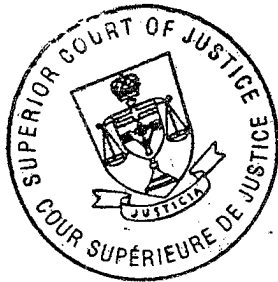


**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE )  
JUSTICE G.R. STRATHY ) TUESDAY, THE 29<sup>th</sup>  
DAY OF JUNE, 2011

BETWEEN:



**1250264 ONTARIO INC.**

Plaintiff

- and -

**PET VALU CANADA INC.**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**ORDER**

**THIS MOTION** made by the plaintiff for an order certifying this action as a class proceeding was heard at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, on November 21 and 22, 2010; a further hearing with respect to the common issues was heard on March 8, 2011; the decision with respect to certification was reserved to January 14, 2011; the decision with respect to the common issues was reserved to March 28, 2011; reasons in respect of costs, following written submissions, were released on June 7, 2011.

**ON READING** the notice of motion, the affidavits of Robert Rodger sworn January 7 and April 30, 2010; the affidavit of Edward Casey sworn April 16, 2010; the affidavit of James McAuley sworn April 16, 2010; the affidavit of Roger Ware sworn April 16, 2010; the affidavit of Thomas McNeely sworn April 16, 2010; the transcript of the cross-examination of Thomas

McNeely conducted on May 10, 2010; the transcript of the cross-examination of Edward Casey conducted on May 11, 2010; the transcript of the cross-examination of James McAuley conducted on May 12, 2010; the transcripts of the cross-examination of Robert Rodger conducted on May 25, May 26 and June 8, 2010; and the statement of claim; filed, and on hearing the submissions of counsel for the plaintiff and the defendant,

1. **THIS COURT ORDERS** that this action be and is hereby certified as a class proceeding against Pet Valu Canada Inc. (“Pet Valu”).

2. **THIS COURT ORDERS** that the classes be and are hereby defined as:

(a) all persons carrying on business as a franchisee in the Province of Ontario under a franchise agreement with Pet Valu at any time from December 31, 2003 to and including March 28, 2011 (the “Ontario Class”); and

(b) all persons carrying on business as a franchisee in the Province of Manitoba under a franchise agreement with Pet Valu at any time from December 31, 2003 to and including March 28, 2011 (the “Manitoba Class”).

Collectively, the Ontario Class and Manitoba Class shall be known as the “Class” or “Class Members.”

3. **THIS COURT ORDERS** that the plaintiff, 1250264 Ontario Inc., be and is hereby appointed as the representative plaintiff on behalf of the Class.

4. **THIS COURT ORDERS** that the following common issues be and are hereby certified for the purposes of this proceeding:

For the purposes of this paragraph of this Order, “Volume Rebates” means all volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu or its affiliates and includes any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system, but does not include discounts tied to the performance of individual stores.

1. Has the defendant breached its contractual duty to the Class Members at any time during the Class Period by failing to share Volume Rebates with them?

2. If the answer to common issue # 1 is yes, has the defendant breached its contractual duty to the Class Members at any time during the Class Period by:

(a) charging a mark-up on private label products without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products?

(b) imposing a distribution charge on the price of products without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products?

3. Has the defendant breached the duty of fair dealing to the Ontario Class Members under section 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the "A.W.A.") by any of the conduct described in common issues 1 and 2 above, if so found?

4. If the conduct described in common issues 1 and 2 above did not constitute a breach of the Franchise Agreement, has the defendant been unjustly enriched by such conduct, if so found?

5. What is the aggregate amount of damages for the breaches of any of the duties referred to in common issues 1, 2 and 3 above, or the aggregate amount of compensation for unjust enrichment, if so found?

6. Did the defendant have a duty at common law to the Class Members or under section 3 of the A.W.A. to the Ontario Class Members to disclose the following information to the Class Members or to some of them, and if so, did it breach such duty:

(i) whether the defendant or its affiliates receives Volume Rebates in respect of purchases which are made by the defendant or its affiliates for wholesale to the Class Members;

(ii) the defendant's policy in respect of the allocation of Volume Rebates to Class Members and, in particular, whether the defendant complied with sections 22(e) and (f) and 23(c) of the Franchise Agreement;

(iii) the amount of Volume Rebates received by the defendant or its affiliates during the Class Period;

(iv) the amount of Volume Rebates retained by the defendant or its affiliates and the amount, if any, that was shared with Class Members;

(v) the criteria that were used by the defendant to determine how much of the Volume Rebates were retained and how much, if any, were shared with the Class Members?

7. If the answer to common issue 6 is yes, is the plaintiff entitled to an order requiring the defendant to disclose such information forthwith and what damages, if any, is the defendant required to pay for the breach of such duty?
5. **THIS COURT ORDERS** that the Plan of Proceeding attached hereto as Schedule "A" be and is hereby approved.
6. **THIS COURT ORDERS** that the defendant provide Class counsel with the last known mailing address of each Class Member by July 13, 2011.
7. **THIS COURT ORDERS** that a Notice to the Class in the form attached hereto as Schedule "B" be delivered to Class Members by the following means:
- a. Publication of the notice on the website of Sotos LLP; and
  - b. Mailing to all Class Members.
8. **THIS COURT ORDERS** that a Class Member may opt out of the class proceeding by delivering to Sotos LLP either the Opt-Out Coupon attached to the Notice to the Class, or some other legible, written, signed request to opt-out containing substantially the same information as the Opt-Out Coupon, on or before the expiry of the 60<sup>th</sup> day after the Notice to the Class is sent, which date shall be specified in the Notice to Class and Opt-Out Coupon.
9. **THIS COURT ORDERS** that a Class Member may not opt-out of this proceeding after the date specified in the Notice to Class and Opt-Out Coupon for opting out.
10. **THIS COURT ORDERS** that Sotos LLP shall serve on the defendant, within 7 days after the end of the opt-out period, an affidavit containing a list of persons who have opted out of the class proceeding and attaching copies of all Opt-Out Coupons, or other legible, written, signed request to opt out containing substantially the same information as the Opt-Out Coupon, received from Class Members.

11. **THIS COURT ORDERS** that the defendant shall pay to the plaintiff costs of this motion in the amount of \$125,000 inclusive of disbursements and taxes, of which \$75,000 is payable forthwith and \$50,000 is payable in the cause.

THIS ORDER BEARS INTEREST AT THE RATE OF 3 per cent per year commencing on the date hereof.

G.R. Strathy J.

STRATHY, J.

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

JUN 3 0 2011

PER / PAR:



**SCHEDULE "A"**

Court File No.: CV-09-392962-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**1250264 ONTARIO INC.**

Plaintiff

- and -

**PET VALU CANADA INC.**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**PLAN OF PROCEEDING  
PURSUANT TO S. 5(1)(e)(ii) OF THE *CLASS PROCEEDINGS ACT, 1992***

**A. Identification of Class Members**

1. The classes are defined as:

(a) all persons carrying on business as a franchisee in the Province of Ontario under a franchise agreement with Pet Valu Canada Inc. ("Pet Valu") at any time from December 31, 2003 to and including March 28, 2011 (the "Ontario Class"); and

(b) all persons carrying on business as a franchisee in the Province of Manitoba under a franchise agreement with Pet Valu Canada Inc. at any time from December 31, 2003 to and including March 28, 2011 (the "Manitoba Class").

Collectively, the Ontario Class and Manitoba Class shall be known as the "Class" or "Class Members".

2. All Class Members can self-identify and are known to Pet Valu.

3. Pet Valu will provide contact information for all Class Members by July 13, 2011.

**B. Particulars of the notice to the Class**

4. The Notice will be sent to all Class Members by regular mail within 10 days of the receipt of the contact information. The Notice will also be published on a dedicated website for this action maintained by Class Counsel.

5. The cost of such notification will be borne by the plaintiff Class at first instance.
6. Class Counsel will establish a link within their website for this class action. Copies of the Notice to Class, court decisions and other information related to the class proceeding will be available on the website.

**C. Timetable**

7. The plaintiff proposes the following schedule:

**Pleadings**

- (a) Statement of defence (and counterclaim if so instructed) to be served by August 31, 2011.
- (b) Reply, if any, will be delivered within ten days thereafter (or 20 days in the case of a counterclaim).

**Productions and Discovery**

- (c) The parties shall meet and confer within 30 days of the close of pleadings to agree upon a discovery plan and a timetable for the exchange of productions. Failing agreement, the parties will convene a case conference for this purpose.
- (d) The productions and examinations for discovery will focus on Volume Rebates as described in the common issues. It is intended that the discoveries will be conducted in a focused and timely manner.
- (e) Following the exchange of productions, the parties shall agree upon a reasonable timetable for the conduct of discoveries and matters arising from discoveries.
- (f) Matters relating to expert reports will be determined at case conferences.

**Mediation/Pre-trial Conferences**

- (g) Mediation will take place within three months of the completion of discoveries.

**Common Issues Trial and Following**

- (h) If the common issues are resolved by judgment in favour of the plaintiff Class, the timing, form and content of the notice of resolution of the common issues will be addressed by the common issues judge.
- (i) Individual hearings, if any, will be conducted according to the timelines and other directions to be determined by the common issues judge.

**D. Method of communication with the Class**

8. Class Counsel are in regular communication with the representative plaintiff regarding all aspects of this action.
9. Pet Valu is permitted to communicate with Class Members in the context of its ongoing commercial franchise relationship with the Class Members.
10. Following expiry of the opt-out period, the representative plaintiff will be entitled to communicate information on a regular ongoing basis to the Class Members by means of periodic e-mail and other communications.
11. Communications with the Class Members before the expiry of the opt-out period are subject to the direction of the class proceedings judge.
12. Due to confidentiality issues arising from the continuing relationship of the parties, information communicated to the Class Members will be of a limited and non-strategic nature.
13. Limited and non-strategic information will also be communicated to the Class Members by regular updates to the Sotos LLP website.

**E. Possibility of settlement**

14. The parties will conduct settlement negotiations from time to time, as circumstances dictate.
15. The timetable includes mandatory mediation following discoveries.

**F. Funding**

16. The plaintiff's legal fees are to be paid on a contingency basis, as provided for in the *Class Proceedings Act, 1992*, and are subject to the Court's approval. Funding of all disbursements necessary to properly prosecute this action will be paid by voluntary contributions from the Class Members or Class Counsel. An application may be made to the Class Proceedings Fund.



DATE: June 29, 2011

**SOTOS LLP**

Barristers and Solicitors

180 Dundas Street West

Suite 1250

Toronto, Ontario M5G 1Z8

Allan D.J. Dick (LSUC # 24026W)

David Sterns (LSUC# 36274J)

Tel: (416) 977-0007

Fax: (416) 977-0717

Lawyers for the plaintiff

**SCHEDULE "B"**

Court File No.: CV-09-392962-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**1250264 ONTARIO INC.**

Plaintiff

- and -

**PET VALU CANADA INC.**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

Notice published under the *Class Proceedings Act, 1992*

**TO ALL PET VALU FRANCHISEES**

If you carried on business as a Pet Valu franchisee at any time from December 31, 2003 to March 28, 2011, this Notice will be important for you.

A legal claim against Pet Valu Canada Inc. ("Pet Valu") has been certified as a class action by the Ontario Superior Court of Justice. The class action will deal with claims alleged against Pet Valu which, if proven, could entitle you to various relief including a monetary payment.

This Notice is published by Order of the Ontario Superior Court of Justice dated June 29, 2011 (the "Certification Order") and deals with:

1. Nature of the Class Action and Common Issues;
2. Inclusion in/Opting Out of the Class Action;
3. Consequences of the Class Action; and
4. Other Matters.

**1. Nature of the Class Action and Common Issues**

The Plaintiff, 1250264 Ontario Inc., is a Pet Valu franchisee located in Aurora, Ontario. The Plaintiff started an action against Pet Valu on December 9, 2009 by issuing a Statement of Claim ("Claim") on behalf of all persons carrying on business under a franchise agreement with Pet Valu at any time on or after December 31, 2003 (the "Class" or "Class Members"). A copy of the statement of claim and rulings by the Court in this action are available at: <http://www.sotosllp.com/class-actions/pet-valu/>.

In the certified class action, the Plaintiff claims damages against Pet Valu for the following: on behalf of the entire Class, breach of contract in respect of Volume Rebates and certain statutory or common law remedies potentially arising therefrom.

Pet Valu denies the allegations in the statement of claim and intends to defend the class action.

This action has been certified as a Class Action by the Court. A copy of the Court's decision certifying the Class Action is available at: <http://www.sotosllp.com/class-actions/pet-valu/>. The Class Action will proceed to trial on the common issues listed in Schedule A of this Notice.

## **2. Inclusion In / Opting Out of the Class**

### **a. Automatic inclusion in the Class**

If you carried on business as a franchisee under a franchise agreement with Pet Valu at any time from December 31, 2003 to and including March 28, 2011, you are automatically included in the Class. No steps are required to "join" the Class.

### **b. How to be excluded from the Class**

If you do not wish to be included in the Class, you must opt-out by filling out the attached coupon and sending it to Sotos LLP, the lawyers for the Class, at the address located on the coupon or alternatively, send Sotos LLP some other legible, written, signed request to opt-out containing substantially the same information as the Opt-Out Coupon. The deadline for opting out is September 15, 2011 (The "Opt-Out Date"). If your written request to opt out is not received by that date, you will remain a member of the Class.

### **c. Consequences of opting out**

If you opt out of the Class, you will not be affected by any decision the Court makes on the common issues. If you choose to opt out, you will not be entitled to any award that might be granted by the Court or any possible settlement reached with Pet Valu on the common issues.

### **d. Consequences of not opting out**

Whether or not the Class Action is successful, all Class Members who do not opt out will be bound by the judgment. This means, for example, that after the Class Action has concluded, a Class Member cannot start its own individual claim against Pet Valu based on the same or similar allegations.

## **3. Consequences of the Class Action**

In determining the common issues, the Court may decide whether Pet Valu should pay any monies to the Class Members, and if so, how much the affected Class Members should receive.

Class Members may be required to participate in some stages of the lawsuit, particularly in the calculation and distribution of monies, if any are awarded. The determination of how any recovery should be distributed to each individual Class Member will be made either by the Court or by a process to be supervised and sanctioned by the Court.

If the Class Action is not successful, Class Members will not be responsible for any legal costs or face any other financial obligations arising from the proceedings.

## **4. Other Matters**

The Plaintiff has retained the law firm of Sotos LLP ([www.sotosllp.com](http://www.sotosllp.com)) to represent the Class in the Class Action. The law firm will be paid legal fees only if the Class Action is successful. The Plaintiff has agreed that the law firm's fees will be 25% of the monetary amounts recovered or other benefits received as a result

of settlement or judgment, plus disbursements, in addition to any costs Pet Valu is required to pay. The retainer agreement and any fees charged by class counsel must be approved by the Court.

For further information about the class action lawsuit you may contact:

Sotos LLP, Barristers and Solicitors, Suite 1250, 180 Dundas St. West, Toronto, Ontario M5G 1Z8, attn.: David Sterns ([dsterns@sotosllp.com](mailto:dsterns@sotosllp.com)) or Allan D.J. Dick ([adjidick@sotosllp.com](mailto:adjidick@sotosllp.com)) • Tel: (416) 977-0007 Fax: (416) 977-0717.

The statement of claim and other court papers in this action are available for inspection at the Ontario Superior Court of Justice, 393 University Avenue, 10<sup>th</sup> Floor, Toronto, Ontario M5G 2J6 and on Sotos LLP's website at <http://www.sotosllp.com/class-actions/pet-valu/>.

**PLEASE DO NOT CALL** the Ontario Superior Court of Justice or the Registrar of the Court. They will not be able to answer your questions about the lawsuit.

Date: July 15, 2011

**OPT OUT COUPON**

**TO: SOTOS LLP**  
Barristers and Solicitors  
180 Dundas Street West, Suite 1250  
Toronto, Ontario M5G 1Z8

Attention: David Sterns  
Facsimile: (416) 977-0717

I wish to opt out of the Pet Valu class action lawsuit.

\_\_\_\_\_  
Signature

Name of company and current or former store #:

Address:

Postal code:

Telephone:

Note: To opt out, this coupon must be completed and received at the above address by September 15, 2011.

## SCHEDULE A – LIST OF COMMON ISSUES

For the purposes of this List of Common Issues, “Volume Rebates” means all volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu or its affiliates and includes any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system, but does not include discounts tied to the performance of individual stores.

1. Has the defendant breached its contractual duty to the Class Members at any time during the Class Period by failing to share Volume Rebates with them?
2. If the answer to common issue # 1 is yes, has the defendant breached its contractual duty to the Class Members at any time during the Class Period by:
  - (a) charging a mark-up on private label products without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products?
  - (b) imposing a distribution charge on the price of products without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products?
3. Has the defendant breached the duty of fair dealing to the Ontario Class Members under section 3 of the *Arthur Wishart Act (Franchise Disclosure) 2000*, S.O. 2000, c. 3 (the “A.W.A.”) by any of the conduct described in common issues 1 and 2 above, if so found?
4. If the conduct described in common issues 1 and 2 above did not constitute a breach of the Franchise Agreement, has the defendant been unjustly enriched by such conduct, if so found?
5. What is the aggregate amount of damages for the breaches of any of the duties referred to in common issues 1, 2 and 3 above, or the aggregate amount of compensation for unjust enrichment, if so found?
6. Did the defendant have a duty at common law to the Class Members or under section 3 of the A.W.A. to the Ontario Class Members to disclose the following information to the Class Members or to some of them, and if so, did it breach such duty:
  - (i) whether the defendant or its affiliates receives Volume Rebates in respect of purchases which are made by the defendant or its affiliates for wholesale to the Class Members;
  - (ii) the defendant's policy in respect of the allocation of Volume Rebates to Class Members and, in particular, whether the defendant complied with sections 22(e) and (f) and 23(c) of the Franchise Agreement;
  - (iii) the amount of Volume Rebates received by the defendant or its affiliates during the Class Period;
  - (iv) the amount of Volume Rebates retained by the defendant or its affiliates and the amount, if any, that was shared with Class Members;
  - (v) the criteria that were used by the defendant to determine how much of the Volume Rebates were retained and how much, if any, were shared with the Class Members?
7. If the answer to common issue 6 is yes, is the plaintiff entitled to an order requiring the defendant to disclose such information forthwith and what damages, if any, is the defendant required to pay for the breach of such duty?

**1250264 ONTARIO INC.**  
Plaintiff

-and-

**PET VALU CANADA INC.**  
Defendant

Court File No.: CV-09-392962-00CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**PROCEEDING COMMENCED AT TORONTO**

**ORDER**

**SOTOS LLP**  
Barristers and Solicitors  
180 Dundas Street West  
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Lawyers for the Plaintiff