AMENDED THIS Aug. 19/2019 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À

☐ RULE/LA RÈGLE 26.02 (__________)

☑ THE ORDER OF JUSTICE PERELL
L'ORDONNANCE DU
DATED / FAIT LE July 22/2019

REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Court File No. CV-10-414774-OOCP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

Plaintiffs

AND

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

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

<u>AMENDED</u> SECOND FRESH AS AMENDED STATEMENT OF CLAIM
(Notice of Action issued November 19, 2010)

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CLAIM

1. The Plaintiffs claim:

(a) an order pursuant to the *Class Proceedings Act, 1992*, certifying this action as a class proceeding and appointing the Plaintiffs as representative plaintiffs;

(b) a declaration that the Defendants:

(i) have breached their franchise agreements with the Class;

(ii) have breached their common law duty of dealing in good faith and/or their statutory duty of fair dealing with the Class in respect of the manner in which the Defendants have operated the Shoppers Franchise System (as defined below);

(iii) have been unjustly enriched as a result of systematically and unlawfully collecting, receiving and/or retaining funds and/or benefits over and above the amounts to which they are entitled under the terms of their franchise agreements with the Class; and

(iv) are holding in trust for the benefit of the Class those funds and/or benefits that the Defendants collected, received and/or retained over and above the amounts to which they are entitled under the terms of their franchise agreements with the Class;

(c) an order that all monies collected, received and/or retained unlawfully by the Defendants shall be paid by the Defendants to the Class Members and/or the Professional Allowances Class (defined below) in such amounts and proportions as is determined by the common issues trial judge;

(d) damages in the amount of $500,000,000 <u>or such other amount as particularized prior to trial</u>;

(e) punitive damages in an amount to be fixed by the court;

(f) pre-judgment and post-judgment interest, compounded annually, at a rate fixed pursuant to the *Courts of Justice Act*, R.S.O. 1990 c. C.43; and

(g) costs of this action fixed on a substantial indemnity basis.

I. <u>The Parties</u>

2. Shoppers Drug Mart Inc. is a corporation, incorporated under the laws of Canada ("SDM"). SDM is a wholly owned subsidiary of Shoppers Drug Mart Corporation.

3. Shoppers Drug Mart (London) Ltd. ("SDM London") is a corporation formerly known as Big V Pharmacies Co. Limited, which owned and operated the Big V chain of drug stores ("Big V"). In February 1996, SDM's predecessor purchased Big V. Big V Pharmacies Co. Limited changed its name to Shoppers Drug Mart (London) Limited on January 9, 1997. Commencing January 1, 1998, SDM London began to franchise Shoppers Drug Mart stores in Ontario and continues to do so under arrangement with SDM. SDM London has appointed SDM as its agent to carry out certain obligations and duties undertaken by SDM London pursuant to its form of Associate Agreement, which is materially identical to the form of Associate Agreement that other Associates enter into with SDM (as described below). The precise nature of the arrangement between SDM and SDM London is not known to the plaintiffs, but is within the Defendants' knowledge. Together, SDM and SDM London are referred to herein as the "Defendants". The Defendants operate a large network of franchised retail pharmacy stores across Canada, exclusive of Quebec, under the name Shoppers Drug Mart (the "Shoppers Franchise System"). In Quebec, SDM's franchised retail pharmacy stores operate under the name Pharmaprix. There are approximately 1,181 Shoppers Drug Mart and Pharmaprix stores across Canada. Approximately 50% of the stores are located in Ontario.

4. Giovanni ("John") Spina ("Spina") is a licensed pharmacist in the province of Ontario. Along with his wife, Spina owns John Spina Drugs Ltd., an Ontario corporation created for the purpose of entering into franchise agreements with SDM (collectively, the "Spina Plaintiffs").

5. In February 1992, the Spina Plaintiffs entered into an agreement with SDM to franchise Shoppers Drug Mart store #690 located in Whitby, Ontario. From time to time thereafter, the Spina Plaintiffs have renewed their franchise agreements with SDM. The Spina Plaintiffs now operate franchise store #1224 in Ajax, Ontario pursuant to a franchise agreement dated March 1, 2009, which is in the standard form of the 2002 Associate Agreement (defined below).

6. Romeo Vandenburg ("Vandenburg") is also a licensed pharmacist in the province of Ontario. Along with his wife, Vandenburg owns Romeo Vandenburg Drug Company Ltd., an Ontario corporation created for the purpose of entering into franchise agreements with SDM (collectively, the "Vandenburg Plaintiffs").

7. In August 1994, the Vandenburg Plaintiffs entered into an agreement with SDM to franchise Shoppers Drug Mart store #962 located in Whitby, Ontario. From time to time thereafter, the Vandenburg Plaintiffs have renewed their franchise agreements with SDM. The Vandenburg Plaintiffs now operate franchise store #862 located in Toronto, Ontario pursuant to a franchise agreement executed in or about December 2011 which is in the standard form of the 2010 Associate Agreement (defined below).

8. The Defendants require all of their franchisees to enter into a franchise agreement with them. The Defendants refer to the franchise agreement as an "Associate Agreement". The Defendants refer to their franchisees as "Associates" in the Associate Agreements. The Associate Agreements are for a fixed term and generally contain an automatic renewal clause.

9. The relationship between the Defendants and each Associate is subject to and governed by the terms of the Associate Agreement entered into between SDM or SDM London, as franchisor, and the Associate, as franchisee. The relationship is further governed by any relevant provincial legislation governing the relationship between franchisees and franchisors.

10. The Defendants periodically update the Associate Agreement. Most relevant to this claim are the 2002 form of agreement (the "2002 Associate Agreement") and the 2010 form of agreement (the "2010 Associate Agreement"). Together the 2002 Associate Agreement and the 2010 Associate Agreement are the "Associate Agreements".

11. The Associate Agreements between the Defendants and each of the Class Members are standard form contracts of adhesion. The terms of the Associate Agreements material to this action are the same for all Class Members, except for the differences between the 2002 Associate Agreement and the 2010 Associate Agreement, as identified below.

12. Associates are not employees of the Defendants. Associates are independent business owners who are entitled, subject to the terms of their Associate Agreement, to all the profits earned by the business operated in their franchised stores (the "Franchised Business").

II. The Proposed Classes

13. The Plaintiffs bring this action on behalf of the following classes:

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

All current or former Shoppers Drug Mart Associates resident in Canada (save for Associates with franchised businesses located in Quebec) who entered into an Associate Agreement with Shoppers Drug Mart Inc. and/or Shoppers Drug Mart (London) Limited dated between January 1, 2010 and July 9, 2013 (the "2010 Agreement Class").Together the 2002 Agreement Class and the 2010 Agreement Class are the "Entire Class" or "Class Members".

14. In addition, the Plaintiffs bring this action on behalf of the following subclass:

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

III. <u>The Shoppers Franchise System</u>

A. History of the Shoppers Franchise System

15. The Defendants, operating through their franchisees, are among the largest retailers operating in Canada's retail drug marketplace.

16. In 2009, SDM had sales of approximately $10 billion. Approximately 50% of SDM's sales are sales of prescriptions ("Pharmacy"). The remaining portion of SDM's sales consist of sales of other consumer goods, including cosmetics, groceries, and toiletries ("Front Store").

17. SDM was founded in 1962 by Toronto pharmacist Murray Koffler and is one of the oldest franchise systems in Canada. Mr. Koffler's vision was to create a chain of drug stores, with each one independently owned and operated by a local community pharmacist, ensuring personalized service. The benefit of the Shoppers Franchise System for potential franchisees was that each owner-operator pharmacist would be in business for themselves, but in association with other pharmacists.

18. The Shoppers Franchise System was sold to Imasco Minerals Inc. ("Imasco") in or about 1978. However, Mr. Koffler remained involved in the senior management of the Shoppers Franchise System and the Associates continued to be treated as peers in a joint enterprise to generate and share profits to the benefit of both the franchisee and franchisor.

19. The Shoppers Franchise System was then sold to a New York-based investment fund, called Kohlberg Kravis Roberts & Co. ("KKR"), in or about 1999 or 2000. Subsequently, in or about 2001, KKR caused SDM to make an initial public offering and become a publicly traded company. KKR is no longer directly involved in SDM's management.

20. Since about 1999, although the material terms of the Associate Agreements have not substantially changed, the Defendants have implemented a series of incremental "operational" changes which are fundamentally inconsistent with the terms and intent of the Associate Agreements, and which are in breach of the Defendants' statutory and common law duties of good faith and fair dealing with the Class Members. The Defendants now treat all the Class Members, not as peers in a joint enterprise, but as assets to maximize shareholder value without regard to the Defendants' legal obligations.

B. Overview of the Shoppers Franchise System

21. The Defendants are obliged to operate the Shoppers Franchise System in keeping with the Associate Agreements. Under the Shoppers Franchise System, Class Members must, among other things:

(a) operate under a common form of Associate Agreement and operations manual;

(b) sell common goods;

(c) purchase goods only from a distribution centre owned and operated by SDM (the "SDM Distribution Centre") or other specific preferred suppliers;

(d) share common advertising;

(e) participate in a common customer loyalty program (the "Optimum Program");

(f) retain common accounting and bookkeeping services; and

(g) acquire common equipment, including computer equipment (the "Equipment").

22. Pursuant to article 6.01(b) of the Associate Agreements, the SDM "Manual" forms part of the Associate Agreement. The Manual is defined in the Associate Agreements as:

> 2002 Associate Agreement - "Manual" means any book, pamphlet, memorandum or other publication prepared by [SDM] 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 [SDM] 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;

23. The Associate Agreements grant a license to each Class Member to operate one (or more) retail drug store(s) under the Shoppers Franchise System. The Associate Agreements grant to the Defendants extensive rights and powers over the Class Members in respect of the operation of Class Members' businesses. In addition, each of the parties provides covenants to the other as specified in the Associate Agreements.

24. The Shoppers Franchise System is a profit sharing arrangement between the Defendants and the Class Members. The amounts payable to the Defendants are established by Article 11 of the Associate Agreements. The Class Members agree to pay to the Defendants a service fee (the "Profit Sharing Fee"), as well as an "Advertising Contribution". Further, the Class Members are obligated to pay for specified services provided by the Defendants as stipulated in the Associate Agreement (the "Cost Recovery Fees").

25. However, the Defendants are unlawfully skimming monies that should be paid to the Class Members and imposing improper fees and charges on the Class Members, and are thereby enriching themselves at the expense of the Class. This includes keeping for themselves all the Professional Allowances (as defined below) earned by the Professional Allowance Class, and charging the Class for services at commercially unreasonable rates. The monies the Defendants have unlawfully skimmed and charged belong to the Class and should be included in the calculation of each store's Gross Sales (and/or overall profitability), and then shared between each Class Member and the Defendants in accordance with the Fee obligations established by Article 11 of the Associate Agreements.

26. Pursuant to Article 11 of the Associate Agreements, the Defendants set the Profit Sharing Fee to be paid by the Associate on an annual basis. Under the 2002 Associate Agreement, the Profit Sharing Fee is supposed to be based upon the total "Gross Sales" of the Associate's store. Under the 2010 Associate Agreement, the Profit Sharing Fee can be based on Gross Sales and/or the profitability of the Associates' store. The Defendants are required to act in good faith and in a commercially reasonable manner in setting the Profit Sharing Fee, which includes taking into consideration, among other things, the past financial performance of each store, local market conditions, the economic environment, and retail drug store trends.

27. The Profit Sharing Fee may be increased by the Defendants if, at the end of any fiscal period it is determined that any franchised store has been more profitable than the Defendants had projected when they prepared the forecast of gross sales and set the Fee.

28. The Profit Sharing Fee may be decreased by the Defendants if, at the end of the fiscal period it is determined that any franchised store has been less profitable than the Defendants had projected when they prepared the forecast of gross sales and set the Profit Sharing Fee.

29. Article 11 of the Associate Agreements does not grant the Defendants the right to impose or charge the Class Members a penalty or increased Profit Sharing Fee if any franchised store fails to achieve the forecast of gross sales and/or overall profitability projected by the Defendants. However, as set out below, the Defendants have breached the terms of the Associate Agreement and have acted in breach of their statutory and common law duties of good faith by systemically imposing upon the Class Members a penalty in the event that any Class Member fails to meet the forecast of gross sales and/or overall profitability unilaterally prepared by SDM.

30. Under Article 11 of the Associate Agreements, the Class Members must contribute to the Defendants' advertising, marketing and merchandising costs (the "Advertising Fee"). Under Article 11.04 of the 2002 Associate Agreement the Advertising Fee is to be determined by the Defendants' marketing department and may not exceed 2% of the Associate's annual gross sales.

31. Under Article 11.05 of the 2010 Associate Agreement, the Advertising Fee is not limited to 2% of annual gross sales; but the Advertising Fee must be commercially reasonable, and the Defendants must act in good faith and in keeping with their duty of fair dealing in establishing the Advertising Fee.

32. Particularly, the Associate Agreements call for the Class Members to "contribute to [the Defendants'] cost" of advertising, promotion and merchandising -

but not to pay the entire amount of these expenses, or to generate a profit for the Defendants through the imposition of Advertising Fees. However, the Defendants have breached the terms of the Associate Agreement and have acted in breach of their statutory and common law duties of good faith by systematically imposing upon the Class Members Advertising Fees that exceed 2% for the 2002 Agreement Class and that are commercially unreasonable and result in a profit to the Defendants for the 2010 Agreement Class.

33. The Associate Agreements also call for payment by the Class of limited and specific Cost Recovery Fees for costs incurred by the Defendants that are to be passed on to the Associate. Some of the permitted Cost Recovery Fees are enumerated in Article 11.05 of the 2002 Associate Agreement and Article 11.07 of the 2010 Associate Agreement. The Cost Recovery Fees are:

(a) The leasing of Equipment (as defined in the Associate Agreements);

(b) The cost of leasing the store Premises (as defined in the Associate Agreements); and

(c) The cost of other services and programs rendered or made available by the Defendants as enumerated in the Associate Agreements and particularized below, including the Academy Fee, the Accounting Fee, and the Loss Prevention Fee.

34. The 2002 Associate Agreement does not include the Optimum Program Fee (as defined below) as an item for which the Defendants may charge a Cost Recovery Fee. The cost associated with a loyalty program was subsequently added as a Cost Recovery Fee in Article 11.07 of the 2010 Associate Agreement.

35. The 2002 Agreement Class have no obligation to pay an Optimum Program Fee to the Defendants, as this fee is not specified or contemplated as a Cost Recovery Fee under the terms of the 2002 Associate Agreement. It is not a "service"

rendered by the Defendants to the 2002 Agreement Class. However, as set out below, the Defendants have breached the terms of the 2002 Associate Agreement and have acted in breach of their statutory and common law duties of good faith by charging the 2002 Agreement Class the Optimum Program Fee.

36. Under the Associate Agreements, the Equipment is to be leased to the Class Members upon terms and conditions to be mutually agreed upon, not unilaterally imposed by the Defendants. The terms must be commercially reasonable. <u>The Defendants are unlawfully embedding other fees in the fee charged to the Class Members for Equipment leases, including the store planning charge, the retail development fee, the IT project management fee and consulting fees. The Defendants are not permitted to add those fees to the fee for rental of Equipment pursuant to the Associate Agreements.</u>

37. Neither the 2002 Associate Agreement nor the 2010 Associate Agreement include a term that permits the Defendants to profit from any other of the Cost Recovery Fees. Rather, the purpose and intent of the Cost Recovery Fees is to pass on to the Class no more than the actual cost incurred by the Defendants for the lease of the retail premises<u>, lease of Equipment</u> or the provision of the enumerated services.

38. In summary, Article 11 of both the 2002 Associate Agreement and the 2010 Associate Agreement contemplates three different classes of fees:

(a) The Profit Sharing Fee, which defines how profits are shared between the Defendants and the Class Members;

(b) The Advertising Fee, through which the Class Members contribute towards the Defendants' costs of advertising; and

(c) The Cost Recovery Fee, through which the Defendants are allowed to recover their costs of delivering specific services to the Class Members, but not to profit.

39. Each Class Member's total net income earned under the Associate Agreement is limited to the actual net profits earned in a given year by a franchised store, net of all the fees paid to the Defendants pursuant to Article 11.

(i) The Profit Sharing Fee

40. Article 11.01 authorizes the payment of the Profit Sharing Fee by each Class Member to the Defendants in consideration of "the rights and privileges granted to the Associate under this agreement". Under the 2002 Associate Agreement, the Profit Sharing Fee is to be calculated based on Gross Sales, as defined in the 2002 Associate Agreement, and allows for specific profit sharing between the Defendants and each of the Class Members.

41. Under the 2010 Associate Agreement, the Profit Sharing Fee can be calculated based on Gross Sales and/or the overall profitability of the Associates' store.

42. The Profit Sharing Fee is subject to adjustment only by operation of Articles 11.02 and 11.03 of the 2002 Associate Agreement and Article 11.03 of the 2010 Associate Agreement.

43. The definition of "Gross Sales" used to calculate the Profit Sharing Fee is very broad and defined in Article 2 of both forms of the Associate Agreement.

44. The definition in the 2002 Associate Agreement states:

> "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[.]

45. The definition of "Gross Sales" used in the 2010 Associate Agreement is substantially similar and states:

> "Gross Sales" means the entire amount of the actual sale price, whether for cash, credit, debit or otherwise, of all sales of merchandise, services and other receipts whatsoever, including receipts from coin or credit or debit card operated vending or rental machines, and of all business conducted or originating in, upon or from the Premises, including personal, mail, facsimile, electronic mail, telephone, or other orders received or taken at the Premises and filled from the Premises or elsewhere, and including all deposits not refunded to purchasers, and sales by any permitted concessionaires, licensees and other persons on the Premises, or otherwise in

> or from the Premises. No deduction shall be allowed for uncollected or uncollectible credit or debit accounts. Gross Sales does not include any sums collected by the Associate for any duly constituted governmental authority and paid out by it to such authority on account of any direct tax imposed by such authority directly upon any purchaser in respect of retail sales made or services provided for compensation by the Associate upon or from the Premises to any such purchaser, or to any goods and services or harmonized sales taxes or value added taxes, whether or not paid out to such governmental authority, nor the amount of returns of merchandise to shippers or manufacturers, nor the sales price of merchandise returned or exchanged by customers for which a credit or refund is made; nor shall Gross Sales include monies collected or arising from the operation of a retail postal outlet (other than on account of the sale of stamps and other related products or services), if any, established on the Premises, monies collected as utility payments, monies arising from the sale of lottery tickets, monies collected on account of sales to employees of the Associate working in the Premises for their own use, or monies collected or arising from such other items as may be designated by the Company from time to time as being excluded from Gross Sales[.]

46. Although the 2002 Associate Agreement contemplates that the Profit Sharing Fee shall be set based on Gross Sales, the Defendants in fact unilaterally impose a Profit Sharing Fee on each Class Member based upon the Defendants' unilateral determination of each store's potential prospective total gross sales and overall profitability.

47. The 2010 Associate Agreement contemplates that the Profit Sharing Fee is set based on Gross Sales and/or overall profitability and the Defendants still unilaterally impose a Profit Sharing Fee on each Class Member in the same manner.

48. The Profit Sharing Fee is set at the beginning of each fiscal year based on a budget (called the "Common Year Plan") set by the Defendants for each Class Member, in accordance with terms established by the Defendants in their Manual.

49. The Profit Sharing Fee allocates a share of any given individual franchised store's budgeted profit to the Associate, and a share to the Defendants. While percentages vary, in a typical year, this limited profit sharing has resulted in an approximate profit split of 80% to the Defendants and 20% to the Associate - for profitable stores.

50. The Associate Agreement only permits two circumstances in which the Profit Sharing Fee paid by each Class Member to the Defendants may be subject to change:

(a) pursuant to Article 11.02 of the 2002 Associate Agreement and Article 11.03 of the 2010 Associate Agreement, the Profit Sharing Fee may be reduced where an Associate can demonstrate to the reasonable satisfaction of the Defendants that profitability was materially adversely affected by circumstances beyond the Associate's control; and

(b) pursuant to Article 11.03 of both Associate Agreements, in circumstances where a franchised store's profitability is materially greater than anticipated by the annual budget, the Defendants may increase the Profit Sharing Fee.

(ii) The Advertising Fee

51. The Advertising Fee is found in Article 11.04 of the 2002 Associate Agreement and Article 11.05 of the 2010 Associate Agreement. Article 11.04 of the 2002 Associate Agreement authorizes the Defendants to collect a fee from each Class Member, not to exceed in any year two percent (2%) of gross sales of the franchise store. Pursuant to both Associate Agreements, this fee is meant to contribute to the Defendants' cost of providing national and/or regional advertising and/or promotion and/or merchandising, and the development and marketing of house brand products ("Advertising Costs").

52. Both the 2002 Associate Agreement and the 2010 Associate Agreement stipulate that the Advertising Contribution Fee will be used by the Defendants exclusively as a contribution to the Defendants' Advertising Costs.

(iii) The Cost Recovery Fees

53. The Cost Recovery Fees are found in the Associate Agreements, which authorize the payment of fees by the Class Members to the Defendants for the delivery of specific services by the Defendants to the Class Members. These Cost Recovery Fees are to be set by the Defendants "as [the Defendants] shall, in the good faith exercise of [their] judgment, determine". However, the Defendants do not provide the Class Members with any disclosure, regarding how the Cost Recovery Fees are determined or on what basis they have exercised their judgment.

54. The Cost Recovery Fees are intended to allow the Defendants to recover only the costs of the specified services, and not to be a source of profit for the Defendants.

C. The Defendants are operating the Shoppers Franchise System in breach of their duty of good faith and fair dealing

55. The Defendants are required to operate the Shoppers Franchise System in accordance with their legal duties to the Class Members.

56. In addition to their contractual obligations under the Associate Agreements, the Defendants have a duty of good faith under the common law, and a duty of fair dealing pursuant to section 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3, s. 7 of the *Franchises Act*, R.S.A. 2000, c. F-23, section 3 of the *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1, section 3 of *The Franchises Act*, S.M., 2010, c. 13 and section 3 of the *Franchises Act*, S.N.B. 2007, c. F-23.5 (collectively, the "statutory duty of fair dealing") to exercise their powers and discretion over the Class Members fairly, in good faith and in a commercially reasonable manner.

57. The common law duty of good faith and, where applicable, statutory duty of fair dealing means the Defendants must deal promptly, honestly, fairly and in a commercially reasonable manner with all Class Members. The common law duty of good faith and, where applicable, the statutory duty of fair dealing requires the Defendants to have due regard for the Class Members' legitimate interests and reasonable expectations when they make decisions and take actions.

58. As detailed further below, the Defendants have been interpreting and/or applying the Associate Agreements in a manner which is in breach of their common law duty of good faith and, where applicable, their statutory duty of fair dealing. Further, the Defendants have taken actions without due regard for the Class Members' legitimate interests in breach of their common law duty of good faith and, where applicable, their statutory duty of fair dealing.

59. The Defendants have systematically increased their share of the profits earned by Class Members at the expense of and to the detriment of the Class Members, and in excess of the amounts to which they are entitled under the Associate Agreements. They have done so by, among other things:

(a) failing to remit Professional Allowances (as defined and described below) earned by the Professional Allowance Class Members to the Professional Allowance Class Members;

(b) charging the Cost Recovery Fees in amounts in excess of that permitted by the Associate Agreements;

(c) systematically manipulating the procurement and inventory policies in a manner that shifts the cost of stale merchandise, damaged goods and shipping errors from the Defendants to the Class Members; and

(d) imposing commercially unreasonable and onerous obligations on Class Members without consideration for their legitimate interests or the intent of the Associate Agreements.

60. Other than as expressly provided for in the Associate Agreements, any and all actions taken by the Defendants based on an interpretation of the Associate Agreements that favours the Defendants' interests over those of the Class Members are a breach of the Defendants' common law duty of good faith and, where applicable, their statutory duty of fair dealing.

IV. Claims Applicable to the Professional Allowance Class

A. Relevant statutory scheme

61. In provinces other than Ontario, generic drug manufacturers are allowed to pay rebates on generic drugs to pharmacies, pharmacists, franchisors and others who purchase generic drugs. The amount of these rebates is not regulated and in practice can be substantial.

62. In Ontario, pharmacies are not permitted to collect rebates on generic drugs, but may claim professional allowances from generic drug manufacturers for the provision of specific direct patient care services (the "Professional Allowances"). Approximately 50% of the current Associates and their franchised businesses are located in Ontario, and provide direct patient care services to their customers that qualify for Professional Allowances.

63. Professional Allowances are governed by the *Ontario Drug Benefit Act*, R.S.O. 1990, c. O-10 ("ODBA") and the *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23 ("DIDFA"). The ODBA governs the treatment of professional allowances under the Ontario Drug Benefit program (the "ODB" or the "public system"), whereas the DIDFA governs the treatment of professional allowances in relation to non-ODB drug sales (the "private system").

64. In 2006, the Ontario government amended the ODBA and DIDFA to prohibit all rebates paid by manufacturers to the Defendants (and all other Ontario-based pharmacies, pharmacy owners, franchisors and others who previously received rebates from generic drug manufacturers), but permitted the payment by generic drug manufacturers of Professional Allowances to purchasers of generic drugs, within certain limits.

65. On July 1, 2010, the Ontario government enacted changes to the Regulations made pursuant to the ODBA and DIDFA, which, in the case of the ODBA, eliminated Professional Allowances entirely, and, in the case of DIDFA, placed limits on the amounts that may be collected as Professional Allowances from generic drug manufacturers.

66. In both Ontario's private and public systems, the applicable regulations define Professional Allowances payable by generic drug manufacturers to pharmacies and others for the provision of direct patient care as:

> [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.

67. Additionally, Ontario pharmacies must comply with the Code of Conduct set out in the applicable regulation to qualify for payments from generic drug manufacturers as Professional Allowances. The Code of Conduct prohibits pharmacies and others from making procurement decisions based on the provision of Professional Allowances.

68. The Professional Allowances are intended to compensate the Class Members for the provision of direct patient care, which is provided exclusively and/or primarily by the Class Members to their patients.

69. The Defendants collect the Professional Allowances on behalf of the Professional Allowance Class Members.

B. Failure to remit Professional Allowances to the Class Members

70. The Defendants have unlawfully retained all of the Professional Allowances earned by the Class Members and collected and/or received by them. As a result, Professional Allowance Class Members have been denied the Professional Allowances that they earned.

71. The Professional Allowance Class Members are entitled to damages equal to the amount the Defendants have received or could have received as Professional Allowances. In the alternative, the Plaintiffs claim these monies should have been included as "gross sales" on each Professional Allowance Class Members' books of account.

72. There is no basis under the Associate Agreements for the Defendants to retain the Professional Allowances earned by the Professional Allowance Class Members. By retaining the Professional Allowances, the Defendants have breached the Associate Agreement. Further, by retaining the Professional Allowances, the Defendants have been unjustly enriched, have breached their common law duty of good faith and their statutory duty of fair dealing.

73. Moreover, the Defendants have made procurement and purchasing decisions for generic drugs in a manner intended to bypass, or which has the effect of bypassing, the statutory scheme in Ontario. In so doing, the Defendants have acted without due regard for the Professional Allowance Class Members' legitimate

interests and reasonable expectations, in breach of their common law duty of good faith and their statutory duty of fair dealing.

74. To calculate damages, the Plaintiffs require a detailed and comprehensive accounting with respect to all generic drug purchases made by the Defendants in connection with Professional Allowances, and with respect to all rebates and Professional Allowances received from generic drug manufacturers together with all reports made to the applicable provincial authority.

C. Failure to meet reporting obligations

75. The Defendants are obligated to report amounts claimed in respect of Professional Allowances. The applicable statutory context requires the Defendants to act transparently and be knowledgeable of, and fully understand the flow of funds in the drug products reporting chain. The Defendants are also strictly prohibited from making procurement and purchasing decisions based on the provision of Professional Allowances.

76. The Defendants' reporting obligations commenced in July 1, 2007 and have varied during the relevant timeframe. However, between July 1, 2007 and June 30, 2010, the Defendants were, at a minimum, required to report the following information:

(a) the amount of all Professional Allowances received by the pharmacy/pharmacist from manufacturers. This includes allowances paid for drugs purchased under both the public and private systems; and

(b) the total amount of all Professional Allowance monies expended by the pharmacy. This includes monies expended in both the private and public system.

77. Further, the Defendants were required to have two senior officers of the company or their auditors certify that:

(a) the Professional Allowance monies were not expended on any of the prohibited uses as described in the Code of Conduct under the heading 'Use of Professional Allowances'; and

(b) the Professional Allowance monies were expended for the purposes of direct patient care.

78. After July 1, 2010, the Defendants' reporting obligations ceased.

79. Although the Defendants do not share Professional Allowances with the Professional Allowance Class Members, the Defendants required the Professional Allowance Class Members to report to the Defendants monthly the amount of time and money spent by each Professional Allowance Class Member on the prescribed services. The Professional Allowance Class Members do this but they may do so in a perfunctory manner because they are not accorded sufficient administrative time in their operating budgets.

80. The Defendants, in turn, fulfil their reporting obligations on behalf of each of the individual Plaintiffs and other Professional Allowance Class Members by submitting regular reports to the relevant provincial authorities regarding this activity on behalf of the Professional Allowance Class Members.

81. The Defendants do not disclose to the Professional Allowance Class Members any of their reports made to the requisite authorities.

V. Claims Applicable to the Entire Class

A. The Defendants unlawfully profit from the Cost Recovery Fees

82. Article 5 of the Associate Agreements imposes certain obligations of service and assistance on the Defendants, including, but not limited to, an obligation:

(a) to provide efficient systems for bookkeeping; and

(b) to acquire and install on the premises of the Franchised Business Equipment (as defined in the Associate Agreement), as the Defendants deem appropriate for the operation of the Franchised Business.

83. In connection with these obligations, Article 11.05 of the 2002 Associate Agreement and Article 11.07 of the 2010 Associate Agreement authorize the Defendants to collect Cost Recovery Fees, determined by the Defendants in the good faith exercise of their judgment. Cost Recovery Fees the Defendants charge the Class Members pursuant to other articles of the Associate Agreements must also be determined in good faith and in accordance with the Defendants' statutory duty of fair dealing.

84. In breach of the Associate Agreement, and the Defendants' common law duty of good faith and, where applicable, their statutory duty of fair dealing, the Defendants have been using the Cost Recovery Fees as a way to earn additional profits beyond those permitted by the Associate Agreement.

85. In documents that form part of the Manual and therefore part of the Associate Agreement, the Defendants have advised the Class that these services will be provided without a profit element.

86. However, contrary to their obligations under the Associate Agreements, the Defendants have admitted that they do realize a profit through the provision of these services.

87. The Defendants provide a number of services to Class Members for which they charge Cost Recovery Fees. Some examples of Cost Recovery Fees through which the Defendants profit include:

(i) an accounting fee, relating to the centralized bookkeeping system provided by the Defendants;

(ii) an equipment rental fee, relating to the equipment leased to Class Members by the Defendants, including the other charges unlawfully embedded therein as set out above at paragraph 36;

(iii) an academy fee, relating to provision of training programs by the Defendants;

(vi) a loss prevention fee, relating to anti-theft programs provided by the Defendants;

(vii) an occupancy charge, relating to the Class Members' leased premises; and

(viii) a fee for a customer loyalty program known as the Optimum Program (the "Optimum Program Fee").

88. The Class Members have received and the Defendants have charged the Class Members on account of all these and other Cost Recovery Fees (or substantially similar, but differently named Cost Recovery Fees) during all material times.

(i) Centralized bookkeeping system

89. Article 5.01(d) and Article 6.03 of the Associate Agreement grant the Defendants extensive rights and discretionary powers over the Class Members with respect to centralized bookkeeping services. The Defendants require that the Class Members participate in a centralized bookkeeping and accounting service for which they charge a fee (the "Accounting Fee").

90. The Accounting Fee is not based on the actual cost of delivering centralized accounting services to the Class Members. Instead, the Accounting Fee is set so that the Defendants will earn a profit unlawfully from the accounting services in which they

require Class Members to participate, and for which they charge a Cost Recovery Fee.

(ii) Equipment rental

91. Article 5.01(b) of the Associate Agreement also grants the Defendants extensive rights and discretionary powers over the Class Members with respect to the Equipment that the Defendants may deem appropriate for the operation of each Class Member's franchise and the terms upon which the Class Members lease the Equipment. The Class Members must lease the Equipment from or through the Defendants.

92. Article 5.01(b) of the Associate Agreement contemplates that the Defendants shall lease the Equipment to each Class Member on terms and conditions to be mutually agreed upon between the parties from time to time.

93. However, in breach of the Associate Agreement, the Defendants do not negotiate with the Class Members regarding the terms and conditions of the leases for their Equipment. Rather, the Defendants present the Equipment to the Class Members on a "take it or leave it" basis. The Defendants simply budget an "Equipment Rental Fee" in each Class Member's Common Year Plan, without further detail.

94. The Plaintiffs have asked the Defendants to provide them with detailed or any accounting of how the SDM Equipment Rental Fee is determined. The Defendants have refused to provide this information, in breach of their obligations under the Associate Agreements, and in breach of their statutory and common law duties of good faith and fair dealing.

<u>94.1 Moreover, in breach of their obligations under the Associate Agreements, and in breach of their common law duty of good faith and statutory duty of fair dealing, the Defendants have embedded other charges in the fee for Equipment rental, including</u>

the Store Planning Charge, the Retail Development Fee, the IT Project Management Fee and Consulting Fees. The Defendants set these fees so that they will earn a profit unlawfully from them.

(iii) Academy fee

94.2 Articles 11.05(ii) of the 2002 Associate Agreement and 11.07(ii) of the 2010 Associate Agreement require the Class Members to pay the Defendants a fee for training programs the Defendants or their affiliates provide (the "Academy Fee").

94.3 The Academy Fee is not based on the actual cost of delivering training programs to the Class Members and their employees. Instead, the Academy Fee is set so that the Defendants will earn a profit unlawfully from the training programs in which they require Class Members to participate, and for which they charge a Cost Recovery Fee.

(iv) Loss prevention fee

94.4 Articles 11.05(i) of the 2002 Associate Agreement and 11.07(i) of the 2010 Associate Agreement require the Class Members to participate in a "security program" provided by the Defendants. The Defendants charge the Class Members a fee for such a program (the "Loss Prevention Fee").

94.5 The Loss Prevention Fee is not based on the actual cost of delivering a security program to the Class Members. Instead, the Loss Prevention Fee is set so that the Defendants will earn a profit unlawfully from the services in which they require Class Members to participate, and for which they charge a Cost Recovery Fee.

~~(iii)~~ (v)Occupancy charge

95 Most Associates' stores are located in leased premises. The Defendants enter into these leases with the landlords. The Defendants lease other stores directly to Associates.

96 The Defendants do not provide Associates with complete copies of the leases for the franchised store premises or any related agreements.

97 Pursuant to Article 11.05 of the 2002 Associate Agreement and Article 11.07 of the 2010 Associate Agreement, the Defendants charge to each Class Member an "Occupancy Charge" to recover the cost of renting the leased premises.

98 The Defendants receive substantial tenant inducements from landlords to enter into retail leases. The amounts of these inducements are not disclosed, and they are not passed on to the Class Members. The Defendants do not set off these inducements against the Occupancy Charge or otherwise pass on to the Class the advantages of these tenant inducements. The Defendants are thereby in breach of the Associate Agreements and their statutory and common law duties of good faith and fair dealing.

~~(iv)~~ (vi) Optimum Program Fee

99 The Defendants also receive fees in connection with a customer loyalty program which they operate (the "Optimum Program"). Through the Optimum Program customers collect points (the "Optimum Points") when they make purchases at franchised stores. The points can be redeemed at any other franchised store. Customers collect Optimum Points based on the dollar value of their purchases. Customers also receive incentives in the form of bonus Optimum Points to purchase specific goods determined by the Defendants.

100 The Defendants charge the Class Members an annual fee, based on the number of points collected at a Class Member's store (the "Optimum Program Fee"). The Optimum Program Fee is not contemplated in the 2002 Associate Agreement.

101 The 2010 Associate Agreement includes loyalty programs as part of the Cost Recovery Fee. However, as with the other Cost Recovery Fees, the Defendants are not permitted to profit through the imposition of the Optimum Program Fee.

102 The Defendants also credit the Class Members with an amount for the redemption of Optimum points in the Class Member's franchised store (the "Redemption Credit"). However, the Optimum Program Fee collected by the Defendants from Class Members is greater than the cost of the Optimum Program to the Defendants, and greater than the amounts redeemed at each of the Class Member's respective franchises (the "Net Optimum Program Fee"). The Class Members therefore lose money from the operation of the Optimum Program and the imposition of the Optimum Program Fee.

103 In addition to breaching their contractual obligation not to profit through the Optimum Program Fee, the Defendants have breached the terms of the 2002 Associate Agreement, acted in breach of their statutory and common law duties of good faith and fair dealing, and have been unjustly enriched with respect to the 2002 Agreement Class since these Class Members have no obligation to pay any Optimum Program Fee at all. The Defendants have been correspondingly enriched and there is no juristic reason for their enrichment in respect of the Optimum Program Fees they have exacted from the 2002 Agreement Class.

~~(v)~~ (vii) The Defendants unlawfully profit from the Cost Recovery Fees

104 The Defendants have been unlawfully profiting from the Cost Recovery Fees. In effect, the Defendants have used the Cost Recovery Fees, in breach of the Associate Agreements and their common law duty of good faith and, where applicable, their statutory duty of fair dealing, as a way to derive additional profit by overcharging the Class Members for the services the Defendants provide to each individual store.

105 The Cost Recovery Fees under the Associate Agreement are intended as a way to recover the Defendants' legitimate costs, assessed reasonably and in good faith, that are spent on specific services for individual stores. The Associate

Agreement does not allow the Defendants to use the Cost Recovery Fees as a means to make further profits.

106 The Defendants' common law duty of good faith and, where applicable, statutory duty of fair dealing requires them to exercise their powers and discretion over the Class Members fairly, in good faith and in a commercially reasonable manner when determining the Cost Recovery Fees.

107 These duties prevent the Defendants from exercising such powers and discretions that they enjoy in a manner which disregards the Class Members' legitimate interests when the Defendants determine the Cost Recovery Fees. The Defendants have breached these duties by using the Cost Recovery Fees as a way to make additional profit that is not permitted by the Associate Agreements nor contemplated by the spirit of the Associate Agreement.

108 The Defendants have been unjustly enriched by collecting and retaining the Cost Recovery Fees from the Class Members in excess of their costs for providing these services, or because the Defendants are not lawfully entitled to collect or retain certain Cost Recovery Fees at all.

109 The Cost Recovery Fees collected by the Defendants in excess of the Defendants' actual cost of providing the associated services are held by the Defendants as constructive trustees on behalf of and for the benefit of the Class.

B. The Defendants unlawfully profit through unjustified procurement and inventory policies

110 Under the Associate Agreements, the Class Members procure goods for their respective franchises based on the Class Member's own evaluation of the franchised store's needs. The Defendants have no right to initiate specific purchase orders on behalf of Class Members.

111 However, from time-to-time, the Defendants purchase a surplus of goods or misjudge what goods will sell in what volumes in their franchises. The result is that the SDM Distribution Centre often has excess inventory that individual Associates are not willing to order.

112 To move this inventory from the SDM Distribution Centre, the Defendants deliver unwanted goods to the Class Members which they have not ordered and which they do not want. The Defendants charge the Class full price for these unwanted goods. These centralized and automatic deliveries are known as "mass order generations" or "MOGs".

113 Class Members may be forced to discount the price of these unwanted goods to sell them to customers. This results in a loss of profitability at each of the Class Members' franchises and, in effect, shifts a part of the cost of stale merchandise from the Defendants to the individual Class Members, to the Class Member's detriment and the Defendants' benefit.

114 The Defendants have also systemically imposed policies that limit the ability of the Class Members to make inventory adjustment claims against the Defendants. Specifically, the Defendants have imposed minimum claim requirements, unreasonable time limits for the making of a claim, and operational restrictions limiting the detection of a claim.

115 Under these policies, although the Class Members must pay for these items, they are not permitted to make inventory adjustment claims in the following circumstances:

(a) where the Defendants fail to ship goods ordered that are valued at $50.00 or less;

(b) where the Defendants ship any damaged goods that are valued at $50.00 or less;

(c) where the Defendants ship any unwanted/unordered goods that are valued at $50.00 or less;

(d) to correct an ordering error for Front Store purchases valued at $100.00 or less and for Pharmacy purchases valued at $50.00 or less; and

(e) where inventory errors are discovered by the Class Members after 48 hours have elapsed from the time of delivery.

116 Moreover, the Defendants specifically instruct the Class Members not to receive Front Store goods (e.g. toiletries, groceries) delivered from the SDM Distribution Centre into their inventory on an item-by-item basis, as distinct from goods shipped from other, non-SDM suppliers, which are received and documented in this detailed manner. The natural consequence is that Class Members do not know in a timely manner when the SDM Distribution Centre has failed to deliver a Front Store item or items that they ordered and for which they have already paid, or when it has delivered damaged goods.

117 When setting the Class Members' budgets, the Defendants do not budget time for Class Members to receive Front Store goods shipped from the SDM Distribution Centre into their inventory on an item-by-item basis, which further inhibits Class Members' ability to discover inventory errors.

118 The effect of these policies is to unfairly or unjustly advantage the Defendants to the detriment of the Class Members. The Defendants' imposition of these policies is a breach of their common law and, where applicable, statutory duties of good faith and fair dealing.

119 The Defendants have been unjustly enriched by the amounts in which they have profited through the imposition of their procurement and inventory policies, and the Class have been injured in a corresponding amount.

120 The profits the Defendants have realized through their commercially unreasonable procurement and inventory policies are held by the Defendants as constructive trustees on behalf of and for the benefit of the Class.

C. The Defendants penalize Class Members for failing to meet their unilaterally imposed budgets by systemically imposing penalties that unlawfully transfer profits from Associates to the Defendants

121 Articles 11.02 and 11.03 of the 2002 Associate Agreement and Article 11.03 of the 2010 Associate Agreement provide limited circumstances in which the Profit Sharing Fee will be adjusted.

122 Pursuant to Article 11.02 of the 2002 Associate Agreement, if the Class Member can demonstrate to the reasonable satisfaction of the Defendants that the budget was not met for reasons beyond the Class Member's reasonable control, the Defendants will reduce the Profit Sharing Fee. Pursuant to Article 11.03 of the 2002 Associate Agreement, if the Defendants determine that total profitability is materially greater than what was budgeted, they may increase the Profit Sharing Fee in a fair and equitable manner in the good faith exercise of their reasonable business judgment.

123 Similarly, pursuant to Article 11.03 of the 2010 Associate Agreement, if the profitability of the franchised store is materially greater or less than that which was projected by the Defendants, then the Defendants, acting in good faith and in accordance with reasonable commercial standards, may increase or decrease the Profit Sharing Fee.

124 Prior to about 2002, the Defendants and each Class Member would negotiate the Class Member's share of the profits where the franchised store did not meet its targeted profitability. In circumstances where a Class Member's store was less profitable than anticipated due to circumstances beyond the individual Class Member's reasonable control, in accordance with Article 11.02 of the 2002 Associate

Agreement, the Defendants would reduce the Profit Sharing Fee so that the individual Class Member's compensation will not be negatively impacted.

125 Since about 2002, the Defendants have failed to apply Article 11.02 of the 2002 Associate Agreement or Article 11.03 of the 2010 Associate Agreement in this manner.

126 Class Members' compensation is now negatively impacted in all cases where a franchised store fails to meet its targeted profitability. Contrary to Article 11.02 of the 2002 Associate Agreement and Article 11.03 of the 2010 Associate Agreement, the Class Members' compensation is reduced by a percentage of the shortfall.

127 The negative impact of the Defendants' failure to properly 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, the Defendants have been imposing commercially unreasonable, overly aggressive and unrealistic Common Year Plans on Class Members. As a result, Class Members who achieve the same level of profitability but fail to meet the unfairly imposed higher target earn less, while the Defendants benefit from the Class Member's failure to meet target as illustrated by the following chart:

	Target Profit	Actual Profit	Associate Earnings from Profit Sharing Fee	Penalty for Shortfall	Total Associate Earnings	The Defendant's Earnings from Profit Sharing Fee
Associate meets imposed profit budget	$1.0 million	$1.0 million	$221,000 (or ~ 22.1% of the total profit)	$0	$221,000	$779,000
Associate misses imposed profit budget	$1.1 million	$1.0 million	$221,000 (or ~22.1% of the total profit)	$30,000 (or ~30% of the $100,000 budget shortfall)	$191,000	$809,000

128 The imposition of penalties by the Defendants have been made systematically and without due regard to the legitimate interests of the Associates, and are a breach of the Defendants' common law duty of good faith and, where applicable, statutory duty of fair dealing, as well as being a breach of the terms of the Associate Agreements, which do not permit the Defendants to exact a penalty for the failure to meet a budget.

VI. <u>Damages</u>

129 The information required to calculate the Class Members' damages is entirely within the knowledge of the Defendants.

130 On behalf of the Entire Class, the Plaintiffs seek damages in an amount to be determined for all funds and/or benefits that the Defendants have collected, received and/or retained over and above what is allowable pursuant to the Associate Agreements, specifically:

(a) damages in an amount to be determined for all amounts collected, received and/or retained as Cost Recovery Fees above and beyond the Defendants' actual costs to provide these items;

(b) damages in an amount to be determined for all amounts collected, received and/or retained in respect of inventory that Class Members paid for but never received or that arrived damaged and for which the value could not be recovered, and any losses arising as a result of the MOGs; and

(c) damages for breach of the Defendants' contractual obligations, common law duty of good faith and, where applicable, statutory duty of fair dealing by imposing overly onerous conditions on the Class Members in the operation of their franchised stores.

131 On behalf of the Professional Allowance Class, the Plaintiffs are seeking damages in an amount to be determined for all amounts collected, received and/or retained (or which could and/or should have been collected, received and/or retained) as Professional Allowances for all direct patient care services provided by Class Members.

132 The Defendants' conduct entitles all Class Members to receive the benefit of compound interest and/or equitable damages.

VII. Statutes Relied Upon

133 The Plaintiffs plead and rely on the following statutes:

(a) *Class Proceedings Act, 1992*, S.O. 1992, c. 6;

(b) *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3;

(c) *Franchises Act*, R.S.P.E.I. 1988, c. F-14.1;

(d) *Franchises Act*, R.S.A. 2000, c. F-23;

(e) *The Franchises Act*, S.M., 2010, c. 13;

(f) *Franchises Act*, S.N.B. 2007, c. F-23;

(g) *Ontario Drug Benefit Act*, R.S.O. 1990, c. O.10 and applicable regulations; and

(h) *Drug Interchangeability and Dispensing Fee Act*, R.S.O. 1990, c. P.23 and applicable regulations.

134 The Plaintiffs propose that this action be tried in the City of Toronto, Ontario.

December 21, 2010

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Court File No. CV-10-414774-OOCP

GIOVANNI SPINA, JOHN SPINA DRUGS LTD. et al.
Plaintiffs

v.

SHOPPERS DRUG MART INC. et al.
Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced in TORONTO

AMENDED SECOND FRESH AS AMENDED STATEMENT OF CLAIM
(Notice of Action issued November 19, 2010)

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