’s store was less profitable than anticipated due to circumstances beyond the individual Associate's reasonable control, Article 11.02 of the 2002 Associate Agreement and Article 11.03 of the 2010 Associate Agreement requires Shoppers to reduce the Profit Sharing Fee such that the individual Associate's compensation would not be negatively impacted.

[89] The Plaintiffs allege that since about 2002, Shoppers no longer applies Article 11.02 of the 2002 Associate Agreement or Article 11.03 of the 2010 Associate Agreement. The Plaintiffs submit that an Associate's compensation is now negatively impacted in all cases where a franchised store fails to meet its targeted profitability. The Plaintiffs allege that contrary to Article 11.02 of the 2002 Associate Agreement and Article 11.03 of the 2010 Associate Agreement, the Associates' compensation is reduced by a percentage of the shortfall.

[90] The Plaintiffs allege that the negative impact of Shopper's failure to apply Article 11.02 of the 2002 Associate Agreement and Article 11.03 of the 2010 Associate Agreement is compounded by the fact that, since about 2002, Shoppers has been imposing aggressive and unrealistic Common Year Plans on Associates. As a result, Associates who achieve the same level of profitability but fail to meet the unfairly imposed higher target earn less, while Shoppers benefits from the Associate's failure to meet the target. The Plaintiffs allege that these actions have been taken without due regard to the legitimate interests of the Associates, and are a breach of Shoppers' common law duty of good faith and, where applicable, statutory duty of fair dealing.

[91] Further, the Plaintiffs advance a claim based on the budgeted allocation of hours of work. Under the budgets, Associates are required to work as a dispensing pharmacist for a specific number of hours each week. The Plaintiffs allege that Shoppers has continually increased Pharmacy Hours from 25 to 32 hours per week for all 52 weeks of the year, without allowance for the time required for professional development, vacation, mandatory corporate meetings, and other similar commitments.

7. The Inventory Practices Claim

[92] The Plaintiffs allege that under the Associate Agreement, Associates procure goods for their stores based on their own evaluation of the store's needs and that there is no basis in the Associate Agreement for Shoppers to initiate specific purchase orders. However, from time-to-time, Shoppers purchases a surplus of goods and has excess inventory, and to move this inventory from the Distribution Centre, it delivers unwanted goods to the Associates without input or approval. Associates are required to pay full price for these unwanted goods. These orders are known as "mass order generations or "MOGs".

[93] The Plaintiffs allege that Associates may be forced to discount the price of the unwanted goods with a loss of profitability to the Associates' detriment and Shoppers' benefit.

[94] The Plaintiffs allege that Shoppers has systemically imposed policies that unjustly limit the ability of Associates to make inventory adjustment claims. Specifically, there are minimum claim requirements, unreasonable time limits for the making of a claim, and operational restrictions limiting the detection of a claim. The effect of these policies is to unfairly or unjustly advantage Shoppers to the detriment of

the Associates. The Plaintiffs allege that Shoppers' imposition of these policies is a breach of its contractual, common law and, where applicable, statutory duties.

[95] The Plaintiffs allege that Shoppers has been unjustly enriched by the amounts in which it has profited from the imposition of the procurement and inventory policies.

8. The Interference with Association Claim

[96] Associates have rights under the common law and by statute, including s. 4 of the *Arthur Wishart Act (Franchise Disclosure)*; s. 8 of the *Franchises Act*, R.S.A. 2000; s. 4 of the *Franchises Act*, R.S.P.E.I.; s. 4 of the *Franchises Act*, S.N.B. 2007, (not yet in force); and s. 4 of the *Franchises Act*, S.M. 2010, (not yet in force), to associate together, free from Shoppers' interference and any threat of retribution or penalty for doing so, either direct or indirect.

[97] The Associates belong to a franchisee association called the PEERs Committee, which, until 2002, was independent of Shoppers. PEERs was organized regionally, with each region having its own constitution, its own elected executive committee, and its own bank account. PEERs representatives were elected by the Associates to represent the Associates' interests.

[98] The Plaintiffs allege that in 2002, Shoppers began to interfere in the activities of PEERs and took control of PEERs by, among other things: (a) requiring the attendance of Associates; (b) taking control of PEERs financing; (c) requiring Shoppers' approval for the agendas; (d) denying Associates the opportunity to vote on changes to Shoppers' policies or to make recommendations; and (e) controlling the contents of the minutes of PEERs meetings.

[99] The Plaintiffs allege that PEERs is not free from Shoppers' intimidation and threats of retaliation and that Shoppers routinely reprimands, threatens and intimidates the Plaintiffs and Associates who raise concerns about Shoppers' administration of the franchise system at PEERs meetings.

[100] Since the start of these proceedings, the Plaintiffs have taken steps to organize an Independent franchisee association called the United Association of Pharmacist Franchisees ("UAPF"), which Shoppers refuses to recognize. The Plaintiffs allege that Shoppers has taken steps to intimidate Associates from participating in the UAPF, including Shoppers' representatives conspicuously loitering outside of UAPF meetings.

[101] The Plaintiffs allege that Shoppers is in breach of its common law and, where applicable, statutory duties by interfering with PEERs, by interfering in the formation of an independent franchisees' association, and by threatening and intimidating the Plaintiffs and other Associates in their efforts to exercise their right to freely associate.

[102] The Plaintiffs allege that because of Shoppers' unwillingness to recognize an organization other than the one they control, the Associates require a declaration that

they are entitled to an effective, independent and representative association of their own choosing, free from control, interference, intimidation or reprisals from Shoppers.

C. THE PLAIN AND OBVIOUS TEST

[103] As noted in the introduction, the motion before the court has become a pleading motion under Rule 21 and under s. 5(1)(a) of the *Class Proceedings Act, 1992*. There is, however, a dispute between the parties about the test to be applied to the Plaintiffs' Amended Statement of Claim and a dispute about whether it is premature to evaluate the causes of action.

[104] Under s. 5 (1)(a) of the *Class Proceedings Act, 1992*, the first criterion for certification is whether the plaintiff's pleading discloses a cause of action. For the purposes of s. 5 (1)(a), the "plain and obvious" test for disclosing a cause of action employed in *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 is used to determine whether the action discloses a cause of action: *Anderson v. Wilson* (1999), 44 O.R. (3rd) 673 (C.A.) at p. 679, leave to appeal to S.C.C. refd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), affd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[105] The plain and obvious test is derived from what historically was known as a demurrer pleading and what in Ontario was Rule 126 of the former *Rules of Practice* and what is now rule 21.01 (1)(b) of the *Rules of Civil Procedure*, which states:

21.01 (1) A party may move before a judge, ...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

[106] No evidence is admissible on a motion under rule 21.01 (1)(b), and the factual context is taken from the pleadings.

[107] There is also a similar jurisdiction to review the legal merits of a pleading provided by rule 21.01 (1)(a). The difference is that under subrule 21.01 (1)(a), with the consent of the parties or leave of the court, some evidence may be admissible to decide an issue of law. Rule 21.01 (1)(a) states:

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or, ...

and the judge may make an order or grant judgment accordingly.

[108] Where a defendant submits that the plaintiff's pleading does not disclose a reasonable cause of action, to succeed in having the action dismissed, the defendant must show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim: *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

[109] In assessing the cause of action or the defence, no evidence is admissible and the court accepts the pleaded allegations of fact as proven, unless they are patently ridiculous or incapable of proof; *A-G. Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Canada v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441; *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.); *Folland v. Ontario* (2003), 64 O.R. (3d) 89 (C.A.); *Canadian Pacific International Freight Services Ltd. v. Starber International Inc.* (1992), 44 C.P.R. (3d) 17 (Ont. Gen. Div.) at para. 9.

[110] A motions judge is entitled to consider any documents specifically referred to and relied on in the pleading: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (C.A.), leave to appeal dismissed, [1999] S.C.C.A. No 460; *Corktown Films Inc. v. Ontario*, [1996] O.J. No. 3886 (Gen. Div.); *Montreal Trust Co. of Canada v. Toronto-Dominion Bank*, [1992] O.J. No. 1274 (Gen. Div.); *Re*Collections Inc. v. Toronto-Dominion Bank*, 2010 ONSC 6560.

[111] Matters of law that are not fully settled should not be disposed of on a motion to strike: *Dawson v. Rexcraft Storage & Warehouse Inc.*, *supra*, and the court's power to strike a claim is exercised only in the clearest cases: *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

[112] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff: *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n. However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law: *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).

[113] Generally speaking, the case law imposes a very low standard for the demonstration of a cause of action, which is to say that, conversely, it is very difficult for a defendant to show that it is plain, obvious, and beyond doubt that the plaintiff cannot succeed with the claim.

[114] The case law establishes the directive that issues that are novel, complex, and important should normally be decided on a full factual record after trial: *Leek v. Vaidyanathan*, [2011] O.J. No. 200 (C.A.), para. 3; *PDC 3 Limited v. Bregman + Hamann Architects*, [2001] O.J. No. 422 (C.A.), paras. 7-12.

[115] I recently examine this last directive in *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642, and I will not repeat that discussion here, save to note again that the

directive is honoured in the contravention as much as it is in compliance. It is difficult to predict when a court will defer to trial a novel, complex, and important issue that arises on a pleadings motion. Instead of repeating from *Arora*, I will focus my attention on Rule 21 and s. 5 (1)(a) of the *Class Proceedings Act, 1992* in the context of breach of contract cases.

[116] Generally speaking, in the context of an alleged breach of contract, Rule 21 is not designed to answer questions of law where material facts about the contract dispute are in dispute: *Portuguese Canadian Credit Union Ltd. v. CUMIS General Insurance Co*, 2011 ONSC 6107. Where the question of law turns on the construction of a contract with unclear or ambiguous terms, a Rule 21 motion, is not an appropriate way to resolve the legal question: *Portuguese Canadian Credit Union Ltd. v. CUMIS General Insurance Co*, *supra*; *Montreal Trust Co. of Canada v. Toronto-Dominion Bank*, [1992] O.J. No. 1274 at para. 14 (Gen. Div.). In *TransCanada Pipelines Ltd. v. Pottery Station Power Limited Partnership* (2002), 22 B.L.R. (3d) 210 at paras. 14-15 (Ont. S.C.J.), Justice Lane stated that a court should be loathe to construe a contract in the absence of evidence as to the surrounding circumstances and business context in which the contract was negotiated and signed.

[117] However, conversely, if the factual nexus is not contentious and the construction of the contract is a matter of applying principles of contract interpretation, which are issues of law, then a Rule 21 motion may be an appropriate way to resolve the legal issue or to determine whether the plaintiff has shown a reasonable cause of action.

[118] In *ArcelorMittal Dofasco Inc. v. U.S. Steel Canada Inc.*, [2008] O.J. No. 4412 (S.C.J.), where a termination provision in a contract was interpreted on a Rule 21 motion, Justice Wilton-Siegel stated at para. 32-34.

32. I conclude, however, that the Court is able to make a determination under Rule 21 on the U.S. Steel motion for reasons best set out by way of distinguishing the present circumstances from those in the *Pottery Station Power* and *Montreal Trust Company* decisions. The circumstances in the present proceeding differ from those apparently before the Court in those decisions in two important respects.

33. First, as discussed further below, there is no ambiguity with respect to the interpretation of the Termination Right on its plain meaning. Arguably, this removes any need for consideration of the surrounding circumstances and business context in which the Agreement was formed.

34. Second, in any event, the Court is in a position to take such surroundings and business context into consideration to the extent necessary for the interpretation of the Agreement. The material facts pertaining to the surrounding circumstances and the business context in which the Agreement was formed are before the Court in the plaintiffs' pleadings and are not challenged by the defendants. Instead, the defendants have proceeded on the basis that all such facts are proven for purposes of this motion. Therefore there is no dispute as to whether the evidence supports these facts as pleaded by the plaintiffs. Nor is there any competing evidence that requires factual determinations by the Court. Accordingly, the circumstances that gave rise to the concern expressed by Lane J. in *Pottery Station Power*

are not present in this proceeding. There is no need for the Court to admit evidence before it can take into consideration the business context in which the Agreement was formed.

[119] As noted earlier, in the case at bar, the Plaintiffs submit that in the circumstances of the immediate case, it is premature for the court to decide the contract interpretation issues and the Plaintiffs submit that in order for the court to interpret the agreements, it must make findings of fact about the surrounding circumstances and context.

[120] I disagree with these submissions for much the same reasons as Justice Wilton-Siegel did in *ArcelorMittal Dofasco Inc. v. U.S. Steel Canada Inc.*, *supra*. In the case at bar, the contractual nexus is readily apparent from the Amended Statement of Claim, the facts of which are taken to have been proven.

[121] The main contextual circumstance is the Associate Agreements are standard form contracts between franchises and one of Canada's largest franchisors with a long history of sharing and co-operation, which is described in some detail in the Amended Statement of Claim, which includes rhetorical allegations about the history of the Shoppers' franchise and about the nature of its franchise scheme.

[122] There is a further reason for disagreeing with the Plaintiffs' submission that it is premature to decide the interpretative issues in the case. If their submission about contract interpretation is meant to be categorical, then, practically speaking, contract interpretation causes of action are removed from the scrutiny of the s. 5 (1)(a) criterion of the test for certification on the basis that a contract cannot ever be interpreted until after certification when there can be a comprehensive appreciation of the factual nexus. If their proposition is meant to be categorical, I disagree with it. Courts have for decades, if not centuries, been able to interpret contracts, wills, statutes, by-laws, regulations, and other texts on motions or applications.

[123] Ironically, if the Plaintiffs' submission were categorically true, then in any proposed class action with any unstable factual underpinnings, it would become unlikely that the plaintiff would ever be able to satisfy the commonality criterion to certify questions based on the alleged breach of contract. I pointed out this irony during the argument, and the Plaintiffs' submission was essentially that they would cross that bridge when they came to it.

[124] I do, nevertheless, agree that there will be cases where under the plain and obvious test, the court should accept that a breach of contract claim that depends upon the interpretation of the contract should not be determined on pleadings motion.

[125] However, in my opinion, there will also be cases where the interpretation of the contract can be determined pursuant to Rule 21 or under s. 5 (1)(a) of the *Class Proceedings Act*, 1992. As it happens, the discussion below will reveal that both phenomena are present in the case at bar. As the discussion will show, in my opinion, the Plaintiffs have some interpretative or breach of contract claims that should not be

determined on a Rule 21 motion and they have some claims that can and will be determined on this motion.

[126] *Landsbridge Auto Corp. v. Midas Canada Inc.*, [2009] O.J. No. 1279 (S.C.J.), demonstrates that the cause of action criterion or Rule 21 may be used to cull causes of action when as a matter of contract interpretation it is plain and obvious that the claim is untenable.

[127] *Landsbridge* was a certification motion in a dispute between franchisees and a franchisor. Justice Cullity certified the action as a class action, but he did so on the basis of causes of action that were more narrow than those that the plaintiff had advanced. Justice Cullity described his approach to interpretative issues on a certification motion at paragraph 13 of his judgment, where he stated:

13. Although evidence is not admissible for the purpose of determining whether a pleading discloses a cause of action, this does not, in my opinion, mean that context is to be ignored when a question of interpretation arises under section 5(1)(a) of the CPA. Rather, the plain and obvious test must be applied to the words of the contract read in the light of the contextual circumstances pleaded.

[128] In *Landsbridge*, Justice Cullity applied a similar analytical approach to the allegations that the franchisor had breached its duty of good faith. At paragraph 37 of his judgment, he stated that at trial the determination of whether there had been a breach of the duty of good faith would involve weighting the facts and the respective interests of the parties, but that on the certification motion, the court's task was to decide whether it is plain and obvious that the facts as pleaded could not justify a decision by the trial judge in favour of the plaintiffs and the class.

[129] In *Landsbridge*, Justice Cullity held that the class members had demonstrated a reasonable cause of action based on the franchisor's obligation to perform the contract in good faith at common law or based on the statutory codification of a franchisor's duty of good faith. However, he concluded that the class members claims' based on the terms of the franchise agreement independent of the duty of good faith were not sustainable. Thus, he stated at paragraph 30 of his judgment:

30. To the extent that the plaintiffs' claim that Midas had no right to discontinue sales to the Franchisees was based on the interpretation of section 3.2(a), counsel for the defendants were, in my judgment, correct in their submission that, independently of the duty of good faith, the section cannot reasonably be interpreted as imposing a duty on Midas to continue selling products however commercially unfeasible or unprofitable this might be.

[130] In the case at bar, I will proceed in a way similar to Justice Cullity's approach in *Landsbridge*, and I shall decide whether it is plain and obvious that the facts as pleaded, including the matters of contract interpretation and the matters of alleged breaches of good faith, could justify a decision by the trial judge in favour of the Plaintiffs and the class members they would represent.

D. PRINCIPLES OF CONTRACT INTERPRETATION

[131] Assuming the factual nexus described in the Amended Statement of Claim is true, this motion is largely about applying the principles of contract interpretation to the 2002 and 2010 Associates Agreements described above.

[132] The rules of contract interpretation direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888.

[133] In searching for the intent of the parties, the court should give particular consideration to the terms used by the parties, the context in which they are used, and the purpose sought by the parties in using those terms: *Frenette v. Metropolitan Life Insurance Co.*, [1992] 1 S.C.R. 64.

[134] The words of a contract must be interpreted in context. Although, with a few exceptions for situations of ambiguity, evidence of negotiations and of the parties' subjective intent is not admissible, in interpreting a commercial contract, the court should have regard to the surrounding circumstances; that is, the factual background and the commercial purpose of the contract: *Prenn v. Simmonds*, [1971] 3 All E.R. 240 (H.L.); *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.); *Canada Square Corp. v. VS Services Ltd.* (1981), 34 O.R. (2d) 250 (C.A.).

[135] Provisions should not be read in isolation but in harmony with the agreement as a whole: *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6; *Hillis Oil and Sales Limited v. Wynn's Canada*, [1986] 1 S.C.R. 57; *Scanlon v. Castlepoint Dev. Corp.* (1993), 11 O.R. (3d) 744 (C.A.).

[136] The various clauses must be given an interpretation that takes the entire agreement into account; *Canadian Newspapers Co. v. Kanda General Insurance Co.* (1996), 30 O.R. (3d) 257 at p. 270 (C.A.), leave to appeal refd. [1996] S.C.C.A. No. 553. A court should construe a contract as a whole giving meaning to all its provisions: *Van Ginkel v. QGZ Ltd.*, [2009] O.J. No. 6204 (S.C.J.) at para. 30.

[137] Interpretation is an objective exercise; evidence of one party's subjective intention has no independent place in construing the meaning of a contract: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para. 54. When interpreting the provisions of a written contract, the court must look first at the language used in that contract, and if the language reveals no ambiguity, the court should not go outside of the agreement to consider evidence of the parties' subjective intention: *Eli Lilly and Co. v. Novopharm Ltd.* *supra*.

[138] In *British Columbia Hydro and Power Authority v. BG Checo International Ltd.*, (1993), 99 D.L.R. (4th) 577 (S.C.C.), La Forest and McLachlin, JJ. stated at pp. 581-2:

It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole. Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term. A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms -or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

[139] Several particular canons of contract interpretation are engaged by the factual nexus described in the Amended Statement of Claim.

[140] Given the far superior negotiating power of the franchisor, Shoppers, the 2002 and 2010 Associates Agreements are contracts of adhesion and the *contra proferentem* rule applies. When there is an ambiguity or contradiction in an agreement that cannot be resolved by the other rules of construction resort then may be had to the *contra proferentem* rule, i.e., that the language of the contract will be construed against the party that inserted the provision to the other with no opportunity to modify its meaning: *Reliance Petroleum Limited v. Stevenson* [1956] S.C.R. 936; *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6; *Hillis Oil and Sales Limited v. Wynn's Canada*, [1986] 1 S.C.R. 57; *Scanlon v. Castelpoint Dev. Corp.* (1992), 11 O.R. (3d) 744 (C.A.).

[141] Where contracting parties expressly incorporate terms into a contract, the court must make two interrelated interpretative decisions. First, because the incorporated language will be read into the contract, the court must determine the extent of the incorporation by reference. Second, the court must eliminate wording that is inconsistent or insensible with the pre-existing language of the contract. See: K. Lewiston, *The Interpretation of Contracts*, (5th ed) (London: Sweet & Maxwell, 2011), pp. 105, 505-506; H.G. Beale, *Chitty on Contracts* (30th ed.) (London: Sweet & Maxwell, 2008), para. 12-079; *Tradigrain S.A. v. King Diamond Shipping SA*, [2000] 2 Lloyd's Rep. 319.

[142] When terms would be incorporated by reference into a contract, the terms of the host contract prevail over any inconsistent terms incorporated by reference: *Sabah Flour and Feed Mills Sdn Bhd v. Comfez*, [1988] 2 Lloyd's Rep. 18 (C.A.); *Modern Building Wales Ltd. v. Limmer and Trinidad Co. Ltd.*, [1975] 1 W.L.R. 1281 (C.A.); *Lac La Ronge Indian Band v. Dallas Contracting Ltd.*, 2001 SKQB 135 at para. 83; *Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd.* 2003 BCCA 580 at paras 15-17.

E. STATUTORY DUTY OF FAIR DEALING AND THE COMMON LAW

DUTY OF GOOD FAITH

[143] Subsection 3(1) of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 provides that “Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.” Section 3 of the Act states:

3. (1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

[144] Substantially similar provisions exist in franchise legislation in Manitoba, New Brunswick, P.E.I. and Alberta. See: *Franchises Act*, S.M. 2010, c. 13, s. 3(1); *Franchises Act*, S.N.B. 2007, c. F-23.5, s. 3(1); *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1, s. 3(1); and *Franchises Act*, R.S.A. 2000, c. F-23, s. 7.

[145] The *Arthur Wishart Act* is remedial legislation, designed to address the power imbalance between franchisor and franchisee, and it is entitled to a generous interpretation to give effect to its purpose: *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300 at paras. 31, 74; *TA & K Enterprises Inc. v. Suncor Energy Products Inc.*, [2010] O.J. No. 5532 at para. 41; *Salah v. Timothy's Coffees of the World Inc.*, [2010] O.J. No. 4336 at para. 26 (S.C.J.), *aff'd*, 2010 ONCA 673; *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252 at para. 496.

[146] A duty of good faith exists at common law in the context of a franchisor-franchisee relationship: *Shelanu Inc. v. Print Three Franchising Corp.*, [2003] O.J. No. 1919 (C.A.). Section 3(1), of the *Arthur Wishart Act* is a codification of the common law: *Landsbridge Auto Corp. v. Midas Canada Inc.*, *supra* at paras. 24, 59; *Machias v. Mr. Submarine Ltd.* (2002), 24 B.L.R. (3d) 228 at para. 114 (Ont. S.C.J.); *1117304 Ontario Inc. v. Cara Operations Ltd.*, [2008] O.J. No. 4370 at para. 66 (S.C.J.); *Fairview Donut Inc. v. The TDL Group Corp.* *supra*, at para. 495.

[147] The determination of whether a party has breached the duty of good faith will require an examination of all the circumstances of the case: *Shelanu Inc. v. Print Three Franchising Corp.*, *supra*; *Fairview Donut Inc. v. The TDL Group Corp.*, *supra* at para. 498.

[148] The duty of good faith and fair dealing is imposed to secure the performance of the contract the parties have made and it is not intended to replace that contract with another contract or to amend the contract by altering the express terms of the franchise contract: *Pointts Advisory Ltd. v. 754974 Ontario Inc.*, [2006] O.J. No. 3504 at para. 55

(S.C.J.); *Agribrands Purina Canada Inc. v. Kasamekas*, [2011] O.J. No. 2786 at para. 51 (C.A.); *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.).

[149] The duty of good faith and fair dealing has been considered in several cases involving claims by franchisees. These cases reveal that the duty of good faith and fair dealing requires a franchisor:

- To exercise its powers under the franchise agreement in good faith and with due regard to the interests of the franchisee: *Shelanu Inc. v. Print Three Franchising Corp.*, *supra* at paras. 66 and 69.
- To observe standards of honesty, fairness and reasonableness and to give consideration to the interests of the franchisees: *Landsbridge Auto Corp. v. Midas Canada Inc.*, [2009] O.J. No. 1279 (S.C.J.) at para. 15; *Shelanu Inc. v. Print Three Franchising Corp.*, *supra* at paras. 5, 68-71.
- To ensure that the parties do not act in such a way that eviscerates or defeats the objectives of the agreement that they have entered into: *Transamerica Life Inc. v. ING Canada Inc.*, *supra* at para. 53; *Landsbridge Auto Corp. v. Midas Canada Inc.*, *supra* at para. 17.
- To ensure that neither party substantially nullifies the bargained objective or benefit contracted for by the other, or causes significant harm to the other, contrary to the original purpose and expectation of the parties: *Katotikidis v. Mr. Submarine Ltd.*, [2002] O.J. No. 1959 at para. 72 (S.C.J.); *TDL Group Ltd. v. Zabco Holdings Inc.*, [2008] M.J. No. 316 at para. 272 (Q.B.).
- Where the franchisor is given a discretion under the franchise agreement, the discretion must be exercised reasonably and with proper motive and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties: *Landsbridge Auto Corp. v. Midas Canada Inc.*, *supra* at para. 17; *CivicLife.com Inc. v. Canada (Attorney General)* [2006] O.J. No. 2474 (C.A.), at para. 50; *Shelanu Inc. v. Print Three Franchising Corp.*, *supra* at para. 96.

[150] In *1117304 Ontario Inc. (c.o.b. Harvey's Restaurant) v. Cara Operations Ltd.*, [2008] O.J. No. 4370 (S.C.J.), Justice Kershman summarized the content of the duty of good faith in the franchise context as follows, at paras. 68-72:

- a party may act self-interestedly, however in doing so that party must also have regard to the legitimate interests of the other party;
- if A owes a duty of good faith to B, so long as A deals honestly and reasonably with B, B's interests are not necessarily paramount;
- good faith is a minimal standard, in the sense that the duty to act in good faith is only breached when a party acts in bad faith. Bad faith is conduct that is contrary

to community standards of honesty, reasonableness or fairness (e.g. serious misrepresentations of material facts); and

- good faith is a two way street. Whether a party under a duty of good faith has breached that duty will depend, in part, on whether the other party conducted itself fairly.

F. DISCUSSION

1. Introduction

[151] The Plaintiffs assert breach of contract claims. They submit that Shoppers has breached the terms of the Associate Agreement in numerous ways. The Plaintiffs also assert that in numerous ways, Shoppers has breached its Statutory Duty of Fair Dealing and its common law duty of performing a contract in good faith. And the Plaintiffs assert that Shoppers has breached fiduciary duties and has been unjustly enriched. They assert that Shoppers has interfered with the Associates' right to associate.

[152] Metaphorically speaking, if the Plaintiffs proposed class action were likened to a baseball game, in their Amended Statement of Claim, they throw different types of legal pitches, and they throw many pitches. On this motion, the court is the umpire calling the balls and strikes. It is a called ball when it is plain and obvious that the legal pitch is outside the legal strike zone and a called strike where the Plaintiffs have pleaded a reasonable cause of action. On the motion, the umpire-court must have a generous and wide strike zone.

[153] To be more specific about how the Plaintiffs have pitched their case, they assert that Shoppers has breached the terms of the Associate Agreement and also Breached its Statutory Duty of Fair Dealing and or Common Law Duty of Good Faith: (a) by failing to account for and to remit Professional Allowances; (b) by failing to account for and to provide the Class with the advantages of bulk purchasing by not sharing the rebates or reducing the cost of goods Distribution Centre so that it is not a profit centre; (c) by collecting an Advertising Contribution Fee in excess of the 2% cap in the 2002 Associate Agreement; (d) by making unauthorized charges for the Optimum Program; (e) by profiting from the services rather than recovering its costs without a profit element; (f) by imposing a budgeting system that is biased against the interests of Associates; (g) by imposing inventory practices that are inconsistent with an implied term in the Associate Agreement that any specifications, standards, policies, and operating procedures imposed on Associates must be reasonable; and (h) by failing to provide necessary disclosure required to allow Associates to determine if Shoppers is meeting its legal obligations.

[154] The Plaintiffs allege that Shoppers' breaches of contract are also breaches of its common law and statutory duties to exercise their powers and discretion over the Associates fairly, in good faith and in a commercially reasonable manner. Additionally,

the Plaintiffs allege that Shoppers' duty to act in good faith has been breached by: (a) Shoppers' failing to disclose material facts and/or misrepresenting material facts to the Associates in relation to the Cost Recovery Fees; and (b) Shoppers' imposing inventory practices without regard to the interests of the Associates.

[155] The Plaintiffs allege that some of these breaches are also breaches of fiduciary duty and some give rise to unjust enrichment claims, and the Plaintiffs also seek a declaration that Shoppers has interfered with the Associates' right to associate.

[156] The court as the umpire charged with identifying which of these many pitches is in the legal strike zone has the enormous task of carefully scrutinizing and analyzing each pitch. However, I believe that the court's task can be simplified with some organization and remembering that under the plain and obvious test, there is a generous strike zone making it relatively easy for a Plaintiff to throw a strike.

[157] My general approach will be to organize the discussion by beginning with the claims where it is easiest to say that the Plaintiffs have thrown a pitch within the legal strike zone and then proceeding to the progressively more difficult pitches to call. The resulting analysis will have seven stages, or innings to continue the baseball metaphor.

[158] The claims to be considered in the First Stage are: (a) the Cost Recovery Fees Claim; (b) the Budgeting Practices Claim; and (c) the Inventory Practices Claim. In my opinion, the Plaintiffs pitches are within the large strike zone. Therefore, I shall not say a great deal about these claims and the associated causes of action, in part, because it would be unfair and inappropriate for me to express an opinion about the merits, strengths or weakness of these claims at this juncture of the proceedings.

[159] In Stage Two, I shall discuss the more difficult unjust enrichment claim. With the exception of the claim for rebates, the Plaintiffs' unjust enrichment claims are more strikes.

[160] In Stage Three, I shall discuss two claims that in my opinion should be struck from the Amended Statement of Claim; namely: the breach of fiduciary duty claim and the interference with association claim. These claims are not tenable.

[161] In Stage Four, I shall discuss the breach of statutory and common law duties of good faith claims. Here, again the claims can be organized into classes so as to simplify the discussion. Most of these claims are strikes.

[162] In Stage Five, I shall discuss the Duty of Disclosure Claims. My opinion is that these claims should be struck from the Amended Statement of Claim.

[163] In Stages Six and Seven, I shall discuss the two most difficult and contentious claims; namely: The Advantages of Bulk Purchasing/Rebates Claim; and The Professional Allowances Claim. The discussion will explain my opinion that the rebate claim should be struck but not the professional allowances claim.

2. The Cost Recovery Fees Claim/The Budgeting Practices Claim/The Inventory Practices Claim

[164] The essence of the Plaintiffs' Cost Recovery Fees Claim is the submission that Shoppers is not entitled to collect fees for providing services and equipment to Associates with a profit element.

[165] Shoppers' response is that both article 11.05 of the 2002 Associate Agreement and article 11.07 of the 2010 Associate Agreement provide that the fees to be charged to the Associates in respect of the Store Charges will be "of such amount or amounts as Shoppers determines in the good faith exercise of its judgment." It submits that Shoppers is not prohibited from including a profit or return-on-investment element in the store charges. It submits that it is plain and obvious that the Plaintiffs' various Cost Recovery Fee Claims will inevitable fail.

[166] The Plaintiffs, however, interpret the Associate Agreements differently to advance their claim that Shoppers is not entitled to collect fees for providing services and equipment to Associates with a profit element.

[167] The Plaintiffs submit that under Article 11.05 of the 2002 Associate Agreement and 11.07 of the 2010 Associate Agreement, acting in good faith Shoppers cannot make a profit and its fees are limited to covering the cost of the services. In respect of any equipment charges, the Plaintiffs rely on Article 5.01(b), which requires Shoppers to only lease equipment to Associates on "terms and condition to be mutually agreed upon." The Plaintiffs submit that Shoppers does not bargain but rather imposes the equipment lease expense and does not account for tenant incentives paid by landlords. The Plaintiffs submit that Shoppers claims an unreasonable rate of return on store leases.

[168] As noted earlier, the Plaintiffs submit that Shopper's overcharges for the advertising fee and for the Optimum Program, which the Plaintiffs submit is a fee not authorized under the 2002 Associates Agreement.

[169] With respect to The Budgeting Practices Claim, the Plaintiffs allege that Shoppers has created a biased budgeting process that unlawfully increasing Shoppers's profitability at the expense of Associates. The budgeting process sets the targets that are part of the formula for dividing the profits from the stores between Shoppers and the Associates. The targets or planned profits can have a substantial influence on the measure of the profit shared with the Associates, and the Plaintiffs submit that Shoppers benefits from imposing aggressive budgets on Associates because its share of profit increases when an Associate fails to meet planned profitability.

[170] With respect to the Inventory Practices Claim, the Plaintiffs also claim that Shoppers has imposed unfair inventory policies and procedures on Associates. These policies make Associates pay for unordered, unwanted, and damaged goods also some goods that are never delivered to the stores.

[171] In my opinion, it cannot be said that it is plain and obvious that any of the Cost Recovery Fees Claim, the Budgeting Practices Claim or the Inventory Practices Claim will inevitably fail. In my opinion, these claims have sufficient traction as breach of contract claims and as possible breach of good faith claims.

3. The Unjust Enrichment Claims

[172] In advancing their claims for rebates, the professional allowances, cost recovery fees, and inventory practices, the Plaintiffs submit that Shoppers has been unjustly enriched. Relying on *Landsbridge Auto. v. Midas Canada*, *supra*, Shoppers submits that the unjust enrichment claim is untenable. The Plaintiffs counter that *Landsbridge Auto* is distinguishable.

[173] My own view is that: (1) the Plaintiffs do not have a viable unjust enrichment claim for rebates; (2) they have viable but superfluous or redundant unjust enrichment claims for the professional allowances, cost recovery fees, and inventory practices; and (3) *Landsbridge Auto* does not stand against the viable but redundant unjust enrichment claims.

[174] There are three elements to an unjust enrichment claim: (1) enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) the absence of a juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, at para. 30; *Landsbridge Auto Corp. v. Midas Canada Inc.*, *supra* at para. 62; *Kerr v. Baranow*, [2011] 1 S.C.R. 269.

[175] The first two elements are subject to a simple economic analysis: *Kerr v. Baranow*, *supra* at paras. 37 and 537. The requirement that there be a corresponding deprivation means that there must be a direct nexus between the enrichment of the defendants and the deprivation suffered by the plaintiffs: *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 (S.C.J.) at para. 111; *VGI General Partner Inc. v. Ensis Management Inc.*, 2010 ONSC 3766 at para. 20.

[176] In my opinion, the simple economic analysis is satisfied for the Plaintiffs' claims for rebates, the professional allowances, cost recovery fees, and inventory practices.

[177] For the claims for rebates and professional allowances, the simple analysis is that the Associates were entitled to share in these revenues and Shoppers has been enriched by taking the Associates' share of the rebates and professional allowances that would have been included in gross sales.

[178] For the Plaintiffs' claims for cost recovery fees and inventory practices, the simple analysis is that the Plaintiffs were overcharged and Shoppers was correspondingly enriched, or, in some instances, the costs recovery fees did not give credit for recoveries, tenant's allowances and the like, which like rebates the Plaintiffs submit should have been shared and, therefore, Shoppers was unjustly enriched.

[179] This simple analysis of the first two elements of the Plaintiffs' unjust enrichment claim in the case at bar is not affected by *Landsbridge Auto Corp. v. Midas Canada Inc.*, where Justice Cullity trimmed back the plaintiff's unjust enrichment claim.

[180] In *Landsbridge*, there were three stages to the economic exchanges between the franchisor and the franchisees. In the first stage, the franchisor charged the franchisees a royalty of 5% of the franchisee's retail sales of products purchased from the franchisor. In the second stage, the franchisor increased the royalty but reduced the price of its products by a 14.5% discount. In the third stage, the franchisor continued charging a royalty but no longer sold goods to the franchisees, who purchased their goods from a wholesale distributor that had replaced the franchisor. In advancing an unjust enrichment claim for the third stage, the franchisees complained that they had lost the benefit of the 14.5% product discount and the franchisor had obtained the new benefit of rebates paid by the wholesale distributor.

[181] It was in this context that Justice Cullity stated at paragraph 66 of his judgment: "Counsel for the defendants were, I believe, correct in their submission that the alleged deprivation consisting of higher prices that the Franchisees have been forced to pay under the new distribution system, and a loss of benefits under the Midas system, do not constitute a corresponding deprivation." The economic relationship between the franchisor and the franchisees in the case at bar is different. The Associates do not pay royalties and they share revenues through the dynamic of the franchise scheme's profit sharing arrangement. Thus, I conclude that the first two elements of an unjust enrichment claim could be established.

[182] This brings the viability of the unjust enrichment claim to its third element. In *Kerr v. Baranow*, *supra* at paras. 40-41, Justice Cromwell described the juristic reason element as follows:

40. The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, [1978] 2 S.C.R. 436, at p. 456; *Sorochan*, [1986] 2 S.C.R. 38, at p. 44; *Peter*, [1993] 1 S.C.R. 980, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

41. Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp.990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (*Peel*, at p. 803).

[183] A contract may constitute a valid reason for the defendant's enrichment: *Kiss Estate v. Kiss*, [1983] 1 S.C.R. 623, *Pettikus v. Becker*, [1980] 2 S.C.R. 834; *Kerr v. Baranow*, *supra*; *Murray v. TDL Group Ltd.*, [2002] O.J. No. 5095 (S.C.J.) at paras. 262-5; *Pak v. Reliance Resources Group Canada Inc.*, [2002] O.J. No. 684 (S.C.J.); *Re Collections Inc. v. Toronto-Dominion Bank Inc.*, [2010] O.J. No. 5686 (S.C.J.) at para. 143.

[184] Below, I conclude that the interpretation of the Associate Agreements supports Shoppers' claim to rebates but not necessarily to its claim for professional allowances. Thus, it is plain and obvious that the Plaintiffs do not have an unjust enrichment claim for rebates, because the Associates Agreement provides a juristic reason for the enrichment; however, they may have an unjust enrichment claim for professional allowances because there is a reasonable argument that the Associates Agreement does not provide a juristic reason for Shoppers' enrichment.

[185] However, the unjust enrichment claim for the professional allowances is redundant because its success or failure is commensurate with the Associates' success or failure on the contract interpretation and breach of contract claim for the professional allowances.

[186] A similar analysis applies to the claims for cost recovery fees and inventory practices. The Plaintiffs have pleaded a tenable unjust enrichment claim, but the claims are superfluous.

[187] The above analysis leads to the conclusion that with one exception, the claim for rebates, none of the Plaintiffs' claim for unjust enrichment should be struck out.

4. The Breach of Fiduciary Duty Claim

[188] In advancing their claim for the professional allowances, the Plaintiffs submit that Shoppers was under a fiduciary obligation to include the allowances in gross sales. Shoppers counters that the Associate Agreements negate any fiduciary relationship between the parties.

[189] Relying on 6323588 *Canada Ltd. v. 709528 Ontario Ltd. (c.o.b. Panzerotto Pizza and Wing Machine)*, 2012 ONSC 2985, the Plaintiffs submit that the courts have not foreclosed franchisors being fiduciaries and that it is not plain and obvious that the facts in this case do not give rise to a fiduciary duty. They also submit that the determination of whether a fiduciary duty is a question of mixed fact and law, and, therefore, it is not possible to determine at this time that the Plaintiffs' claim will fail.

[190] In their debate about whether there is a viable claim for breach of fiduciary duty against Shoppers, the parties refer to *Jirna Ltd. v. Mister Donut of Canada Ltd.*, [1972] 1 O.R. 251 (C.A.); 909787 *Ontario Ltd. v. Bulk Barn Foods Ltd.*, [2000] O.J. No. 3649 (Div. Ct.), rev'g [1999] OJ No 2973 (S.C.J.); 530888 *Ontario Ltd. v. Sobeys Inc.*, [2001] O.J. No. 318 (S.C.J.); *Beaucage v. Grand & Toy Ltd.*, [2001] O.J. No. 5128

(S.C.J.); 946648 *Ontario Ltd. v. Discount Car & Truck Rentals Ltd.*, [2007] O.J. No. 3646 (S.C.J.) and *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24.

[191] The focus of the debate between the parties is whether there is a fiduciary relationship between the Associates (franchisee) and Shoppers (franchisor). I think that Shoppers has the far better side of the debate. Article 16.01 of the 2002 Associate Agreement provides: “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,” and the 2010 is even clearer that there is no fiduciary relationship. Article 16.01 of the 2010 Associates Agreement states: “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, or to create any such relationship or any trust or fiduciary relationship.”

[192] But I need not decide the winner of the fiduciary relationship debate because, in my opinion, the debate is somewhat beside the point that actually needs to be resolved, which is whether there is a fiduciary duty in the pleaded circumstances of this case. Put somewhat differently, the question is not so much whether there is a fiduciary relationship; the question is whether in the factual nexus of its franchisee-franchisor relationship, Shoppers has a fiduciary duty to share the rebates and professional allowances.

[193] The problem for the Plaintiffs’ breach of fiduciary duty claim is that a breach of duty by a fiduciary is not necessarily a breach of fiduciary duty. The distinction I am drawing was noted by Justice Southin in *Girardet v. Crease & Co.*, (1987), 11 B.C.L.R. (2d) 361 (S.C.) at p. 362 and by Justices Sopinka and La Forest in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 596–98, 647.

[194] In *Girardet*, Justice Southin said that it was a perversion of words to say that simple carelessness in giving advice was a breach of fiduciary duty. In *Varcoe v. Sterling*, (1992), 7 O.R. (3d) 204 (Gen. Div.) at p. 229; affd. (1993), 10 O.R. (3d) 574 (C.A.), Justice Keenan, put it simply: “But not every wrong done by a fiduciary is a breach of that duty. It must be a wrong which is a betrayal of that trust component of the relationship.” In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, Justice Sopinka states that fiduciary duty “must be reserved for situations that are truly in need of the special protection that equity affords.”

[195] In my opinion, it is not an act of disloyalty, breach of confidence or misappropriation of the Associates’ property for Shoppers to keep the rebates to itself. If it is wrong for Shoppers to keep the rebates, then it is a wrong in the performance of Shopper’s contractual obligations. The Associates are not entitled to nor do they need the special protection that equity affords them if Shoppers has a contractual duty or a common law duty of good faith to share the rebates and professional allowances.

[196] In my opinion, apart from whether or not there is a fiduciary relationship, it is plain and obvious that the material facts for a breach of fiduciary duty have not and

cannot meaningfully be pleaded, and this claim should, therefore, be struck from the Amended Statement of Claim.

5. The Interference with Association Claim

[197] In Ontario, s. 4 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000 provides a cause of action for interfering with an Associates right to associate. There are similar statutes in Manitoba, Alberta, New Brunswick and Prince Edward Island. The Plaintiffs submit that for Associates in other province, there is a common law right to associate. For Associates not governed by the above statutory provisions, the Plaintiffs plead that these Associates have a common law right to associate.

[198] In paragraph 1 of the Plaintiffs' Amended Statement of Claim, the Plaintiffs seek the following relief with respect to their Interference with Association Claim:

- (i) a declaration that the Entire Class is entitled to an independent and representative franchisee association free from control, interference, intimidation and reprisals by the Defendants;
- (j) an order enjoining the Defendants from interfering with the franchisee organization referred to in paragraph 1(i) above;

[199] A request for a declaration is a very limited remedial request. A declaratory judgment acknowledges or conversely negates a legal right, but does not itself provide substantive relief; see: *Rado-Mat Holdings Ltd. v. Peter Inn Enterprises Ltd.* (1988), 65 O.R. (2d) 299 (H.C.J); *Letter Carriers' Union of Canada v. Canada Post Corp.* (1986), 8 F.T.R. 93 at p. 94; L. Sarna, *The Law of Declaratory Judgments* (3rd edition) (Thomson Canada Limited, 2007), p.1. It became clear during the argument of the motion that the Plaintiffs' request for a declaration was even more insubstantial.

[200] It turns out that all the Plaintiffs are seeking is a declaration that they have the rights to associate that the *Arthur Wishart Act* says they have. Then in anticipation of interference with their rights under the *Arthur Wishart Act*, the Plaintiffs seek an injunction.

[201] The Plaintiffs fear but have not actually suffered interference with their right to associate. The Associates have established an Independent franchisee association called the United Association of Pharmacist Franchisees ("UAPF"), and they do not have any meaningful reason to ask the court to declare that there is a right to associate under the *Arthur Wishart Act*.

[202] A declaratory order is a discretionary order: *Maynes v. Allen-Vanguard Technologies Inc.* 2011 ONCA 125. The court will withhold the exercise of its discretion in circumstances in which a declaration cannot meaningfully be acted upon by parties: *Canada (Commissioner of Competition) v. Toshiba of Canada Ltd.* 2011 ONSC 949 (Div. Ct.) at para. 79. It is plain and obvious to me that the pleading of the interference with association claim is not a genuine claim but is a matter of the

Plaintiffs' adding colour to the Amending Statement of Claim. This claim should be struck out with leave to amend if in the future there is real interference with their rights under the *Arthur Wishart Act*.

6. The Breach of Statutory and Common Law Duties of Good Faith

[203] Earlier in this judgment, I set out the legal principles associated with the statutory duty of fair dealing and the common law duty of good faith.

[204] Relying on *Shelanu Inc. v. Print Three Franchising Corp.*, *supra* and other cases, the Plaintiffs submit that Shoppers has a duty to take Associates' legitimate interests into account when making decisions and taking actions and must treat Associates honestly and reasonably. They submit Shoppers must exercise any contractual discretion reasonably, with proper motive, and consistently with the reasonable expectations of the Associates. They submit that Shoppers cannot make changes to its systems and operations that will result in a fundamentally different bargain; and Shoppers has an ongoing duty truthfully to disclose relevant and material facts to the Associates. The plaintiffs rely on these duties to support their various claims.

[205] The question now to be addressed is whether it is plain and obvious whether the pleaded facts could support a decision by the trial judge in favour of the Plaintiffs based on the breach of statutory and common law duties of good faith. In my opinion, to answer that question, it is possible to place the Plaintiffs' claims of breach of statutory duty and common law duties of good faith into three categories or classes of claim. Once the claims are classified, the tenability of the claims can be relatively easily ascertained.

[206] In the first class are the Plaintiffs' good faith claims that (a) mirror or correspond to a claim for breach of an express term of the contract, but (b) as a matter of interpretation, the Associates Agreement authorizes Shopper's conduct. For this class of claims, as noted above in the discussion of the legal principles associated with the doctrine of good faith, it is a general principle that good faith is not intended to replace that contract with another contract or to amend the contract by altering the express terms of the franchise contract. In my opinion, it is plain and obvious that good faith claims that fall in the first class must inevitably fail because, to use Shoppers' metaphor, they run up against the wall of the Associates Agreement.

[207] In my opinion, the Plaintiffs' claim with respect to rebates is the sole member of this class of breach of good faith claim, and this claim should be struck from the Amended Statement of Claim.

[208] In the second class of good faith claims are the Plaintiffs' good faith claims that (a) mirror or correspond to a claim for breach of an express term of the contract, but (b) where as a matter of contract interpretation, it is not plain and obvious that Associates

Agreement authorizes Shopper's conduct, and (c) where it is not plain and obvious that the doctrine of good faith does not apply. It is not plain and obvious that good faith claims that fall in the second class must inevitably fail.

[209] In my opinion, the Plaintiffs' claims for professional allowances, the various costs recovery fee claims, and the inventory practices claims are members of the second class of good faith claims. These claims may or may not succeed as a contract law claims, but if they fail as contract law claims, it is not plain and obvious that they will fail as statutory or common law breach of good faith claims.

[210] It should be noted that good faith claims in the second class are not superfluous or redundant, because it is possible that the court may find no breach of contract but conclude that there has been a breach of the duty of good faith. This legal phenomenon explains, in part, Justice Cullity's analysis in the certification motion in *Landsbridge Auto Corp. v. Midas Canada Inc.*, *supra*.

[211] In the third class of good faith claims are the Plaintiffs' good faith claims that (a) do not mirror or correspond to a claim for breach of contract of an express term of the contract and (b) where it is plain and obvious that the duty of good faith would not impose an implied term or duty of good faith into the contract or the relationship between franchisor or franchisee. In my opinion, the Plaintiffs' "Duty of Disclosure Claims" are members for this class, and I will discuss these claims in the next section of these reasons.

[212] For present purposes, the above analysis leads to the conclusion that with one exception (the claim for rebates) and reserving for the moment, the duty of disclosure claims to be next discussed, none of the Plaintiffs' breach of good faith and fair dealing claims should be struck out.

7. The Duty of Disclosure Claims

[213] The Plaintiffs allege that Shoppers has breached its common law duty of good faith and, where applicable, statutory duty of fair dealing by failing to provide sufficient financial information to verify that there have not been breaches of the Associates Agreements. This allegation is made with respect to: (a) the advantages of bulk purchases/rebates claim; (b) the professional allowances claim; and (c) the various costs recovery fees claims. There is also a general allegation that Shoppers is obliged to make the disclosure necessary for the Associates to verify that Shoppers is meeting its obligations under the Associates Agreements.

[214] The Plaintiffs' argument here is very simple. The argument is that in the franchise context, the scope of the common law duty of good faith and the statutory duty of fair dealing is currently uncertain, and, therefore, it is not plain and obvious that Shoppers does not have an ongoing duty of disclosure.

[215] The counterargument is also very simple. The counterargument is that, however, far and wide the measure of a franchisor's duty of good faith and fair dealing may be calibrated, it is plain and obvious that it does not extend to the duty of disclosure pleaded by the Plaintiffs.

[216] I agree with the counterargument. Although, the *Arthur Wishart Act* provides a carefully defined regime of disclosure by franchisors for persons considering becoming franchisees, and although as occurred in *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2011 ONSC 1300, the statute's duty of good faith and fair dealing may arguably extend the franchisor's disclosure obligations, it is plain and obvious that the Plaintiffs' proposed duty of disclosure goes well beyond the scope of good faith and fair dealing.

[217] In *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, in order to obtain government bailout funds, General Motors informed 240 of its 705 franchisees that their franchises would not be renewed and they were being offered Wind-Down Agreements with a six-day deadline for acceptance. In a proposed class action by franchisees who had accepted the Wind-Down agreements, Justice Strathy held that the plaintiffs had adequately pleaded a cause of action for breach of the duty of good faith and fair dealing. He stated that it was not inconsistent with the purposes of the *Arthur Wishart Act* to suggest that General Motors had an obligation to disclose all material facts known to it that might reasonably affect the franchisees' decision to accept the Wind-Down Agreements.

[218] The suggested duty of disclosure in the case at bar is much different. It is not a discrete or defined duty of disclosure to allow the franchisees to make decisions, except perhaps the decision of whether to sue for breach of the franchise agreement. The Plaintiffs submit that under the duty of good faith and fair dealing, Shoppers is obliged to make the disclosure necessary for the Associates to verify that Shoppers is meeting its obligations under the Associates Agreements. The Plaintiffs would require Shoppers to provide information to verify that it has not breached the Associates Agreements, with the Plaintiffs themselves defining what is or is not a breach of the Associates Agreement.

[219] Apart from the fact that complying with this pre-litigation-oriented duty of disclosure is likely impossible and a recipe for strife, it is not consistent with the relationship between franchisor and franchisee and rather turns over the design, supervision, and management of the franchise system to each franchisee, who gets to fish for grounds to sue the franchisor based on the franchisee's interpretation of the Associates Agreement.

[220] In my opinion, it is plain and obvious that neither at common law or under the *Arthur Wishart Act* are the Plaintiffs' Duty of Disclosure claims legally tenable. They should be struck from the Amended Statement of Claim.

8. The Advantages of Bulk Purchasing/Rebates Claim

[221] The two most contentious claims and the claim that prompted the original Rule 21 motion is the Plaintiffs' Advantage of Bulk Purchasing/Rebates Claim and their claim for a sharing of the professional allowances. Shoppers submit that it is plain and obvious that the Plaintiffs are not entitled to receive any rebates including professional allowances and, thus, there is no reasonable chance of success for the Plaintiffs' advantages of bulk purchases and rebates claim.

[222] Shoppers submits the Agreements make it clear that Shoppers is entitled to rebates, including professional allowances, and that no provision in the Associate Agreements entitles the Associates to the rebates or to the professional allowances collected by Shoppers.

[223] Shoppers relies on Article 11.04 of the 2002 Associate Agreement, which is part of the advertising fee provision of the Agreement, and article 11.10 of the 2010 Associate agreement, which is a free standing provision. These articles state:

Associate Agreement 2002 – Article 11.04

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.

Associate Agreement – Article 11.10

11.10 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.

[224] The Plaintiffs argue that the under the 2002 Associates Agreement, Shoppers has a limited right to rebates as part of its advertising fee, which may not to exceed 2% of gross sales.

[225] The Plaintiffs submit that although under the 2010 Associates Agreement, Shopper's right to rebates is no longer placed in the advertising fee part of the contract, Article 11.10 must still be read together with Article 5.01(c) and in light of the history of the parties' relationship and the nature of the parties' economic bargain.

[226] In other words, the Plaintiffs submit that under both the 2002 Associates Agreement and the 2010 Associates Agreement, Shoppers has only a limited right to claim the rebates and no rights to professional allowances, which the Plaintiffs submit are not rebates.

[227] The Plaintiffs submit further that Shoppers' interpretation that it is entitled to the rebates is inconsistent with: (a) Article 5.01(c) of the Associate Agreements, under which Shoppers is obliged to seek out sources of supply of merchandise and to provide each Associate with the advantages of bulk purchases; and (b) article 6.01 (j), which provides that "the prices charged by the Distribution Centre will, when assessed as a whole over a reasonable period of time, be competitive."

[228] Further still, as noted in the factual background portion of these reasons, the Plaintiffs rely on The Eagle Vision 97 document and the "Changes to Store Charges" memorandum in support of their interpretation that rebates are an item of gross sales to be shared between Shoppers and the Associates.

[229] Shoppers submits that the Plaintiffs' interpretation of the agreements contravenes the principles of contract interpretation. Shoppers argues that the Plaintiffs would interpret the Associates Agreement to include the receipt of rebates as an advantage of bulk purchasing; however, this interpretation directly contradicts and would render ineffective the specific language of article 11.04 of the 2002 Agreement and article 11.10 in the 2010 Associate Agreement.

[230] Shoppers points out that in *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, noted above, the Supreme Court of Canada held it is a fundamental principles of contractual interpretation that a court should reject an interpretation of a contract that would render one of its terms ineffective and where there is an apparent conflict between a general term and a specific term, the general term should be construed to not extend to the subject-matter of the specific term. Shoppers, therefore, submits that the Plaintiffs' interpretation is an error in law.

[231] Shoppers submits that Article 5.01(c) of the Associate Agreement, which refers to Shopper's obligation with respect to "the provision of the advantages of bulk purchasing, where practical" cannot be interpreted to require it to share rebates and professional allowances with Associates. It submits that this interpretation would contradict the express provisions of Articles 11.04 or Article 11.10, as applicable and would contradict Article 6.01(j) of the Associate Agreement, which indicates that Shopper's obligation is to supply products to Associates at "competitive" prices "when assessed as a whole over a reasonable period of time."

[232] Shoppers submits that there is nothing of assistance in the terms of the documents incorporated by reference, but if there is some language that does assist the Plaintiffs' claims for rebates or professional allowances, then Shoppers' says that in accordance with the normative principles of contract interpretation, the inconsistent

terms incorporated by reference must give way to Shopper's right to rebates as expressly set out in the Associate Agreements.

[233] Putting aside, the issue of whether professional allowances are rebates, in my opinion, it is plain and obvious that Shopper's interpretation of the Associates Agreements is the correct interpretation and that it has the right to have the rebates, which, thus, do not become an element of gross sales.

[234] The Plaintiffs' interpretation, which concedes a limited right for Shoppers to keep some rebates as an aspect of the Advertising Contribution Fee is a tortured interpretation of the contract that produces contradictions and inconsistencies in the agreement.

[235] In a free-standing provision, the 2010 Agreement states that the Associates agree that Shoppers 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 Shoppers or the Associates.

[236] Although, the rights to rebates provision is found in the advertising fee portion of the 2002 Associates Agreement, which is a sensible enough location given that rebates include advertising allowances, limiting Shoppers' right to rebates to 2% of gross sales, as the Plaintiffs suggest, seems no more than a desperate attempt to find a way to interpret the contract in a way that is opposite to its plain language and, in any event, it is an interpretation that is not available for the 2010 Associates Agreement.

[237] In contrast, Shoppers' interpretation gives meaning to the rebates provision and leaves considerable contractual meaning to the advantages of bulk purchases provision of the contracts, the obvious advantage being preferential pricing, while the Associates' interpretation essentially negates the plain language of the rebates provisions found in both agreements.

[238] For two reasons, the Plaintiffs' interpretation that they are entitled to share the rebates is not supported by The Eagle Vision 97 document and the "Changes to Store Charges" memorandum.

[239] The first reason is that neither document appears to be addressing rebates. The Eagle Vision 97 document refers to "purchase discounts," which seems to be a reference to lower pricing from the supplier, and does not refer to rebates. The 1998 Memorandum refers to "cash discounts," which seems to be a reference to lower prices from the supplier for cash on delivery purchases and not a reference to rebates.

[240] The second reason is that if either document incorporated by reference were interpreted to give the Associates a right to share the rebates, then the Associates Agreement would be internally inconsistent and, as noted above, inconsistencies in the incorporated words must give way to the language of the host contract. In other words, I

agree with Shopper's interpretative argument about the manual not being of assistance to the Plaintiffs' case.

[241] Although I do not rely on it at all, there is a third reason why the Eagle Vision 97 document and the "Changes to Store Charges" memorandum do not assist the Plaintiffs. It is at least doubtful that these documents are part of the manual that is incorporated by reference into the Associates Agreement. I have, however, for the purposes of the motions assumed that these documents are part of the contract. I, therefore, do not rely on this third reason.

[242] For the above reasons, it is plain and obvious that the Plaintiffs do not have a claim to the rebates under their advantages of bulk purchases/rebate claim. For the reasons expressed above, this claim cannot be saved by a good faith claim. Therefore, this claim should be struck from their Amended Statement of Claim without leave to amend.

[243] I appreciate that claims for rebates have been certified in some class actions involving franchisees and franchisors, but each case must be decided based on its own material facts and on the particular contractual arrangements between the parties.

[244] For completeness, I note that a franchisee's claim for a share of rebates was certified in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), affd. (2004), 70 O.R. (3d) 182 (Div. Ct.); however, in that case the defendant did not dispute that the plaintiffs had shown a cause of action. Similarly, that there was a cause of action was conceded in: *578115 Ontario Inc. (cob McKee's Carpet Zone) v. Sears Canada Inc.*, 2010 ONSC 4571 and *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287. A claim for rebates based on a fiduciary relationship failed in *Jirna Ltd. v. Mister Donut of Canada Ltd.*, *supra*, failed because there was no fiduciary relationship.

[245] The above conclusion, however, does not address the Plaintiffs' claim to the professional allowances, which raise different interpretative issues, to which I now turn.

9. The Professional Allowances Claim

[246] It does not follow from my conclusion that the Plaintiffs do not have a claim for rebates that they do not have a claim for what were called professional allowances under Ontario legislation.

[247] This conclusion does not follow because the Plaintiffs have an argument that professional allowances are not rebates. In my opinion, it is a reasonable argument. Thus, what does follow is that it is not plain and obvious that the Plaintiffs' claim for professional allowances is bound to fail.

[248] Some additional background information is required to understand the dispute between the parties about professional allowances. I will provide that background and then discuss the Plaintiffs' claim for professional allowances.

[249] In 2006, the Ontario government introduced, the *Transparent Drug System for Patients Act*, S.O. 2006, c. 14, which amended the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P. 23 and the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O-10.

[250] The new legislation prohibited generic drug manufacturers paying rebates to pharmacies, pharmacy owners, franchisors and others. The Act also introduced the concept of professional allowances. Rebates are prohibited, but professional allowances are permitted.

[251] Section 11.5 (18) of the *Ontario Drug Benefit Act*, defines rebates as follows:

"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.

[252] Professional allowance is defined in s. 1(8) of *O. Reg. 201/96*. The full definition is set out in Schedule "A" to these reasons. For present purposes, the following extract is sufficient:

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. ...
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. ...
4. Education days provided by pharmacists that are targeted to the general public for health protection and promotion activities. ...
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.
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. ...

[253] The Plaintiffs' position is that professional allowances are different from rebates, which are paid by a manufacturer as an incentive to induce purchases, and are paid in exchange for and in recognition of the provision of specific services by pharmacists. The Plaintiffs submit that unlike rebates, professional allowances are compensatory in nature; they do not act as an incentive to purchase a product, but are intended to compensate pharmacies for the costs they actually incur delivering services to pharmacy patients in Ontario.

[254] The Plaintiffs assert that Associates perform professional allowance activities, including (a) providing pharmacy staff courses; (b) holding flu shot clinics; (c) preparing unit dose compliance packaging to assist patients to manage multiple medications in blister packs; (d) hosting education days (both onsite and offsite); and (e) installing private counseling areas in stores, including the purchase of clinical reference texts. The Plaintiffs submit, therefore, that the Associates are entitled to the professional allowances.

[255] Shoppers' position is that professional allowances are just a type of rebate that receives special treatment under the legislation, and since it is entitled to rebates under the Associates Agreements, it is also entitled to keep the professional allowances.

[256] In my opinion, it is not plain and obvious that professional allowances are a form of rebate and, therefore, it is also not plain and obvious that Shoppers has a right to claim the professional allowances under the Associates Agreement.

[257] I add that it is also not plain and obvious that what are now known as professional allowances were ever rebates. What I mean, in other words, is that before the enactment of s. 1(8) of *O. Reg. 201/96*, these payments now known as professional allowances may or may not have been included within the meaning of "rebates" in the Associates Agreement. The enactment of the *Transparent Drug System for Patients Act* drew attention to these payments to pharmacists but the interpretation of the legislation simply begs the question of how these payments should be treated as a matter of contract.

[258] In any event, it is not plain and obvious that the Plaintiffs' claim to these payments will inevitably fail. Therefore, and this claim should not be struck from the Amended Statement of Claim.

G. SUMMARY AND CONCLUSION

[259] To summarize, in my opinion, the Plaintiffs have satisfied the s. 5 (1)(a) criterion for certification with respect to: (1) the professional allowances claim; (2) the

costs recovery fees claims; (4) the budgeting practices claim; and (5) the inventory practices claim.

[260] In my opinion, it is plain and obvious that the Plaintiffs' claim for (1) rebates, (2) interference with association, (3) breach of fiduciary duty, and (4) duty of disclosure are untenable. All these claims should be struck from the Amended Statement of Claim without leave to amend.

[261] With the balance of the certification motion still to be argued, it is premature to address the matter of costs.

[262] There shall be a case conference to schedule the completion of the certification motion.

Perell, J.

Released: October 3, 2012

Schedule "A"

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.

Definition

(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; ("prix au titre du régime de médicaments")

"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. ("rabais")

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.

Schedule "B"

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 <u>a 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</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 <u>a 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</p>

with the other as follows:	with the other as follows:
<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>2.01 In this agreement or in any amendment hereto, the following terms shall have the following meanings:</p> <p>(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;</p> <p>(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;</p> <p>(g) "Manual" means any book, pamphlet, memorandum or other <u>publication</u> prepared by the Company for use by its associates generally or the Associate in particular</p>	<p>Article 2.00 – Interpretation</p> <p>2.01 In this agreement or in any amendment hereto, the following terms shall have the following meanings:</p> <p>(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;</p> <p>(k) "Gross Sales" means the entire amount of the actual sale price, whether for cash, credit, <u>debit</u> or otherwise, of all sales of merchandise, services and other receipts whatsoever, including receipts from coin or credit <u>or debit card</u> operated vending or rental machines, and of all business conducted or originating in, upon or from the Premises, including personal, mail, <u>facsimile, electronic mail</u>, telephone, <u>or other orders</u> 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 <u>or debit accounts</u>. 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 <u>or harmonized sales taxes</u> 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, <u>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</u>;</p> <p>(m) "Manual" means any book, pamphlet, <u>bulletin, directive, memorandum or other document or communication</u> prepared <u>in written or electronic format</u></p>

<p>setting forth information, advice or instructions respecting the operation of the Franchised Business;</p> <p>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.</p> <p>2.04 This agreement shall be construed in accordance with the laws of the Province where the Premises are located.</p>	<p>by the Company for use by its Associates generally or the Associate in particular setting forth information, advice, instructions, <u>specifications, standards, rules, policies or procedures</u> respecting the operation of the Franchised Business;</p> <p>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.</p> <p>2.04 This Agreement shall be construed in accordance with the laws of the province where the Premises are located.</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, 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</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</p>

<p>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 of <u>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>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 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</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</p>

<p>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, standards, policies and <u>operating</u> 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 <u>operating</u> 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;</p> <p>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,</p>	<p>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 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, <u>rules</u>, 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 <u>in written or electronic format</u> 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 <u>stored in electronic format</u>, shall at all times remain the sole property of the Company and shall promptly be returned to it upon the termination of this Agreement;</p> <p>(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"</p>
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<p>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;</p> <p>(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;</p> <p>(f) to participate in the <u>advertising</u> programs prescribed from time to time by the Company for national and regional advertising and promotion, including without limitation adopting, implementing and using all <u>marketing and promotional programs which are designated as "Core Marketing Programs"</u> 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;</p> <p>(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.</p> <p>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</p>	<p>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;</p> <p>(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, <u>the Premises</u>, 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;</p> <p>(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 <u>all programs which are designated by the Company from time to time, whether such programs are intended for advertising, marketing, promotion or other purposes</u>. 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;</p> <p>(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.</p> <p>The Associate agrees that the maintenance of the standards of quality and uniformity of goods sold or merchandised <u>and services provided, at or from</u> 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</p>
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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 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

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 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;

<p>other suppliers so long as the products:</p> <ul style="list-style-type: none"> (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". <p>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.</p> <p>(k)</p> <p>(i) to maintain and preserve, for at least <u>three (3)</u> 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.</p> <p>Further, and in addition to the Company's right of termination as provided in Article 13.00, if</p>	<ul style="list-style-type: none"> (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, <u>copyright, industrial design, patent, or other</u> 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". <p>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.</p> <p>(k)</p> <p>(i) to maintain and preserve, for at least <u>six (6)</u> 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, <u>including any copies stored in any electronic medium</u>. 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.</p> <p>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</p>
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<p>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.</p> <p>(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</p> <p>(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.</p> <p>(iii) to take actual physical inventories semi-annually or at more frequent intervals as required by the Company <u>which inventories will be used</u></p>	<p>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.</p> <p>(ii) (A) <u>If requested</u>, 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</p> <p>(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.</p> <p>(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</p>
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<p><u>in preparing the financial statements referred to in subparagraph (ii) above.</u> 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.</p> <p>(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.</p>	<p>Franchised Business;</p> <p>(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</p> <p>(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.</p>
<p>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.</p> <p>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</p>	<p>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 <u>or electronic bookkeeping</u>, accounting, point-of-sale and inventory control systems. The Associate agrees on request of the Company to promptly purchase, <u>lease, license</u> or otherwise obtain, implement and use any such system specified by the Company. All components of any such system may be purchased, leased, licensed <u>or otherwise obtained</u> 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.</p> <p>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</p>

<p>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.</p>	<p>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.</p>
<p>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 <u>appoint</u> 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 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>6.03 So long as the Company provides <u>or arranges</u> to provide a centralized bookkeeping and accounting service to the Associate and other Associates of the Company, the Associate agrees <u>to and does hereby retain</u> the Company to provide or <u>arrange to provide</u> 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 <u>or the service provider (the "Service Provider")</u> 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 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</u></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</u> or within a reasonable period of time</p>

<p>hereof, 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>after the commencement of each Fiscal Year, the Company shall <u>by means of the Manual or otherwise</u> fix the Fee payable by the Associate for such period <u>and the times for payment of the Fee</u>. <u>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</u>, unless the parties shall otherwise mutually agree in writing.</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 the Company under this Agreement.</p>
<p><u>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:</u></p> <p><u>(a) one hundred percent (100%) of such fee; or</u></p> <p><u>(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</u></p>	<p><u>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.</u></p> <p><u>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.</u></p>

<p><u>length (as that term is defined in the Income Tax Act (Canada) as amended from time to time) with the Associate or the Pharmacist.</u></p> <p><u>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.</u></p>	
<p><u>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.</u></p>	<p><u>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.</u></p>
	<p><u>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.</u></p>
<p><u>11.05 The Associate acknowledges and agrees that the 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</u></p>	<p><u>11.07 The Associate acknowledges and agrees that the 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 or programs rendered or made available by the Company or its Affiliates 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) loyalty programs from time to time developed by the Company or its Affiliates, and (v) other services or programs from time to time rendered or made available by the Company or its Affiliates 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</u></p>

the Company shall, in the good faith exercise of its judgment, determine.	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.
<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.	<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 <u>under 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.
<u>11.07</u> If the total payments required of the Associate under Sections 11.01 <u>and 11.04</u> hereof <u>in respect of any 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.	<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 <u>any 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.
	<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.
Article 16.00 - Relationship Of Parties 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 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	Article 16.00 - Relationship Of Parties 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 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</u>

<p>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><u>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.</u> <u>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 or violation by the Associate shall not affect or impair the Company's right in respect of any subsequent <u>breach</u>, default or violation 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>

CITATION: Spina v. Shoppers Drug Mart Inc. 2010 ONSC 5563

**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: October 3, 2012.