

AMENDED THIS Nov 6/09 PURSUANT TO  
MODIFIÉ CE Nov 6/09 CONFORMÉMENT À  
 RÈGLE LA RÈGLE 26.02 ( A )

THE ORDER OF  
L'ORDONNANCE DU  
DATED / FAIT LE \_\_\_\_\_

Court File No.: 06-CV-311330CP

ONTARIO

LOCAL JUDGE / JUGE LOCAL  
SUPERIOR COURT OF JUSTICE / COURT SUPÉRIEURE DE JUSTICE

SUPERIOR COURT OF JUSTICE

2038724 ONTARIO LTD. and 2036250 ONTARIO INC.

Plaintiffs

- and -

**QUIZNO'S CANADA RESTAURANT CORPORATION,  
QUIZ-CAN LLC, THE QUIZNO'S MASTER LLC,  
CANADA FOOD DISTRIBUTION COMPANY, GORDON FOOD SERVICE, INC.  
and GFS CANADA COMPANY INC.**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**AMENDED AMENDED AMENDED STATEMENT OF CLAIM**

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyers or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

If you wish to defend this proceeding but are unable to pay legal fees, legal aid may be available to you by contacting a local Legal Aid office.

Date: May 12, 2006

Issued by:

*Y. Grant*  
Local Registrar

**Y. Grant**  
Registrar

Address of Court Office:  
Superior Court of Justice  
393 University Avenue  
10<sup>th</sup> Floor  
Toronto, Ontario M5G 2J6

**TO: QUIZNO'S CANADA RESTAURANT CORPORATION**  
5045 Orbitor Drive, Building 12, Suite 400  
Mississauga, Ontario L4W 4Y4

**AND TO: THE QUIZNO'S MASTER LLC**  
1475 Lawrence Street  
Suite 400  
Denver, Colorado, 80202  
UNITED STATES OF AMERICA

**AND TO: QUIZ-CAN LLC**  
1475 Lawrence Street  
Suite 400  
Denver, Colorado, 80202  
UNITED STATES OF AMERICA

**AND TO: CANADA FOOD DISTRIBUTION COMPANY**  
**Suite 900, 1959 Upper Water Street**  
**Halifax, Nova Scotia B3J 2X2**

**c/o Charles S. Reagh, Registered Agent**  
**Stewart McKelvey**  
**Suite 900, Purdy's Wharf Tower One**  
**1959 Upper Water Street,**  
**Halifax, Nova Scotia B3J 2X2**

**AND TO: GORDON FOOD SERVICE, INC.**  
333 - 50th Street, South West  
Grand Rapids, Michigan 49508  
UNITED STATES OF AMERICA

**AND TO: GFS CANADA COMPANY INC.**

2999 James Snow Parkway  
Milton, Ontario L9T 4Y9

## CLAIM

## 1. The plaintiffs claim:

A. Against the defendants, Quizno's Canada Restaurant Corporation, The Quizno's Master LLC, Quiz-Can LLC and Canada Food Distribution Company, or any of them:

- (a) Compensation and damages in the amount of \$75,000,000 for conduct that is contrary to Section 61(1) of the *Competition Act*, R.S.C. 1985, c. 19 (2nd Supp.) ("*Competition Act*");
- (b) An interim, interlocutory and permanent injunction preventing these defendants, or any of them, from directly or indirectly by agreement, threat, promise or other like means, fixing, enhancing or maintaining the prices at which any other person engaged in business in Canada, including without limitation the other defendants herein, sells Supplies (as defined in paragraph 25 hereof) to the Class Members;
- (c) Damages, including compensatory and restitutionary damages, in the amount of \$75,000,000 for breach of contract including breach of the common law duty of good faith;
- (d) Damages in the amount of \$75,000,000 for breach of the duty of fair dealing under section 3 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 ("*Wishart Act*"), section 7 of the *Franchises Act*, S.A. 1995, c. F-17 ("*Alberta Act*"), section 3 of the *Franchises Act*, S.N.B., c. F-23.5 ("*NB Act*"), and section 3 of the *Franchises Act*, R.S.P.E.I. 1988, c. F-14 "*PEI Act*"; and
- (e) An amount equal to the full investigative costs of the plaintiffs and the plaintiff class, pursuant to section 36 of the *Competition Act*;

- (f) Costs of this action on a complete indemnity basis pursuant to section 36 of the Competition Act or, in the alternative, costs on a substantial indemnity basis;
- B. Against all defendants, or any of them:
  - (a) Damages, including actual and special damages, in the amount of \$75,000,000 for civil conspiracy;
    - (a)(i) An amount equal to the full investigative costs of the plaintiffs and the plaintiff class as further actual and special damages resulting from the civil conspiracy;
  - (b) Punitive, exemplary and/or aggravated damages in an amount to be determined by the Court;
  - (c) Prejudgment interest at the rate of 18% per annum, or, alternatively, compound interest in accordance with commercial rates, or, alternatively, consequential damages in an equivalent amount or, alternatively, interest pursuant to section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
  - (d) Postjudgment interest in accordance with section 129 of the *Courts of Justice Act*;
  - (e) Costs of this action on a substantial indemnity scale, plus GST; and
  - (f) Such further or other relief as the nature of this action requires and this Honourable Court deems just, including all further necessary or appropriate accounts, inquiries and references.

### **“Quiznos”**

2. Quiznos is the trade name under which a chain of restaurants operates in Canada and worldwide. The trade name “Quiznos” (sometimes written as “Quizno’s”) and related names and trademarks are or were, during some of the material time, owned by the defendant, The

Quizno's Master LLC ("TQM"), and may recently have been partly or wholly transferred to an affiliated company without the plaintiffs' knowledge. TQM and/or its affiliated company licenses the use of the name and related trademark and system for the operation of restaurants primarily by means of franchising.

### **The Parties**

3. The plaintiff, 2038724 Ontario Ltd., is incorporated under the laws of Ontario and carries on business as a Quiznos franchisee in the City of Windsor, Ontario. 2038724 Ontario Ltd. is a franchisee under a franchise agreement with the defendant, Quizno's Canada Restaurant Corporation ("QCRC"), as franchisor, dated September 17, 2003.

4. The plaintiff, 2036250 Ontario Inc., is incorporated under the laws of Ontario and carries on business as a Quiznos franchisee in the Town of Oakville, Ontario. 2036250 Ontario Inc. is a franchisee under a franchise agreement with QCRC, as franchisor, dated April 4, 2001.

5. The plaintiffs are members of, and bring this action on behalf of, the following class (the "Class Members"):

All persons, including firms and corporations, carrying on business in Canada under a "Quiznos" Franchise Agreement on or after May 12, 2006.

6. QCRC was originally incorporated under the name Quizno's Canada Corporation under the laws of British Columbia. It has since changed its name to Quizno's Canada Restaurant Corporation and moved its principal place of business to the City of Mississauga, Ontario. QCRC carries on business throughout Canada as the franchisor of the Quiznos chain of restaurants, providing franchisor services to its franchisees pursuant to franchise agreements.

7. The defendant, Quiz-Can LLC (“Quiz-Can”), is a Delaware, USA limited liability company (converted from a Colorado limited partnership) with its principal place of business in the City of Denver, Colorado, USA. Quiz-Can is the owner of QCRC. Pursuant to a management agreement with QCRC, Quiz-Can provides certain management services to QCRC relating to the day-to-day operations of QCRC.

8. TQM is a limited liability company formed under the laws of Colorado, USA. TQM is expressly named as a third party beneficiary of the franchise agreements between QCRC and its franchisees, and has the contractual right to enforce those agreements against the franchisees.

8A. Canada Food Distribution Company (“CFD”) is a Nova Scotia unlimited liability company formed on or about February 7, 2003. CFD is a wholly-owned affiliate of the Quiznos defendants or parties related to or affiliated with them.

9. QCRC, Quiz-Can, TQM, and CFD are referred to collectively herein as the “Quiznos defendants”.

10. The defendant, Gordon Food Service, Inc. (“GFS”) is a company incorporated under the laws of Michigan, USA. GFS is the owner of the Gordon Food Service trade mark in Canada, as well as the trade mark GFS Canada Inc.

11. The defendant, GFS Canada Company Inc. (“GFS Canada Co.”), is incorporated under the laws of New Brunswick and carries on business throughout Canada, including through various subsidiaries described in paragraph 25 below.

12. GFS Canada Co. carries on business in Ontario from offices in the Town of Milton.

### **The Quiznos System**

13. Originating in Denver, Colorado, the Quiznos system was started over 25 years ago and now has over 4000 franchises worldwide. Quiznos restaurants offer submarine sandwiches, featuring meats, cheeses and vegetables, as well as soft drinks and other products such as chips to the public. Nearly all Quiznos restaurants are operated by franchisees pursuant to franchise agreements.

14. QCRC began offering Quiznos franchises in Canada in or around August, 2001. There currently are approximately 400 Quiznos franchises in Canada.

15. The relationship between QCRC and each of the Class Members is governed primarily by written franchise agreements executed by QCRC, as franchisor, each of the Class Members respectively, as franchisees, and often by the principal owners of each Class Member, as guarantors.

16. The franchise agreements between QCRC and the Class Members are standard form agreements and are similar in all respects material to this action.

17. The Quiznos system requires the Class Members to offer common menu items made from uniform supplies. The Class Members operate under common franchise agreements, a common Operating Manual, common advertising and other common promotional materials. The Class Members must follow Quiznos' uniform business methods. They are also restricted from selling at prices which exceed prices determined by QCRC. All Class Members pay royalties of 7% on their gross sales.



18. Most significantly for the purposes of the present action, the Class Members must purchase all equipment, products, services, supplies and materials from common sources or from sources with common ownership, all of which are designated exclusively by QCRC.

#### **Quiznos' Taken Private by Owners and Primed for Re-Sale**

19. From 1994 until December 2001, the Quiznos chain operated as a publicly traded company. In December 2001, the chain was taken private in a transaction orchestrated by Quiznos' CEO Richard E. Schaden and his father, Richard F. Schaden (the "Schadens") who, together with other family members, controlled a majority of the shares of the company.

20. Having pegged the entire value of the Quiznos chain at \$25 million for the purposes of the going-private transaction in December 2001, the Schadens put into motion a scheme to inflate the Quiznos chain's short-term value while under their ownership in order to sell it within a few years at a grossly inflated valuation.

21. As the Quiznos chain operates almost entirely as a franchise chain, in order to justify the exorbitant premium, the Schadens looked for every opportunity to maximize the chain's short-term profits at the franchisees' expense. One of the primary means chosen to pump up the chain's earnings before interest, taxes, depreciation and amortization (EBITDA) was to abuse the Quiznos defendants' contractual and discretionary power over the Class Members with respect to supplies, and to exploit their corresponding leverage over the Class Members' suppliers.

22. Thus, from in or about January 2002 and continuing to the present and for so long as such conduct continues (the "Class Period"), the Quiznos defendants conspired and arranged to illegally enhance, inflate, fix and maintain the prices which the Class Members are forced to pay for their products and supplies in return for exorbitant rebates and remittances from the Class

Members' suppliers and distributors. The Quiznos defendants have engaged in such unlawful practices solely for their own financial gain and in order to inflate and maximize their profit and EBITDA including in anticipation of a sale of the chain to third-party investors.

23. In late 2005, the Schadens put the Quiznos chain up for sale at a reported estimated price of up to \$2.3 billion US. This price is approximately 1000 times more than the price at which the Schadens had valued the chain for the going-private transaction.

#### **The Franchisees' Purchasing Obligations**

24. The franchise agreements grant QCRC extensive rights and discretionary powers over the Class Members in respect of their purchase of products and supplies. For example, although many of the items required for the businesses are commodities such as sliced meat, cheese, name-brand potato chips and name-brand soft drinks, Section 13.4 of the franchise agreements requires the Class Members to purchase all such items, as well as all equipment, products, services, supplies, and materials solely from sources unilaterally designated by QCRC.

25. Pursuant to this power, QCRC has designated GFS Canada Co. to sell and distribute a full line of products including meats, produce, frozen foods, dry goods, paper, cleaning chemicals, etc. ("Supplies") to the Class Members in Ontario. In addition, QCRC has designated the following companies which are affiliated with GFS Canada Co. to sell and distribute Supplies to the Class Members in other parts of Canada:

- (a) Bridge Brand Food Services Ltd. ("Bridge Brand"), incorporated under the laws of Alberta, and headquartered in the City of Calgary, Alberta;

(b) Neptune Food Service Inc. ("Neptune"), incorporated under the laws of Canada, and headquartered in the City of Calgary, Alberta with offices in the Town of Delta, British Columbia;

(c) Distal Inc. ("Distal"), continued under the laws of Canada, and headquartered in the Town of Beauport, Quebec; and

(d) M&S Food Service Ltd. ("M&S"), incorporated under the laws of New Brunswick, with offices in the Town of Amherst, Nova Scotia.

26. GFS Canada Co., Bridge Brand, Neptune, Distal and M&S are directly or indirectly owned by GFS. Headquartered in Grand Rapids, Michigan, USA, GFS is the largest privately held foodservice distributor in North America. GFS and its affiliated companies have total annual sales of over \$3 billion US. GFS, GFS Canada Co., Bridge Brand, Neptune, Distal and M&S are hereafter referred to as the "GFS companies".

27. The GFS companies supply and distribute the majority of Supplies to the Class Members. The Class Members purchase the Supplies directly from the GFS companies.

**Price Maintenance in Contravention of Section 61(1) of *Competition Act***

28. Although the franchise agreements allow QCRC to dictate the Supplies that the Class Members must purchase and from whom, and allow the Quiznos defendants to receive reasonable rebates from suppliers, they do not permit, nor could they legally permit, the Quiznos defendants to directly or indirectly enhance, fix or maintain the prices which the Class Members pay for their Supplies.

29. Moreover, the franchise agreements do not prevent, nor could they legally prevent, the Class Members from negotiating with the designated suppliers or distributors, or demanding competitive prices of Supplies from the designated suppliers or distributors.

30. Indeed, given the intense competition in the fast food industry, and the fact that QCRC sets the maximum retail prices which the Class Members may charge for their products, the Class Members' ability to receive competitively priced Supplies is critical to their businesses.

31. During the Class Period, as further particularized below, the Quiznos defendants have used agreements, threats, promises and other like means, directly or indirectly, to enhance, fix and maintain the prices which each of the Class Members pays for Supplies, and have thereby engaged in price maintenance in contravention of section 61(1) of the *Competition Act*. The Quiznos defendants have engaged in such unlawful activities solely for their own financial gain, at the expense of, and to the extreme detriment of the Class Members.

*i) Price Maintenance Agreements*

32. The Quiznos defendants have entered into oral and/or written agreements (the "Price Maintenance Agreements"), directly or indirectly, with each of the GFS companies and other manufacturers and/or suppliers of Supplies ("Other Suppliers"), to enhance, fix and maintain the prices at which the Supplies are sold by the GFS companies to the Class Members.

32A. The nature of the Price Maintenance Agreements is set out more fully in paragraphs 55A to 55G hereof.

33. The existence of the Price Maintenance Agreements has been disclosed to the plaintiffs; however, the defendants refused to provide copies of, or disclose the particulars of any of the Price Maintenance Agreements to the Class Members until after the commencement of this

action. Until that time, the particulars of the Price Maintenance Agreements were known only to the defendants herein.

34. The Price Maintenance Agreements are “agreements” in furtherance of price maintenance within the meaning of section 61(1) of the *Competition Act*.

**(ii) Threats Made in Furtherance of Price Maintenance**

35. The Quiznos defendants have engaged in threats and intimidation for the purpose of directly or indirectly preventing or attempting to prevent the lowering of the prices of the Supplies. Such threats and intimidation include:

(a) By letter dated March 13, 2006 served by process server, the Quiznos defendants, through their jointly-retained Canadian counsel (“Quiznos’ Counsel”), threatened to sue two leading foodservices experts (the “experts”) retained by the Quiznos franchisees to assist them in lowering their cost of Supplies. The experts had been retained by an association of Quiznos franchisees (the “Franchisee Association”) to gather pricing information from suppliers to determine the scope and extent of price gouging on Supplies, and, if necessary, to provide expert evidence in support of the franchisees in a contemplated legal action in relation to same;

(b) By the same letter, Quiznos’ Counsel falsely asserted that neither the Franchisee Association nor the experts were legally entitled to request pricing information from, or have any contact with, any suppliers for the purposes, *inter alia*, of negotiating or enquiring about the prices of Supplies sold to the Class Members;

(c) By the same letter, Quiznos' Counsel falsely asserted that all information relating to the Supplies was "proprietary, confidential and the property of Quizno's", and that the experts had "no authority or right whatsoever to be in possession of this information";

(d) By the same letter, Quiznos' Counsel asserted that the experts' requests to suppliers for pricing information regarding the Supplies constituted "interference with a variety of established contracts and business relationships including ... binding legal obligations with [Quiznos' suppliers]";

(e) By the same letter, Quiznos' counsel made explicit threats intended to prevent the experts from continuing to gather evidence of price gouging for use in a contemplated proceeding. As a result of those threats, the experts ceased all such activities on behalf of the Quiznos franchisees. The threats to these potential witnesses was contrary to Rule 4.03(1) of the Law Society of Upper Canada's *Rules of Professional Conduct*;

(f) In order to intimidate the Franchisee Association and the franchisees which formed it, Quiznos' Counsel by the same letter demanded that the experts disclose all instructions received from the Franchisee Association "and the identity of the parties who issued them" or face a lawsuit brought against them in their corporate and personal capacities. Such threats constitute a breach of section 4 of the *Wishart Act*, section 8 of the *Alberta Act*, section 4 of the *NB Act* and section 4 of the *PEI Act* which prevent a franchisor from interfering with a franchisee association; and

(g) By separate letter dated March 29, 2006, written on a 'with prejudice' basis, Quiznos' Counsel advised that the Quiznos defendants would not meet with the Franchisee Association or its counsel to discuss the excessive costs of Supplies, or at all.

36. The conduct particularized in the preceding paragraph was undertaken on behalf of all three Quiznos defendants jointly in furtherance of price maintenance. Such threats and intimidation constitute direct or indirect “threats” and “other like means” within the meaning of section 61(1) of the *Competition Act*.

**(iii) Promises Made in Furtherance of Price Maintenance**

37. In exchange for the agreement of the GFS companies and the Other Suppliers to participate in the price maintenance scheme, at times known only to the defendants, one or more of the Quiznos defendants promised to designate the GFS companies and/or the Other Suppliers as designated, or, alternatively, the sole designated manufacturers, suppliers or distributors of Supplies to the Class Members, and promised to use their contractual powers under the franchise agreements to prevent the Class Members from purchasing the Supplies from alternative, lower-priced suppliers, or from demanding price reductions from the GFS companies or the Other Suppliers.

38. Such promises were in furtherance of price maintenance, and constitute “promises” within the meaning of section 61(1) of the *Competition Act*.

**(iv) “Other Like Means” in Furtherance of Price Maintenance**

39. At times known only to the defendants, the Quiznos defendants have directly or through Quiznos’ Counsel communicated with some or all of the GFS companies, by telephone, in person, by email or other written correspondence, in order to:

- (a) prevent the GFS companies from lowering the prices of Supplies, and in order to ensure that the GFS companies are selling the Supplies to the Class Members at the prices which have been fixed and maintained by the Price Maintenance Agreements;

- (b) prevent the GFS companies from meeting with the Quiznos franchisees;
- (c) prevent the GFS companies from providing copies of the Price Maintenance Agreements to the Quiznos franchisees; and
- (d) prevent the GFS companies from providing information to the experts which would enable the experts to assist the Class Members in obtaining lower prices for the Supplies.

40. At times known only to the defendants, the Quiznos defendants have directly or through Quiznos' Counsel communicated with the Other Suppliers by telephone, in person, by email or other written correspondence, in order to:

- (a) prevent the Other Suppliers from providing information to the experts which would enable them to assist the Class Members in obtaining lower prices of the Supplies; and
- (b) demand that the Other Suppliers provide to them all information and correspondence, including requests for pricing information, submitted to them by the experts in order to be used against the experts and the Franchisee Association.

41. The particulars of the times, places and parties to the communications pleaded in paragraphs 39 to 40 hereof are within the exclusive knowledge of the defendants and the Other Suppliers.

42. The conduct particularized in paragraphs 39 to 40 hereof constitutes "other like means" in furtherance of price maintenance within the meaning of section 61(1) of the *Competition Act*.



**Effect of Price Maintenance on Class Members**

43. As a result of the price maintenance, the prices charged to the Class Members for Supplies during the Class Period have been significantly above market prices for comparable Supplies.

44. The inflated cost of Supplies to the Class Members has been and continues to be a significant contributor to the chronic lack of profitability of many of the Class Members. It has also resulted in significantly lower profits for those Class Members which manage to realize a profit.

45. But for the price maintenance scheme, the prices of the Supplies sold by the GFS companies to the Class Members would have been, and would be, substantially lower.

46. The Quiznos defendants are aware that the inflated costs of Supplies charged pursuant to the Price Maintenance Agreements are causing many of the Class Members to carry on business at losses, including unsustainable losses, or barely above breakeven despite realizing substantial sales.

47. The Class Members have pleaded with the Quiznos defendants regarding the inflated prices of Supplies and their effect on the Class Members' profitability. The Quiznos defendants have consistently ignored all pleas for commercially reasonable prices for Supplies.

48. Certain Class Members have notified the GFS companies in writing of the impact of the inflated prices of the Supplies on their profitability. The GFS companies have either refused to respond to the Class Members' correspondence or advised that they have no control over the prices of the Supplies as the prices are fixed pursuant to agreements with the Quiznos defendants, i.e., the Price Maintenance Agreements.

### **QCRC's Obligations Under Franchise Agreements**

49. The principal and overriding purpose of the Price Maintenance Agreements is to enable the Quiznos defendants to receive excessive and unreasonable payments ("remittances") from the GFS companies and the Other Suppliers on account of the Class Members' purchases of Supplies. By virtue of the inflated prices of the Supplies, the GFS companies and the Other Suppliers are able to satisfy the Quiznos defendants' demands for excessive and unreasonable remittances, without sacrificing or diminishing their own profits on the Supplies. But for the price maintenance, the Quiznos defendants would not receive, and the GFS companies and the Other Suppliers would not pay, remittances in the amounts actually paid to the Quiznos defendants.

50. The franchise agreements impose certain obligations of advice and assistance on QCRC with respect to the purchasing of Supplies. For instance, paragraph 9.1(c) of the franchise agreement requires QCRC to provide "advice regarding the ... supplies, and materials used in, and the menu items offered for sale by, the Restaurant and advice regarding selecting suppliers for and purchasing such items". Similarly, paragraphs 10.1(a) and (c) of the franchise agreement require QCRC to provide assistance in the nature of "consultation ... regarding the continued operation and management of a Restaurant and advice regarding Restaurant services, product quality control [and] menu items ..." and "information and programs regarding menu items and ... the Restaurant business ...".

51. Notwithstanding its obligations of advice and assistance with respect to the purchasing of Supplies, QCRC has maintained for itself under section 13.4 of the franchise agreements, under the heading "Quality Control", the sole and exclusive right to dictate to the Class Members all Supplies and all manufacturers, suppliers and distributors of those Supplies.

52. Having regard to its obligations of advice and assistance with respect to the purchasing of Supplies, QCRC is obligated by the terms of the franchise agreements to exercise its rights and powers under section 13.4 of the franchise agreements at all times in a manner consistent with its obligations of advice and assistance, i.e. in the best interests of the Class Members.

53. Further, QCRC has a duty under the common law, section 3 of the *Wishart Act*, section 7 of the *Alberta Act*, section 3 of the *NB Act* and section 3 of the *PEI Act* to exercise its power to designate exclusive or sole manufacturers, suppliers and distributors of Supplies, in respect of which the Class Members are a captive market, fairly, in good faith and in a commercially reasonable manner. Such duty prevents QCRC from exercising such powers and discretion in a manner which prefers itself or its related companies over its franchisees.

54. Further, when designating and maintaining a manufacturer, supplier or distributor as an exclusive or sole manufacturer, supplier or distributor of Supplies to the Class Members, QCRC is obliged to use its power to designate and remove such designation in order to ensure that such parties will at all times charge fair and commercially reasonable prices, and to prevent such parties from charging inflated or commercially unreasonable prices to the Class Members, directly or indirectly.

55. QCRC has breached the franchise agreements and its obligations of good faith and fair dealing in the exercise of its rights thereunder by failing to assist its franchisees in obtaining and maintaining commercially reasonable prices for the Supplies; by failing to ensure that the designated manufacturers, suppliers and distributors are charging fair and commercially reasonable prices to the Class Members; by failing to remove the exclusive or sole designation of manufacturers, suppliers and distributors which charge excessive prices of Supplies; and by using its contractual powers and the promise of exclusivity to maximize the amount of

remittances paid to itself or related companies, to the extreme prejudice of and without regard to the interests of the Class Members.

### **CFD-GFS Price Enhancement Arrangement**

55A. In or about 2003, QCRC and GFS agreed to interpose a newly formed company, CFD, into the chain of supply of Supplies to the Class Members. CFD was interposed for the purpose of inflating the prices of Supplies sold to the Class Members and remitting the overcharge to CFD and subsequently to its shareholders, all of which are Quiznos-related entities.

55B. CFD was modeled after American Food Distributors, Inc. (AFD), a Quiznos entity devised in or about 2000 before Quiznos was taken private. The purpose of AFD is to extract substantial sums of money from the sale of Supplies to the captive franchisees and thereby dramatically inflate the profitability and value of the Quiznos chain. The AFD model was implemented in the U.S. in or around 2002, shortly after the Quiznos chain was taken private. AFD became, as anticipated, the cash generating-engine which immediately and dramatically increased the value of Quiznos U.S. CFD was incorporated in Canada in 2003 and quickly became the cash-generating engine for the Canadian operation.

55C. Under the CFD-GFS arrangement, CFD was granted the power to unilaterally enhance and inflate the prices of Supplies sold by the GFS companies to the Class Members.

55D. QCRC fully agreed to and facilitated the CFD-GFS arrangement. QCRC's full complicity was necessary to the working of the CFD-GFS arrangement because QCRC had the sole and exclusive right under the franchise agreements to direct the Class Members to buy from designated vendors (ostensibly for the purpose of Quality Control). It was necessary for the working of the CFD-GFS arrangement that QCRC relinquish all power which it has under the

franchise agreements to ensure that designated distributors and suppliers charge fair and commercially reasonable prices, and refrain from charging inflated or commercially unreasonable prices to the Class Members.

55E. By agreeing to and facilitating CFD's role in the supply chain, QCRC in law and in fact relinquished all control and supervision over the prices charged for Supplies by CFD and the GFS defendants, and contractually facilitated the price enhancement mechanism contained in the CFD-GFS arrangement. QCRC knew and intended that CFD would use its pricing powers under the CFD-GFS arrangement to exploit the Class Members which are captive purchasers of Supplies pursuant to the franchise agreements.

55F. In so doing, QCRC has breached its contractual obligations to the Class Members including the common law duty of good faith.

55G. The interposition of CFD and its role in the supply of Supplies to the Class Members was concealed from the Class Members and is neither contemplated by nor permitted under the franchise agreements. The purpose and role of CFD in the supply chain is directly contrary to the purpose and intent of the franchise agreements.

### **Breach of Statutory Duty of Fair Dealing**

56. In addition to QCRC's common law and statutory duty to perform its contractual obligations in good faith, section 3 of the *Wishart Act*, section 7 of the *Alberta Act*, section 3 of the *NB Act* and section 3 of the *PEI Act* imposes an independent duty of fair dealing on all parties to a franchise agreement. The duty of fair dealing includes the duty to act fairly, in good faith and in a commercially reasonable manner in the performance and enforcement of contractual powers and the exercise of contractual discretion under a franchise agreement.

57. As TQM has the right to enforce the franchise agreements against the Class Members, and is expressly named as a third party beneficiary of the franchise agreements under section 21.4 thereof, it is a “party to a franchise agreement” within the meaning of section 3 of the *Wishart Act*, section 7 of the *Alberta Act*, section 3 of the *NB Act* and section 3 of the *PEI Act*.

58. As Quiz-Can provides certain management services relating to the day-to-day operations of QCRC, it is also “a party to a franchise agreement” within the meaning of section 3 of the *Wishart Act*, section 7 of the *Alberta Act*, section 3 of the *NB Act* and section 3 of the *PEI Act*.

59. The duty of fair dealing applies to the powers to designate exclusive manufacturers, suppliers and distributors of the Supplies under section 13.4 of the franchise agreements, and prevents the Quiznos defendants, or any of them, from exercising such contractual powers and discretion in a manner which prefers itself or its related companies to the prejudice of the Class Members.

60. For the reasons stated in paragraphs 55 and 55A-G hereof, the Quiznos defendants have breached the duty of fair dealing under section 3 of the *Wishart Act*, section 7 of the *Alberta Act*, section 3 of the *NB Act* and section 3 of the *PEI Act*.

61. Accordingly, the plaintiffs seek damages against the Quiznos defendants pursuant to section 3 of the *Wishart Act*, section 7 of the *Alberta Act*, section 3 of the *NB Act* and section 3 of the *PEI Act*.

### **Conspiracy by Unlawful Means**

62. By entering into the Price Maintenance Agreements, and acting in furtherance of such agreements, each of the defendants entered into unlawful and tortious conspiracies to use unlawful means directed at the Class Members, knowing fully that their agreements and actions

would cause injury to the Class Members, which injury has in fact resulted to the Class Members.

63. Furthermore, pursuant to the Price Maintenance Agreements and the acts particularized in paragraphs 31 to 42 hereof, the GFS companies have knowingly aided, abetted and counselled the Quiznos defendants in maintaining the prices at which the GFS companies have supplied or offered to supply products and supplies to the Class Members, which price maintenance is contrary to section 61(1) of the *Competition Act* and which aiding, abetting and counselling is contrary to sections 21 and 22 of the *Criminal Code*, R.S.C. 1985, c. C-46.

63A. Further, and in particular, agents and employees of the GFS companies, including Lyn Caputo, Shawn Mesheau, Carl Tobin, Crystal MacIntosh and others including senior managers known only to the conspirators, at various times from May 12, 2004 to the present known only to the conspirators:

- (a) agreed, conspired and arranged with agents and employees of the Quiznos defendants, including Gordon Connolly (Director of Purchasing), Jason Robson (National Marketing Manager, QCRC), Joe Ellery (Director of Distribution and Produce) and Niken Doshi (Accountant) and others including senior managers known only to the conspirators (collectively the "Quiznos Individuals"), to sell Supplies to the Class Members at prices which are fixed and/or maintained by or under the Price Maintenance Agreements, contrary to section 61(1) of the *Competition Act*;
- (b) agreed, conspired and arranged with one or more of the Quiznos Individuals to abide by unlawful price fixing and/or price maintenance arrangements entered

into between one or more of the Quiznos defendants and one or more of the Other Suppliers by *inter alia*:

- (i) agreeing to purchase for distribution to the Class Members Supplies from Other Suppliers at supra-competitive prices;
  - (ii) agreeing not to negotiate lower prices of those Supplies from the Other Suppliers;
  - (iii) aiding, abetting and counselling one or more of the Quiznos defendants in fixing and/or maintaining the prices at which the Other Suppliers have supplied or offered to supply Supplies to the Class Members, which aiding, abetting and counselling is contrary to sections 21 and 22 of the *Criminal Code*, R.S.C. 1985, c. C-46;
- (c) provided information to one or more of the Quiznos defendants and/or their legal counsel about the purchasing activities of Class Members in order to prevent the Class Members from obtaining or attempting to obtain lower priced Supplies;
- (d) communicated with some or all of the Quiznos Individuals by telephone, in person, by email or other written means, and during such communications agreed, arranged and conspired:
- (i) not to lower the prices of Supplies to the Class Members;
  - (ii) to refuse to meet with the Quiznos franchisees to discuss the lowering of the prices of Supplies;



- (iii) not to provide to any Quiznos franchisee copies of the Price Maintenance Agreements;
- (iv) not to provide information to the experts retained by the Franchisee Association to assist in obtaining lower prices for the Supplies; and
- (v) to provide, and did provide, information relating to the experts retained by the Franchisee Association to one or more of the Quiznos defendants and/or their legal counsel for the purpose of facilitating the threats and intimidation particularized in paragraph 35 hereof.

64. The GFS companies are aware of the harmful impact which the inflated costs have had on the Class Members, and the extent to which the prices fixed and maintained pursuant to the Price Maintenance Agreements are inflated and commercially unreasonable.

### **Damages**

65. The cost of Supplies represents the single largest cost component of the operation of a Quiznos restaurant.

66. As a result of the acts particularized herein, the plaintiffs and the balance of the Class Members have suffered, and, those Class Members which have continued in the system, continue to suffer damages, including actual and special damages described in (a) and (e) below, by:

- (a) having paid inflated prices for Supplies;
- (b) having been denied the ability to negotiate lower prices of Supplies with the GFS defendants and the Other Suppliers;

- (c) having been hindered, prevented or denied the opportunity to source identical Supplies from other suppliers;
- (d) having been hindered, prevented or denied the opportunity to compete equitably with competitors whose prices are not unlawfully enhanced, fixed and maintained; and
- (e) having experienced declining profitability, or losses, including unsustainable losses, which, if unabated, will result in irreparable harm including, *inter alia*, loss of total investment by some Class Members, as has, in fact, happened to the plaintiffs.

66A. The plaintiffs seek against all defendants compensatory, actual and special damages and, if appropriate, restitutionary damages including the profits realized by the defendants from or relating to the conduct at issue.

### **Punitive Damages**

67. The business environment in which the Class Members operate is intensely competitive to the knowledge of the defendants. The Class Members' ability to maximize the profitability of their businesses is constrained by, among other things, the fact that QCRC sets the maximum prices which the Class Members may charge for their products, and the fact that QCRC together with the other Quiznos defendants, controls the price of all of the equipment, products, services, supplies and materials needed for the Class Members' businesses.

68. The Class Members' ability to purchase Supplies at competitive prices is therefore critical to their survival and success.

69. The defendants have used surreptitious agreements, remittance schemes, threats and deception in furtherance of a conspiracy to inflict harm on the Class Members for their own financial benefit. They have done so with full knowledge that the Class Members operate in a

competitive environment and that the cost of Supplies is a substantial determinant of their survival and prosperity.

70. The defendants were, at all times, aware that the Class Members are a captive market for the purchase of Supplies, and are particularly vulnerable to price enhancement and fixing. Accordingly, the defendants knew that their actions would cause financial hardship on all Class Members and would likely cause Class Members to lose money and/or go out of business.

71. The Quiznos defendants have used means which are unlawful and contrary to the criminal laws of Canada in a scheme to inflate their EBIDTA in the period leading up to the sale of the companies in 2006. Through these illegal means they have realized exorbitant profits at the franchisees' expense and with wanton disregard for the franchisees' financial interests.

71A. Further, GFS and CFD have renewed their unlawful arrangement in the face of this court proceeding and have continued at all times to operate under such unlawful arrangement throughout the course of this proceeding.

72. Accordingly, the plaintiffs request substantial punitive, exemplary and aggravated damages, or any of them, in favour of each Class Member.

### **Commercial Rate of Interest**

73. The interest which QCRC charges to all Class Members under the franchise agreements on any unpaid amounts is at the rate of 18% per annum.

74. The Quiznos defendants have, throughout the Class Period, profited by illegally enhancing, fixing and maintaining the prices which the Class Members pay for their Supplies. In the circumstances, it is just and equitable that the Quiznos defendants pay to the Class Members

interest on all damages at such commercial rate of interest as this Honourable Court considers appropriate having regard to QCRC's statutory and common law obligations of good faith and fair dealing.

75. Accordingly, the Class Members are entitled to prejudgment and postjudgment compound interest against the defendants in an amount equal to 18% per annum, or, alternatively, compound interest at a commercial rate to be fixed by the Court or, consequential damages including actual and special damages in an equivalent amount. The Class Members plead and rely on the *Courts of Justice Act*, R.S.O 1990, c. C.43 and, in particular, section 130 thereof.

#### **Investigative and Legal Costs**

75A. The Class Members seek recovery from all of the defendants of their full investigative costs and the full legal costs of this proceeding (i.e. on a complete indemnity basis) pursuant to section 36(1) of the *Competition Act* and as actual and special damages resulting from the civil conspiracy.

#### ***Service Ex Juris***

76. The plaintiffs are entitled to serve this statement of claim outside Ontario without a court order pursuant to the following rules of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 because:

- (a) Rule 17.02 (f)(i) – the claim relates to a contract made in Ontario;
- (b) Rule 17.02 (f)(iv) – the claim relates to a breach of a contract committed in Ontario;

- (c) Rule 17.02 (g) – the claim relates to a tort committed in Ontario;
- (d) Rule 17.02 (h) – the claim relates to damage sustained in Ontario arising from a tort and breach of contract; and
- (e) Rule 17.02 (o) – the defendants residing outside of Ontario are necessary and proper parties to this proceeding.

The plaintiffs propose that this action be tried at the City of Toronto.

DATE: May 12, 2006

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Plaintiffs

and

QUIZNO'S CANADA RESTAURANT  
CORPORATION

Defendants

Court File Number: 06-CV-311330CP

*ONTARIO*  
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

AMENDED AMENDED AMENDED  
STATEMENT OF CLAIM

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