

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

1250264 ONTARIO INC.

Plaintiff

- and -

PET VALU CANADA INC.

Defendant

**FACTUM OF THE MOVING PARTY/DEFENDANT,
PET VALU CANADA INC.**

MOTION FOR SUMMARY JUDGMENT

**(On Appearance Before The Honourable Mr. Justice Belobaba
on March 6, 7 & 14, 2014)**

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Proceeding under the Class Proceedings Act, 1992

**FACTUM OF THE MOVING PARTY/DEFENDANT
PET VALU CANADA INC.
(MOTION FOR SUMMARY JUDGMENT)**

PART I - OVERVIEW

1. The defendant, Pet Valu Canada Inc. ("Pet Valu"), moves for an order for summary judgment in respect of the common issues certified in the class proceeding in this matter, dismissing all claims against Pet Valu.
2. The common issues in this class action are focused on one question: whether the class member franchisees are entitled to Volume Rebates that may have been given to Pet Valu by suppliers and manufacturers.
3. Pet Valu answers this question as follows:
 - (a) Pet Valu had no contractual duty to share Volume Rebates with franchisees. The franchise agreement gave Pet Valu the right to retain Volume Rebates at its sole discretion;

- (b) In any event, Pet Valu did not receive significant, annual or periodic Volume Rebates from suppliers and manufacturers;
- (c) To the extent that Pet Valu received any discounts in price, by Volume Rebates or otherwise, it passed those discounts on to franchisees; and
- (d) Pet Valu was contractually entitled to apply a mark-up to products it sold to franchisees, as determined by the certification judge. Products for which volume discounts were given were marked up less than products without volume discounts.

4. Franchisees received lower prices on products from Pet Valu than were available from competing distributors. Furthermore, unlike most franchise systems, Pet Valu franchisees were not captive to Pet Valu. Thus, they were and are free to purchase from any distributors they choose. Over the tenure of its franchise, the plaintiff purchased over 90 percent of its supplies from Pet Valu, demonstrating that Pet Valu supplied and priced products advantageously to the plaintiff in comparison to the market as a whole.

5. The plaintiff and its principal, Robert Rodger, sold their Pet Valu store and exited the Pet Valu system in 2012 to open an independent retail pet food and supplies store in close proximity to their former Pet Valu location. That new operation purchased all of its products from competing distributors and failed within one year. This is symbolic of the franchisee's poor performance during its time within the Pet Valu franchise system. Any problems experienced by the franchisee were due to its poor operation of its business rather than any failure by Pet Valu to share Volume Rebates. Throughout the class period, franchisees as a group had improving gross margins.

6. The class action as a whole is the work of a disgruntled franchisee who does not have the support of Pet Valu franchisees. The majority of current franchisees have opted out of the class proceeding, meaning that the rump of the class consists of franchisees who are no longer part of the system.

7. The plaintiff has offered no evidence to support its bald allegations that Pet Valu overcharges for its products. Rather, the plaintiff is seeking a second “kick at the can” regarding allegations that Justice Strathy refused to certify as common issues. The certification decision is clear – the only issue that is common pertains to whether there is a duty to share Volume Rebates and, if so, has that duty been breached. As explained above, Pet Valu passes all discounts related to volume on to its franchisees in the form of a reduction in price. Its conduct regarding Volume Rebates is above reproach. Pet Valu is therefore entitled to summary judgment on the common issues in this class proceeding.

8. The class proceeding itself is statute-barred under the *Limitations Act*. Furthermore, 80 of the Class Members have released their claims against Pet Valu.¹

PART II - FACTS

A. CONTEXT - WHAT THE PLAINTIFF’S CASE IS NOT ABOUT

9. Before addressing the substance of the facts and argument in this case, it is necessary to address what the class proceeding is not about.

10. It is not about five of the six quantitative common issues that the plaintiff originally sought to certify.² The certifying judge refused to certify a common issue on

¹ Exhibit J to the Supplementary Affidavit of Thomas McNeely sworn September 20, 2013 (“Supplementary McNeely Affidavit”), Pet Valu’s Supplementary Cross-Motion Record, Tab 1J, pp. 101-102.

mark-ups, promotional allowances, performance funds or non-monetary benefits, and an overall obligation to supply products at low cost and distribution fees. Specifically, Justice Strathy held as follows:

- (a) "There is no basis for a common issue based on the mark up of products generally."³ ... "mark-ups are permitted by s. 22(c) of the franchise agreement and nothing prohibits them,"⁴ and "There is no basis for a common issue based on mark-up of private label products..."⁵
- (b) "I am not satisfied that there is a similar contractual or evidentiary basis relating to promotional allowances, performance funds or non-monetary benefits."⁶ ... "There is no basis for a claim relating to promotional allowances or non-monetary benefits."⁷
- (c) "Nor is there any basis for the more general assertion that there was an obligation to supply products at low cost."⁸
- (d) "There is no basis for [a common issue regarding distribution fees]. The distribution fee is authorized by the franchise agreement."⁹
- (e) "...whether Pet Valu has a duty to use its purchasing power for the benefit of all Pet Valu stores, is too general to be of any value in advancing the claims of the class."¹⁰

² The plaintiff sought to certify common issues on six quantitative points: 1) duty to use system-wide purchasing power for the benefit of franchisees; 2) mark-ups on private label; 3) promotional allowances; 4) volume allowances; 5) non-monetary benefits; 6) distribution fee. Only volume allowances (and their tangential impact on private label mark-ups and distribution fees) was certified as a common issue.

³ *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287 ("Certification Decision"), Pet Valu's Book of Authorities, Tab 1, para. 96.

⁴ *Ibid*, Pet Valu's Book of Authorities, Tab 1, para. 88.

⁵ *Ibid*, Pet Valu's Book of Authorities, Tab 1, para. 89.

⁶ *Ibid*, Pet Valu's Book of Authorities, Tab 1, para. 44.

⁷ *Ibid*, Pet Valu's Book of Authorities, Tab 1, para. 90.

⁸ *Ibid*, Pet Valu's Book of Authorities, Tab 1, para. 44.

⁹ *Ibid*, Pet Valu's Book of Authorities, Tab 1, para. 91.

¹⁰ *Ibid*, Pet Valu's Book of Authorities, Tab 1, para. 88.

- (f) "...there was no basis in fact for the claims regarding mark-ups, private label charges and delivery charges."¹¹
- (g) "[the plaintiff] was unsuccessful on its broad general proposition that the franchisor had a duty to use its purchasing power for the benefit of the franchisees. It was also unsuccessful in relation to the claims flowing from that proposition."¹²
- (h) "There is no basis for a common issue based on mark-up of private label products... There is no basis for a complaint based on promotional allowances... or non-monetary benefits..."¹³

11. Despite Justice Strathy's refusal to certify such common issues, the plaintiff's motion record is replete with references to franchisee entitlement to "the benefit of the massive purchasing power of the Pet Valu system,"¹⁴ and "the benefits of the bulk purchasing power of the Pet Valu system".¹⁵ This is not the subject of the class proceeding. The plaintiff may not re-litigate allegations that the certifying judge refused to certify as common issues.

12. Volume Rebates are the only issue at play in this class proceeding.¹⁶ As will be addressed below, the plaintiff and other class members have no contractual or other entitlement to Volume Rebates.

¹¹ 1250264 Ontario Inc. v. Pet Valu Canada Inc., 2011 ONSC 3475 ("Costs Endorsement on Certification"), Pet Valu's Book of Authorities, Tab 3, para. 4.

¹² Ibid, Pet Valu's Book of Authorities, Tab 3, para. 11.

¹³ Certification Decision, *supra*, Pet Valu's Book of Authorities, Tab 1, para. 89.

¹⁴ Plaintiff's Notice of Motion for Summary Judgment dated February 13, 2012 ("Plaintiff's Notice of Motion for Summary Judgment") Plaintiff's Motion Record, Tab 1, p.6, para. 10; Affidavit of Robert Rodger sworn February 13, 2012 ("Rodger Affidavit"), Plaintiff's Motion Record, Tab 2, p.12, para. 10.

¹⁵ Plaintiff's Notice of Motion for Summary Judgment, Plaintiff's Motion Record, p.22, para. 47.

¹⁶ Costs Endorsement on Certification, *supra*, Pet Valu's Book of Authorities, Tab 3, para. 4: "I found that that the only claim appropriate for certification was in relation to the volume rebates...." [Emphasis added.]

B. THE PARTIES

(a) Pet Valu

13. Pet Valu is a company amalgamated under the laws of British Columbia with a registered office located in Markham, Ontario.¹⁷ The first Pet Valu store was opened in Scarborough, Ontario in 1976. As at March 31, 2011, there were 394 franchised and corporate Pet Valu stores located throughout Ontario, Manitoba, Maryland, New Jersey, Virginia, Pennsylvania and Delaware.¹⁸

14. Pet Valu is the largest retail operation in Canada dedicated to the sale of pet food and supplies. Pet Valu stores offer a wide range of pet food and pet-related supply products, including national and premium brand products. Pet Valu stores also carry a broad range of private label pet foods marketed under trade-marks owned by Pet Valu. Pet Valu stores additionally offer customers a large variety of non-food products, such as rawhide, collars, leashes, pet cages and carriers, cat litter and other pet-related accessories, under both brand name and private label brands.¹⁹

(b) Pet Valu's Distribution Arm, Peton

15. Peton Distributors ULC ("Peton") is a wholly-owned subsidiary of Pet Valu. The Peton distribution business purchases, warehouses and transports pet food and supplies for all of Pet Valu's franchisees, corporate stores and other brands.²⁰

16. During the Class Period, Peton has operated out of two distribution facilities in Canada owned by its affiliates and operates out of an additional eight distribution

¹⁷ Affidavit of Thomas McNeely sworn August 3, 2012 ("McNeely Affidavit"), Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.11, para. 10.

¹⁸ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.11, paras. 11-12.

¹⁹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.11-12, para. 13.

²⁰ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.12, para. 14.

facilities leased in Canada and two distribution facilities leased in the U.S. The total space in these facilities is approximately 525,000 square feet.²¹

17. Of the twelve distribution centres, the four larger ones are dedicated to warehousing small pet products, large pet products or canned pet food. The others are regional facilities for warehousing and distributing high volume food products.²²

18. Peton's transportation services in both Canada and the U.S. are provided by a fleet of tractors, trailers and equipment owned or leased by or on behalf of Peton and supplemented by outside carriers and short-term rentals. Those services include delivering merchandise and supplies to Pet Valu corporate stores and franchised stores as well as picking up merchandise from some suppliers.²³

19. Peton employs over 240 employees in respect of its warehousing, transportation, distribution, back office, product selection, purchasing and other distribution services.²⁴

(c) The Plaintiff

20. The plaintiff, 1250264 Ontario Inc., is a former Pet Valu franchisee who operated a store in Aurora, Ontario until it was sold by way of asset sale to a new franchisee in 2012.²⁵ The sole officer, director and shareholder of the plaintiff was Robert Rodger, who acted as the principal and operator of the franchise at all

²¹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.12-13, paras. 15-16.

²² McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.13, para. 17.

²³ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.13, para. 18.

²⁴ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.14, para. 19.

²⁵ Rodger Affidavit, Plaintiff's Motion Record, Tab 2, p.10, para. 1.

relevant times. Mr. Rodger acquired the shares of the plaintiff in 2005 from a former franchisee for \$210,000.

21. Mr. Rodger sold the plaintiff's assets in 2012 to another franchisee for \$320,000 – a value increase of 52% in less than seven years. The plaintiff had gross revenues of almost \$7 million over the years it operated its Pet Valu franchise.²⁶

22. Upon leaving the Pet Valu franchise system, the plaintiff and Mr. Rodger opened up a competing pet food business in Nobleton, Ontario called "The Hungry Pet". The location failed within one year of operation.²⁷

C. FRANCHISEES ARE FREE TO PURCHASE PRODUCTS FROM PETON OR EXTERNAL SUPPLIERS

23. Pet Valu franchisees buy many of the products for sale in their stores through Peton. Pet Valu has the express right to charge mark-ups on the products it offers for sale to its franchisees. There is no limitation on this right.²⁸

24. Pet Valu, through Peton, was entitled to a contribution margin (mark-up or wholesale profit) on the sale of products to franchisees like any other distributor. This margin is used to generate a return on capital and cover the expenses of creating and operating a distribution system, including rent, rolling inventory, inventory obsolescence and carrying costs, franchisee reimbursements on expired products,

²⁶ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, pp.7-8, para. 25.

²⁷ The parties consented to the order of Justice Belobaba dated December 5, 2012, in which the plaintiff and Mr. Rodger acknowledged as follows: "the operation of The Hungry Pet was not profitable." Order of Justice Belobaba dated December 5, 2012, Exhibit "H" to the Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1H, p.87, para. 1(g).

²⁸ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.14, para. 20.

shipping damage, warehouse damage, insurance, and general administrative and employment/benefit expenses.²⁹

25. Many franchisors own the distribution system through which goods reach franchisees, including Tim Hortons, Pizza Pizza, Loblaws, and Sobeys. However, unlike other franchise systems, Pet Valu franchisees are not required to purchase products exclusively from Pet Valu. They may do so from external suppliers.³⁰

26. In addition, unlike other pet food and supply distributors, Peton fully reimburses franchisees for expired products. Peton's reimbursements exceeded \$12 million over the Class Period.³¹

27. The Franchise Agreement contains express language that permits Pet Valu to charge mark-ups on products offered for sale to franchisees:

22.(c) The Franchisee may purchase any Merchandise offered for sale by PPCI during the Term at prices and applicable fees and charges established by PPCI from time to time.³²

28. However, if Pet Valu's sale prices are not competitive, franchisees will be inclined to purchase products from outside suppliers, which they are entitled to do.³³

²⁹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.14, para. 21.

³⁰ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.14-15, para. 22.

³¹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.30, para. 66.

³² McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.15, para. 23.

³³ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.15, para. 24; Also see the Affidavit of Roger Ware sworn April 16, 2010, Pet Valu's Responding Motion Record on Certification dated April 19, 2010, Vol. 4, Tab 3, p. 978, para. 26: "However, despite this right to charge a surcharge on outside purchases, I have been advised by the President of Pet Valu Canada Inc., Ed Casey, that it has never been exercised. Since this fact is well known to franchisees, they have no reason to avoid third-party purchases if they were able to obtain equivalent supplies at a lower cost. The fact of minimal resort to third party suppliers indicates a conclusion that Pet Valu and its distributor Peton are in fact the low cost supplier for the vast majority of supplies required by Pet Valu franchisees."

29. There are at least fifteen competing pet food suppliers in Ontario and Manitoba who sell substantially identical products as those sold by Peton.³⁴ The plaintiff made purchases from competing suppliers during the Class Period. However, over 90% of the plaintiff's purchases were made from Peton.³⁵ This is because Pet Valu offered cheaper prices on the vast majority of goods offered for sale in Pet Valu stores than competing suppliers.

D. PET VALU SELLS ITS PRODUCTS TO FRANCHISEES AT LOWER PRICES THAN THOSE OFFERED BY OTHER DISTRIBUTORS

30. Justice Strathy held that there was no legal "*basis for the [plaintiff's] more general assertion that there is an obligation to supply products to franchisees at low cost*".³⁶ However, the plaintiff continues to allege that it was paying approximately the same amount or more for products as a franchisee than it would have paid had it been an independent store. The plaintiff offers no evidence to support this allegation.

31. In fact, the opposite is true: Pet Valu generally offered its products to franchisees at lower prices than other distributors. KPMG LLP compared the prices paid by franchisees for the top 100 products purchased by volume from Pet Valu against the prices offered for the same products by other distributors in Ontario over the Class Period (the "KPMG Pricing Analysis").³⁷

³⁴ This excludes Pet Valu's private label products.

³⁵ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. 1, Tab 2, pp.15-16, paras. 25-26; The amount of the plaintiff's outside purchases and total purchases can be found at Exhibit "A" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. 1, Tab 2A, at pp. 87-88.

³⁶ Certification Decision, *supra*, Pet Valu's Book of Authorities, Tab 1, para. 44.

³⁷ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.5, para. 15; KPMG Pricing Analysis, Exhibit "A" to the Affidavit of James McAuley sworn September 20, 2013 ("McAuley Affidavit"), Pet Valu's Supplementary Cross-Motion Record, Tab 2A.

32. The KPMG Pricing Analysis concludes that Pet Valu generally offered franchisees lower prices than other distributors for the same products. The prices charged by Pet Valu on the Top 100 products purchased by the plaintiff are on average by year between 6% and 14% lower than prices listed by other distributors. Moreover, the prices charged by Pet Valu on the Top 100 products purchased by all franchisees in the plaintiff's sales zone are on average by year between 7% and 14% lower than prices listed by other distributors.³⁸ A copy of the KPMG chart demonstrating this is attached as Schedule "C" to this factum.

33. Beyond the findings in the KPMG Pricing Analysis, if the plaintiff found Pet Valu's pricing to be higher than competing distributors, it was free to buy from those other distributors.³⁹ On the whole, the plaintiff did not purchase elsewhere because the plaintiff and other franchisees received cheaper prices from Pet Valu than they did from other distributors.

E. WHAT IS A "VOLUME REBATE"?

34. The plaintiff's notice of motion for certification makes no mention of Volume Rebates. Rather, it included claims regarding "volume allowances", "non-monetary benefits", and "promotional allowances" granted to Pet Valu by distributors and

³⁸ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.5, para. 17; KPMG Pricing Analysis, Pet Valu's Supplementary Cross-Motion Record, Tab 2A, p.108 at "Executive Summary".

³⁹ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.5, para. 17.

suppliers,⁴⁰ mark-ups on private and non-private label products,⁴¹ and Pet Valu's distribution fee.⁴²

35. Neither does the Statement of Claim mention "Volume Rebates". It asserts a claim against Pet Valu only regarding "volume allowances" as referenced in section 22(f) of the Franchise Agreement.⁴³ As will be discussed below, the Franchise Agreement provides Pet Valu discretion to allocate volume allowances as it sees fit.

36. As mentioned, with the exception of volume allowances, Justice Strathy found that these proposed claims had no basis in fact, and declined to certify common issues in respect of them.⁴⁴

37. The Franchise Agreement does not refer anywhere to the term "Volume Rebate". "Volume Rebates" is a term referenced by Justice Strathy, which he went on to define as:

"Volume Rebates" means all volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu or its affiliates and includes any director 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.⁴⁵

⁴⁰ Plaintiff's Notice of Motion for Certification dated January 7, 2010 ("Notice of Motion for Certification"), Plaintiff's Motion Record for Certification dated January 7, 2010, Tab 1, p.2, paras. 4(b)(ii), (iii) and (iv).

⁴¹ Notice of Motion for Certification, Plaintiff's Motion Record for Certification dated January 7, 2010, Tab 1, p.2, paras. 4(a)(i) & 4(b)(i).

⁴² Notice of Motion for Certification dated January 7, 2010, Plaintiff's Motion Record for Certification dated January 7, 2010, pp.2-3, paras. 4(a)(ii) & 4(d).

⁴³ Notice of Motion for Certification, Plaintiff's Motion Record for Certification dated January 7, 2010, Tab 1, pp.2-3, paras.4(b)(iii) & 4(i)(ii); Statement of Claim issued December 9, 2009, Plaintiff's Motion Record for Certification dated January 7, 2010, Tab 3, p.181, para. 27.

⁴⁴ See paragraph 10 of this factum for the relevant excerpts of the Certification Decision and Costs Endorsement on Certification.

⁴⁵ *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941 ("Common Issues Decision"), Pet Valu's Book of Authorities, Tab 2, para. 8.

38. The Franchise Agreement makes reference only to "volume allowances". Section 22(f) of the Franchise Agreement defines volumes allowances as allowances "granted to [Pet Valu] by a supplier or manufacturer based upon [Pet Valu's] annual purchasing volume."⁴⁶

39. The common issue definition of "Volume Rebates" requires that such rebates are "volume-based". Other than volume allowances, the only other instance of a discount relating a supplier that is in any way volume-based is amounts that are allocated to an internal Peton cost model under the category "Volume Discount" (line item 5 in Exhibit "I" of Mr. Rodger's affidavit).⁴⁷ (A copy of Exhibit "I" to Mr. Rodger's affidavit is provided at Schedule "D" to the factum.)

40. Allocations to this "Volume Discount" costing account are made in the following circumstances: (i) one-off, opportunistic discounts received from suppliers on purchases made by Pet Valu; (ii) "volume allowances" (in the limited instances when Pet Valu receives them, it is entitled to allocate them to this category in its discretion); and (iii) straight-line discounts received from suppliers on purchases made by Pet Valu that are not tied to the volume of product purchased.⁴⁸

41. Pet Valu shared all amounts allocated to the "Volume Discount" account with franchisees by passing the entire amount of it on to the franchisees as a reduction in price. All franchisees received this beneficial pass-through when they purchased

⁴⁶ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.19, para. 34; Exhibit "B" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2B, p. 145.

⁴⁷ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.18, para. 32; Exhibit "I" to the Rodger Affidavit, Plaintiff's Motion Record, Tab 2I, p. 305.

⁴⁸ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.18, para. 33.

products from Pet Valu.⁴⁹ Thus, to the extent Pet Valu has a contractual duty to share Volume Rebates with its franchisees (which it denied as set out immediately below), it did so in any event.

F. PET VALU HAS NO CONTRACTUAL DUTY TO SHARE VOLUME REBATES WITH FRANCHISEES

42. Section 22(f) of the Franchise Agreement expressly provides that Pet Valu has the sole contractual discretion to determine whether or not to share Volume Rebates to franchisees. It sets out that volume allowances are to be allocated in the manner set out in Pet Valu's operations manual, the Pet Valu Franchise Business System.⁵⁰

22.(f) Volume allowances granted to PPCI by a supplier or manufacturer based upon PPCI's annual purchasing volume shall be allocated all as more particularly set form in the Pet Valu Franchise Business System.⁵¹

43. The Pet Valu Franchise Business System addresses volume allowances at paragraph c.3, under the heading "Allowances", as follows:

The Franchisee's invoice cost of Merchandise shall be subject to the inclusion or the exclusion of merchandising performance or volume allowances as follows:

(a) Performance funds received by [Pet Valu] shall be allocated to the franchisee by means of a proportionate reduction in invoice cost, except where such performance funds are negotiated on the basis of performance by the Franchisee and the Franchisee fails to perform and such failure is not excused by [Pet Valu]. Such performance funds, whether provided to [Pet Valu] by way of a reduction in invoice price or by separate

⁴⁹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.29, paras. 61, 63 & 69.

⁵⁰ Specifically, the Pet Valu Franchise Business System Manual is defined in section 2(ff) of the Franchise Agreement as "collectively, any and all books, memoranda and other publications, prepared and amended from time to time by or for [Pet Valu] setting for the policies of [Pet Valu], including, without limitation, policies with respect to: (i) the purchase and sale of Merchandise, Operating Supplies or Equipment between the Parties; (ii) the payments of money between the Parties;...the main body of such policies being a document titled "Pet Valu Franchise Business System"."

⁵¹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.19, para. 34; Exhibit "B" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2B, pp. 111 & 145.

cheque, shall be passed on to the Franchisee for a period of time equal in length to the period of time in respect of which such funds were made available by the supplier to [Pet Valu].⁵²

44. The Pet Valu Franchise Business System was amended by a memo to all Pet Valu franchisees dated November 6, 2002 (the "November 2002 Memo") that was included in the manual. The November 2002 Memo explicitly states at page 6 that volume allowances may or may not be included in the landed cost of specific products at the discretion of Pet Valu:

The operative addition to the Franchise Business System is being made herewith in relation to this interim step:

Subject to the terms and conditions of respective franchise agreements, promotion, listing, special or volume allowances may be included or not included in the landed cost of specific products, pursuant to the discretion of the franchisor and any permitted upcharge or surcharge may be applied to specific products or groups of products, so as to yield target average franchisee zone margins. [Emphasis added.]⁵³

45. With respect to the reference to "target average franchisee zone margins", the November 2002 memo notes that the average franchisee margin over the prior fifteen years had been 36%.⁵⁴ In the years 2003 to 2011, the average franchisee margin consistently exceeded 36%.⁵⁵

46. Franchisees read the November 2002 memo and accepted it. The franchisee president of Pet Valu's Canadian Franchise Council executive committee commented

⁵² McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.20, para. 37; Exhibit "C" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2C, pp.198-199.

⁵³ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.20, para. 38; Exhibit "C" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2C, pp.189-190.

⁵⁴ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.20, para. 39; Exhibit "C" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2C, p.190.

⁵⁵ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.20, para. 39; Exhibit "D" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2D, pp.206-207.

that, *"I have now spoken to most of the Executives and a number of Franchisees...In all cases the response has been extremely positive and although there are questions regarding the details, I think that the changes to the Franchise Business System and the principles expressed in the memo were well appreciated."*⁵⁶ More importantly, Mr. Rodger confirmed that he received and reviewed the Franchise Business System before entering into the Franchise Agreement on behalf of the plaintiff.⁵⁷ For example, conceded as follows on cross-examination:

Q. I take it you had available to you the business systems manual that is referred to at various portions of the Franchise Agreement?

A. Yes.

Q. And you had an opportunity to read that as well before entering into your agreement?

A. Yes.⁵⁸

47. In summary, the Franchise Agreement entitles Pet Valu to deal with Volume Rebates in its discretion. The franchisees have no contractual entitlement to Volume Rebates. This was understood and accepted by franchisees. In any event, Pet Valu shares the reductions that it books to its Volume Discount account with franchisees.⁵⁹

G. PET VALU SHARES VOLUME REBATES RECEIVED FROM ITS SUPPLIERS

48. Despite having no obligation to share Volume Rebates, Pet Valu has provided substantial and extensive evidence to the plaintiff that demonstrates how it deals with Volume Rebates. In particular, Pet Valu has provided an analysis of: (i) a

⁵⁶ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.21, para. 41; Exhibit "E" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2E, p.209.

⁵⁷ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.22, para. 45.

⁵⁸ Excerpts from the cross-examination of Robert Rodger held May 25, 2010, Exhibit "F" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Tab 2F, pp.211-219.

⁵⁹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.29, paras. 61, 63 & 69.

representative group of products (the "Top 100 products") sold to the plaintiff, which demonstrates that Volume Rebates are shared with franchisees, and (ii) the Volume Rebates received by Pet Valu from a representative group of its suppliers (the "Top Ten suppliers").

49. This methodology corresponded with the direction of Justice Strathy in the Reasons for Judgment on Certification, where he stated:

It also seems to me that the fair and expeditious determination of this proceeding may well lend itself to a process whereby, in the first instance, the analysis of Volume Rebates is confined to a representative group of suppliers, or a representative group of products, or both. If the plaintiff failed to establish an entitlement to share in rebates relating to those products, that might well be the end of the inquiry.⁶⁰

50. Justice Strathy confirmed this approach after reviewing a summary of Pet Valu's Top Ten suppliers, as follows:

I have concluded that information concerning the top ten suppliers in each year would provide the plaintiff with a fair and representative sampling, at least in the first instance, for the purposes of the proposed summary judgment motion."⁶¹

51. Pet Valu's evidence regarding the Top 100 products and Top Ten suppliers amply demonstrates that:

- (a) Pet Valu shared Volume Rebates (as "Volume Discounts") provided by suppliers with franchisees as reductions in price; and
- (b) Any volume allowances received as lump sums from suppliers and manufacturers were *de minimis*.

(See Schedules E and F to this factum for samples of the Top 100 Products and Top 10 Suppliers.)

⁶⁰ Certification Decision, *supra*, Pet Valu's Book of Authorities, Tab 1, para. 109.

⁶¹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.26, para. 51; Exhibit "G" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2G, p. 221.

(a) Pet Valu Shared Volume Discounts and Marked Up Volume-Discounted Products Less Than Non-Volume Discounted Products

52. As noted at paragraphs 39 to 41 above, the only volume-based reference in Pet Valu's pricing model is the "Volume Discount" category as referenced in Exhibit "I" of Mr. Rodger's affidavit. Franchisees received the benefit of these discounts. Specifically, all amounts in this category reduce the price paid by franchisees and are shared with franchisees in their entirety.⁶²

53. However, an argument is made that Pet Valu fails to share "Volume Discounts" with its franchisees (even though it passes them through by way of price reduction), because Peton correspondingly marks-up the products as part of its pricing model and procedure.⁶³ This argument fails for at least three reasons.

54. First, Pet Valu is entitled to mark-up products. Justice Strathy found that "there was no basis in fact for the claims regarding mark-ups,"⁶⁴ because "mark-ups are permitted by s. 22(c) of the Franchise Agreement and nothing prohibits them."⁶⁵

55. Second, Pet Valu earned lower mark-ups on the products for which volume discounts were given than on the products where no volume discount was applied.⁶⁶

An analysis of the Top 100 products purchased annually by the plaintiff over the Class Period confirms this.⁶⁷ On non-volume discounted products, Pet Valu's mark-up was 31 percent of Net Realized Cost. On volume discounted products, the mark-

⁶² McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.29, paras. 61, 63 & 69.

⁶³ Plaintiff's Notice of Motion for Summary Judgment, Plaintiff's Motion Record, Tab 1, pp.5-6, paras. 9 & 13.

⁶⁴ Costs Endorsement on Certification, *supra*, Pet Valu's Book of Authorities, Tab 3, para. 4. See also: Certification Decision, *supra*, Pet Valu's Book of Authorities, Tab 1, para. 96.

⁶⁵ Certification Decision, *supra*, Pet Valu's Book of Authorities, Tab 1, para. 88.

⁶⁶ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.34-35, para. 75.

⁶⁷ From January 1, 2004 until June 30, 2011 (which exceeds the Class Period by approximately three months).

up was only 21 percent.⁶⁸ Thus, even though Pet Valu was contractually entitled to mark-up products, it did so to a significantly smaller degree (65 percent less) on products supplied for which volume discounts were given than on those for which no volume discount was applied.

56. Third, many of the amounts allocated to the "Volume Discount" category are straight-line discounts from suppliers that are not tied to volume. These allocations relate to one-time, special purchases by Pet Valu or ongoing discounts received by Pet Valu unrelated to volume. Regardless, Pet Valu shared all such amounts with franchisees in the form of a reduced Realized Cost. Franchisees therefore received discounts that were not Volume Rebates and to which they were not entitled.⁶⁹

57. In any event, there is nothing wrong with Pet Valu marking up the price of products; it is necessary in order to maintain a viable supply and distribution system. Pet Valu marks up its products in order to cover the significant capital expenditures and expenses associated with operating Peton, a large, complex purchasing, warehousing and distribution network.⁷⁰ Pet Valu's financial statements show that it spent tens of millions of dollars on expenses and capital outlay associated with operating Peton.⁷¹ Other risks and expenses associated with Peton included:⁷²

⁶⁸ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.34-35, paras. 77-78; Exhibit "K" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. II, Tab 2K, p.424.

⁶⁹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.32, para. 69.

⁷⁰ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.30, para. 65.

⁷¹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.31, para. 67; Exhibit "I" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. II, Tab 2-I, p.353 (showing inventory of \$34.2 million) and p.366 (showing investment of \$23.9 million in property and equipment primary related to Peton).

⁷² McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.31, para. 68.

- (a) Introducing a substantial number of new products each year that may not be successful and may not sell;
- (b) Buying a significant volume of products in U.S. dollars from suppliers in the United States, thus creating an inherent foreign exchange risk;
- (c) Stocking pet food with limited shelf life, which leads to significant warehouse expired food costs each year.

58. Pet Valu seeks a reasonable rate of return on its investment in Peton. The "Wholesale Profit" or mark-up category is the method by which Pet Valu allocates a gross margin to cover its expenses and generate a return. As explained by Mr. Tom McNeely, the CEO of Pet Valu, it is inconceivable from a business perspective that these expenses could be incurred and this capital committed on an ongoing basis without generating a positive return. The notion that Pet Valu should do this at cost (or at a loss, as suggested by the plaintiff) is nonsensical.⁷³

59. Pet Valu also uses its Wholesale Profit to subsidize franchisees for returns of expired products. Throughout the Class Period, all Pet Valu franchisees have been entitled to return expired products for full refund at acquisition price. During that time, Pet Valu has reimbursed stores for over \$12 million worth of returned products. This return policy is not available to the franchisees from any other distributor. Importantly, those other distributors also mark-up products for the purpose of making a profit.⁷⁴

60. Importantly, Pet Valu balanced the need to cover its expenses and generate a return on its investment in Peton, and to reimburse franchisees for expired products, with the competitive need to keep prices at or below the market price available to

⁷³ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.30, para. 65.

⁷⁴ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.30, para. 66.

franchisees from other distributors, and to offer reasonable retail prices to consumers.⁷⁵ Any argument that Pet Valu does not share its Volume Rebates because it correspondingly applies a mark-up does not account for Pet Valu's necessary expenses in relation to operating Peton.

(b) Volume Rebates Received From Suppliers Were *De Minimis*

61. In keeping with the suggestion of Justice Strathy, Pet Valu produced its supplier agreements and arrangements for its Top Ten suppliers to plaintiff's counsel for each year of the Class Period (2004-2011).⁷⁶ Specifically, the Top Ten suppliers' products represented between 52.1% to 65.9% of total shipments each year on a dollar basis.⁷⁷ The agreements were provided to Class Counsel in accordance with a confidentiality order, and were identified by way of a table of concordance.⁷⁸ Where agreements were not available, Pet Valu produced letters from suppliers confirming that no Volume Rebates were provided to Pet Valu.⁷⁹

62. The Top Ten agreements demonstrate that Pet Valu simply did not receive Volume Rebates from its suppliers in any substantive fashion. In fact, only three of these supplier agreements contained references to "volume rebates". Specifically:

⁷⁵ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.34, para. 76.

⁷⁶ Exhibit "H" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2H, pp.223-321; Exhibit "C" to the Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1C, p.45-59.

⁷⁷ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.25-26, paras. 48-49.

⁷⁸ Confidentiality Order of Justice Belobaba dated November 5, 2012; Table of Concordance, Confidential Supplier Agreement Brief of Pet Valu dated November 12, 2012; Supplementary Table of Concordance, Supplementary Confidential Supplier Agreement Brief of Pet Valu dated September 27, 2013.

⁷⁹ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.4, para. 11; Exhibit "E" to the Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1E, pp.63-68.

- (a) In one agreement, the reference to a volume rebate was a misnomer that actually referred to a marketing allowance.⁸⁰ Marketing allowances are not the subject of any common issue;
- (b) Another agreement referred to a scaled volume allowance based on different levels of annual purchases. This allowance was referred to in the agreement as a "volume rebate". The volume allowance program was based on Pet Valu's combined purchases on behalf of franchisees, corporate stores and Pet Valu's other pet food chains. Over the Class Period, Pet Valu received \$111,598.19 in Volume Rebates from this supplier.⁸¹
- (c) The third agreement provided for a volume rebate based on a certain sales volume in respect of purchases by Pet Valu (not just franchisee purchases). Pet Valu failed to meet this threshold volume of purchases in all but one year during Class Period. In that year it received \$10,805.02. All other price discounts received from this supplier were shared with franchisees through price reductions.⁸²

63. In total, Pet Valu received the sum of \$122,403.21 in Volume Rebates from its Top Ten suppliers over the entire Class Period. The Top 10 suppliers represent over half of Pet Valu's sales during the Class Period. Pet Valu received these Volume Rebates in respect of products sold to the entire Pet Valu chain, including corporate stores and other brands,⁸³ which account for 44% of Peton's sales. Furthermore, 31% of Peton's sales are attributable to franchisees who have opted out of the class

⁸⁰ This marketing allowance is used to fund marketing materials and flyers for the benefit of the Pet Valu system. See: McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.27, paras. 53-54.

⁸¹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.27-28, paras. 55-57.

⁸² Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.2, paras.4-5; Exhibit "A" to the Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1A, p.22.

⁸³ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.28, para. 56.

action. Only 25% of Peton's sales are attributable to Class Member franchisees.⁸⁴ As such, Class Members would be entitled to only 25% of any such Volume Rebates, even if such entitlement exists (which is denied).

64. Essentially, Pet Valu does not receive Volume Rebates. Rather, when applicable, suppliers extend reductions in prices to Pet Valu, which it shares with franchisees through corresponding price reductions. Even if Pet Valu was obligated to share Volume Rebates, which is denied, it has in no way breached that obligation.

H. FRANCHISEES HAD IMPROVED FINANCIAL PERFORMANCE THROUGHOUT THE CLASS PERIOD

65. Pet Valu franchisees had increasing gross profit margin throughout the Class Period, contrary to the unsupported complaints of the plaintiff.⁸⁵

66. The following table sets out the average franchisee margins for the years 2002 through 2011, as well as the average margins of the top and bottom 20% of franchisees in terms of margin performance:⁸⁶

Year	Average %	Bottom 20%	Top 20%
2002	36.52%	34.39%	38.89%
2003	37.06%	34.61%	39.97%
2004	38.70%	35.89%	41.74%
2005	37.86%	35.27%	40.76%
2006	38.14%	35.50%	41.09%
2007	38.20%	35.48%	40.89%

⁸⁴ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, pp. 9-10, para. 30.

⁸⁵ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.37, paras. 84-85: Sales minus the cost of goods sold equals gross profit. Gross profit divided by sales equals gross margin (expressed as a percentage).

⁸⁶ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.37, para. 86.

2008	36.94%	34.74%	39.09%
2009	38.11%	35.31%	40.17%
2010	40.63%	37.93%	42.64%
2011 (To June)	40.70%	38.43%	42.61%

67. Moreover, at the height of the recession of 2009, Pet Valu provided gratuitous margin relief to franchisees in the amount of \$399,998 on a franchise-by-franchise basis in the form of a product credit. The plaintiff received \$3,156 of this amount.⁸⁷ Despite the clear evidence in the record that the plaintiff received this relief, Mr. Rodger incorrectly stated in his affidavit that no funds were received.⁸⁸

68. The plaintiff's complaints regarding margins cannot be viewed in isolation. Product profit margins are only one aspect of franchisees' overall financial performance, namely their cost of goods sold. It is necessary to look at franchisees' overall performance to determine whether there was any merit to a complaint that they were not successful.

69. Two barometers of franchisee success are: (i) margins (as discussed above), and, (ii) overall revenues (retail sales). Multiplying these figures provides a general idea of financial performance.⁸⁹

70. During the Class Period, the plaintiff's retail sales (as reported) exceeded those of the average Pet Valu franchisee.⁹⁰

⁸⁷ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.37, para. 88; Exhibit "L" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. II, Tab 2L, pp. 428.

⁸⁸ Rodger Affidavit, Plaintiff's Motion Record, Tab 2, p.21, para. 44.

⁸⁹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.38, para. 90.

⁹⁰ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.38-39, para. 91.

Year	Average Retail Sales	Plaintiff's Retail Sales ⁹¹
2006	\$ 649,881	\$ 749,312
2007	\$ 691,904	\$ 971,673
2008	\$ 740,908	\$ 1,028,828
2009	\$ 763,406	\$ 956,651
2010	\$ 743,284	\$ 938,671
YTD P6 2011 ⁹²	\$ 362,779	\$ 406,926

71. The plaintiff's store should have been profitable based on its sales and gross margin. KPMG LLP prepared pro forma financial statements based on the plaintiff's actual sales and costs of goods sold normalized by the financial results of corporate stores that were considered to be comparable (the "KPMG Profitability Analysis"). The KPMG Profitability Analysis concluded that "...the calculated pro forma income available to [the plaintiff] is higher than [the plaintiff's] reported net income...by at least \$56,000 each year."⁹³

72. In the three years prior to the commencement of this litigation, the plaintiff had the potential to earn a positive difference of between \$100,000 and \$160,000 in respect of its reported net income.⁹⁴ Further, Mr. Rodger acquired the plaintiff for \$210,000 in 2005 and sold it for \$320,000 less than seven years later. The plaintiff

⁹¹ These amounts do not include the underreported sales as indicated in the KPMG Report, below.

⁹² Part year only. Sales are generally higher in the last six months of the year than in the first six months.

⁹³ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.6, paras. 22-23; KPMG Profitability Analysis, Pet Valu's Supplementary Cross-Motion Record, Tab 2, p.126.

⁹⁴ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.7, para. 24.

had gross revenues of almost \$7 million dollars over the years it operated. There was ample opportunity for an appropriate return from this business.⁹⁵

73. The franchisee's complaint regarding its profitability and general franchisee performance during the Class Period is therefore not supported by the evidence.

I. THE PLAINTIFF HAS HIDDEN, MISREPRESENTED AND UNDERSTATED ITS FINANCIAL PERFORMANCE

74. The plaintiff has incorrectly alleged that Pet Valu is responsible for its poor financial performance. Its claims of hardship cannot be trusted. The plaintiff has hidden, misrepresented and understated its financial performance. The evidence demonstrates that the plaintiff is now attempting to recalibrate and improve its economic bargain with Pet Valu rather than remedy any real injustice.

75. The plaintiff has not provided any substantive evidence of financial problems. Further, the plaintiff has not been forthright when Pet Valu has examined its financial performance. For example, Mr. Rodger swore in his January 7, 2010 affidavit supporting certification that his "year-end financial statements continue to show a loss", when, in fact, the plaintiff was then 23 months delinquent in preparing its financial statements.⁹⁶

76. Given this discrepancy, in February 2010, Pet Valu invoked its contractual right to audit the plaintiff for the fiscal years ending March 31, 2006 through 2009 (the

⁹⁵ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.7, para. 25.

⁹⁶ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.39, para. 93; Affidavit of Robert Rodger sworn January 7, 2010, Plaintiff's Motion Record on Certification, Tab 2, p. 8, para. 5.

"KPMG Report").⁹⁷ The KPMG Report identifies a number of errors in the plaintiff's financial statements that directly affected the plaintiff's reported net profits and losses in the relevant years:

Noted Errors in Income Statements – we identified a number of errors that were made in the recording of sales, costs of sales or other expenses, which in aggregate resulted in an understatement of net income in the annual financial statements. These errors generally occurred as a result of sales not being recorded and expenses being recorded more than once. In 2008, sales were understated by \$45,614 and in 2007 sales were understated by \$35,664. In 2008, cost of sales was overstated by \$50,733. These items and other more minor errors resulted in an understatement of net income of approximately \$138,000 over the four years reviewed.⁹⁸

77. In addition, the KPMG Report identified \$30,132 in various expense items that appeared to represent a personal benefit to Mr. Rodger and/or his family.⁹⁹ The KPMG Report identified another \$51,301 in various expense items that had some element of personal benefit to Mr. Rodger and/or his family, but which may be seen as only partly business-related, such as payments to his children, meals & entertainment, home office expenses, and auto repairs.¹⁰⁰

78. The KPMG Report also confirmed that the plaintiff failed to report to Pet Valu outside purchases totalling \$156,519 during the four years ended March 31, 2009. As a result, the plaintiff underpaid percentage rent, royalties, and marketing fund contributions.¹⁰¹ In addition, the plaintiff's staff manipulated the POS System for his

⁹⁷ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.40, para. 93; Notice of Audit, Exhibit "M" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. II, Tab 2M, pp. 431-433.

⁹⁸ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.40, paras. 94-95; Exhibit "A" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2A, p.55.

⁹⁹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.41, para. 96.

¹⁰⁰ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.41, para. 97.

¹⁰¹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.42, para. 100; Exhibit "A" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2A, p.71.

store.¹⁰² In fact, Mr. Rodger admitted that he incorrectly recorded the sale of merchandise purchased from third party suppliers.¹⁰³ This further prevented Pet Valu and the plaintiff from being able to properly track inventory and sales in order to calculate the appropriate royalties and percentage rent.¹⁰⁴

79. In addition, the plaintiff processed tens of thousands of dollars worth of sales using incorrect item numbers that corresponded to low-cost (\$0.99) items, such as canned pet food and rodent salt spoons. In each case, the plaintiff had purchased only nominal amounts of these products or none at all. The manipulation of the POS System deprived the plaintiff of useful store management tools and casts serious doubt upon Mr. Rodger's assertions regarding the financial status of his business and his opinions regarding the financial performance of other franchisees.¹⁰⁵

80. The KPMG Report also indicates that, during the relevant years, the plaintiff failed to record in its financial statements sales in the total amount of \$111,976 and recorded certain sales twice in the total amount of \$30,699.¹⁰⁶

81. Further, there are significant discrepancies with respect to the plaintiff's inventory purchases. The impact of these discrepancies is to overstate expenses and underreport profits. The plaintiff made \$401,564 of unreported purchases. The KPMG Report identified \$156,519 of this amount as unreported outside purchases. The difference, \$245,045, remains unexplained and unsupported.¹⁰⁷

¹⁰² McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.42-43, paras. 101-102.

¹⁰³ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.42, para. 102.

¹⁰⁴ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.42, para. 102.

¹⁰⁵ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.43 paras. 103-104.

¹⁰⁶ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.44, para. 106.

¹⁰⁷ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.44-45, paras. 107-108.

82. During the period of April 2005 to January 2010, the plaintiff made \$149,916.87 in unexplained cash withdrawals from its cash register. In combination with the questionable personal benefits referred to above, Mr. Rodger removed at least \$231,349.87 from the franchise business during the four years ending March 31, 2009.¹⁰⁸

83. Mr. Rodger failed to maintain control over his financial records and operational expenses. His complaints about profitability lack credibility and are not representative of how other Pet Valu franchisees operate their businesses.¹⁰⁹ Therefore, serious doubt ought to be cast upon any statements the plaintiff makes about the financial status of its business.

84. The plaintiff's poor management, which is the source of its perceived financial difficulties, became even more evident after the plaintiff left the Pet Valu franchise system in 2012. That year, the plaintiff, through Mr. Rodger, opened a competing pet food store in Nobleton, Ontario called "The Hungry Pet". Pet Valu took the position that the plaintiff and Mr. Rodger were in breach of the non-competition provision within their Franchise Agreement. Pet Valu commenced an action and sought a restraining injunction to prohibit them from operating the store.¹¹⁰

85. The plaintiff and Mr. Rodger acknowledged that the operation of the Hungry Pet was not profitable. They agreed to an order allowing him to sell or shut down the

¹⁰⁸ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.47, para. 112.

¹⁰⁹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.47, para. 113.

¹¹⁰ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.8, para. 26; Exhibit "G" to the Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1G, pp.72-83.

store within a prescribed period of time (60 days). In that order, the plaintiff and Mr. Rodger concede that the Hungry Pet was not profitable, as follows:

ON READING the written consent of the parties, filed;

1. THIS COURT ORDERS THAT 1250264 Ontario Inc. ("1250264") and its principal, Robert Rodger ("Mr. Rodger")...

[...]

g. shall acknowledge by signing the Settlement Release Agreement that the operation of The Hungry Pet was not profitable; (Emphasis added.)¹¹¹

86. The plaintiff was therefore unable to operate an even moderately successful pet food store on its own outside of the Pet Valu franchise system, despite having years of experience. This demonstrates that: (i) the plaintiff's complaints of unprofitability were the result of its own conduct, not Pet Valu's, and (ii) the Pet Valu franchise system offered real benefits to the plaintiff and other franchisees. As such, the plaintiff's complaints must be viewed with serious scepticism.

J. PURCHASES BY REMAINING CLASS MEMBERS ARE ONLY A SMALL PERCENTAGE OF TOTAL SYSTEM PURCHASES

87. Class members accounted for only approximately 25% of purchases from Peton during the class period. Of the remaining 75%:¹¹²

- (a) 44% of purchases were made by other groups that purchase products from Peton, including corporate Pet Valu stores in Canada and the United States; Paulmac's Pet Food Plus stores in Ontario; Bosley's Pet Food Plus stores in British Columbia; Berry's Pet Food stores; All Pet

¹¹¹ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.8, para. 27; Exhibit "H" to the Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1H, p.87.

¹¹² Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, pp.9-10, paras. 28-30.

Enterprises stores; and, Pet Food Direct, an online retailer in the United States.

- (b) 31% of purchases were made by the 140 franchisees¹¹³ that have opted out of the class proceeding.

88. As such, if any damages have been incurred in this case relating to Volume Rebates (which is denied), the Class Members would be entitled to only approximately 25% of the amount earned as Volume Rebates.

K. MANY CLASS MEMBERS HAVE ENTERED INTO RELEASES OF ALL CLAIMS AGAINST PET VALU

89. A significant number of former Pet Valu franchisees have entered into releases with Pet Valu.¹¹⁴ Generally, the former franchisees granted these releases in consideration of Pet Valu purchasing a store back from a franchisee (a "buy-back"), allowing the franchisee to exit the system, or pursuant to the assignment or renewal provisions of their franchise agreements.¹¹⁵

90. Through these releases, these former franchisees have released Pet Valu from "any and all manner of actions, causes of action, claims, demands, suits, debts, sums of money, expenses, damages and costs, of any and every kind whatsoever

¹¹³ According to class counsel (via the Affidavit of Delita Nunes sworn September 22, 2011). As well, class counsel also states that an additional three opt-out coupons were received after the expiry of the opt-out period.

¹¹⁴ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.47, para. 114; Exhibit "P" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. II, Tab 2P, pp. 500-576; Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.11, para. 31; Exhibit "I" to the Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 11, pp.90-99.

¹¹⁵ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.11, para.33.

relating to [their franchises] arising prior or existing up to the date" of the releases.¹¹⁶ Accordingly, these former franchisees no longer have valid claims against Pet Valu.

L. THE PLAINTIFF'S CLAIMS ARE STATUTE-BARRED

91. The plaintiff executed the Franchise Agreement with Pet Valu on April 4, 2005. It has acknowledged reviewing the Franchise Agreement and the Pet Valu Business System prior to doing so.¹¹⁷ As explained above, the Franchise Agreement contained all relevant information about Pet Valu's policies on volume-based benefits.¹¹⁸

92. The plaintiff commenced its claim in December 2009 – more than four years after executing the Franchise Agreement and commencing operation of the business. The plaintiff renewed its Franchise Agreement twice during the Class Period.¹¹⁹

93. Further, class counsel (Sotos LLP) first acted for Pet Valu franchisees in the year 2000. They corresponded with Pet Valu at that time in respect of the firm acting as counsel for an independent Pet Valu franchisee association.¹²⁰

PART III - ISSUES AND THE LAW

94. Pet Valu submits that the following issues are before this Honourable Court:

- (a) The common issues are suitable for dismissal on summary judgment;
- (b) Pet Valu is entitled to summary judgment in respect of the common issues on this class proceeding, as follows:

¹¹⁶ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.47, para. 116.

¹¹⁷ Excerpts from the cross-examination of Robert Rodger held May 25, 2010, Exhibit "F" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Tab 2F, pp.211-219.

¹¹⁸ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.48, para. 117.

¹¹⁹ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.48, para. 118.

¹²⁰ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.48, para. 119; Exhibit "Q" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. II, Tab 2Q, pp.578-579.

- (i) Pet Valu had no contractual duty to share Volume Rebates with Class Members. Even if it did, Pet Valu shared Volume Rebates with Class Members;
- (ii) Pet Valu did not breach the duty of fair dealing under the *Arthur Wishart Act (Franchise Disclosure), 2000* (the "*Wishart Act*") in respect of Volume Rebates;
- (iii) Pet Valu has not been unjustly enriched in respect of Volume Rebates;
- (iv) There are no damages in respect of the plaintiff's claims; and
- (v) Pet Valu had no duty of good faith to disclose information concerning Volume Rebates to Class Members.

A. THE COMMON ISSUES ARE SUITABLE FOR DISMISSAL ON SUMMARY JUDGMENT

95. The Court shall grant summary judgment if satisfied that there is no genuine issue requiring a trial. On a summary judgment motion, a judge may weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence.¹²¹

96. In *Hyrniak v. Mauldin*,¹²² the Supreme Court of Canada confirmed a "culture shift" away from the conventional trial "in favour of proportional procedures tailored to the needs of the particular case."¹²³ It stated that the summary judgment rules must be interpreted broadly, favouring proportionality and the affordable, timely and just

¹²¹ *Rules of Civil Procedure, RRO 1990, Reg 194, Rules 20.04(2) & (2.1) ("Rules")*, Schedule "B".

¹²² *Hyrniak v. Mauldin*, 2014 SCC 7, Pet Valu's Book of Authorities, Tab 4 [*Hyrniak*]. See also, *Rules of Civil Procedure, RRO 1990, Reg 194, Rule 1.04 ("Rules")*, Schedule "B".

¹²³ *Ibid*, Pet Valu's Book of Authorities, Tab 4, para. 2.

adjudication of claims.¹²⁴ The Court therefore enunciated the following framework for summary judgment motions:¹²⁵

- (a) On a motion for summary judgment, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact finding powers;
- (b) There will be no genuine issue requiring a trial when the motion: (i) allows the judge to make the necessary findings of fact, (ii) allows the judge to apply the law to the facts, and (iii) is a proportionate, more expeditious and less expensive means to achieve a just result;¹²⁶
- (c) If there appears to be a genuine issue requiring a trial, the judge should determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2), unless the interests of justice require that such powers be exercised only at trial; and
- (d) Use of the new powers will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

97. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would not be proportionate, timely, or cost effective.¹²⁷

98. Contractual disputes requiring the interpretation of a franchise agreement are suitable for summary judgment. In *Fairview Donut Inc. v. The TDL Group Corp.*,¹²⁸

¹²⁴ *Ibid*, Pet Valu's Book of Authorities, Tab 4, para. 5.

¹²⁵ *Ibid*, Pet Valu's Book of Authorities, Tab 4, para. 66.

¹²⁶ *Hyrniak, supra*, Pet Valu's Book of Authorities, Tab 4, paras. 49 & 66.

¹²⁷ *Ibid*, Pet Valu's Book of Authorities at Tab 4, para. 50.

¹²⁸ *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, Pet Valu's Book of Authorities, Tab 5, aff'd by 2012 ONCA 867, leave to appeal to SCC refused 2013 CarswellOnt 6050 Pet Valu's Book of Authorities, Tab 6 [*TDL Group*]

two Tim Hortons franchisees commenced a proposed class action against the franchisor and its affiliate. Among other things, the plaintiffs claimed that the defendants breached the franchise agreement by implementing operational changes that did not financially benefit the franchisees and by selling ingredients to franchisees at above-market prices. Justice Strathy, as he then was, held that the franchise agreement contained no such obligations and dismissed the claims on summary judgment.

99. Procedurally, Justice Strathy held that the contractual dispute was suitable for summary judgment. It involved the mere exercise of contractual interpretation and did not require the court to weigh evidence, evaluate credibility, or draw inferences.¹²⁹ Substantively, His Honour held that the proper interpretation of the agreement barred the plaintiffs' claims. For example, the agreement expressly entitled the franchisor to earn a profit and to receive rebates on the sale of ingredients to franchisees.¹³⁰ Justice Strathy cautioned that "it is simply not the responsibility of the court to step in to recalibrate the financial terms of the agreement".¹³¹

100. The present case is amenable to summary judgment because, at its heart, it turns on the exercise of contractual interpretation and the undisputed facts that evolve from it. As explained above, the Franchise Agreement entitles Pet Valu to deal with volume allowances in its sole discretion, and to apply mark-ups on products sold to franchisees. Pet Valu is therefore not contractually obligated to share Volume

¹²⁹ *Ibid*, Pet Valu's Book of Authorities, Tab 5, para. 422.

¹³⁰ *Ibid*, Pet Valu's Book of Authorities, Tab 5, para. 476.

¹³¹ *Ibid*, Pet Valu's Book of Authorities, Tab 5, para. 679.

Rebates with franchisees. This is a complete defence to the common issue regarding the alleged breach of contract.

101. Even if the Franchise Agreement required Pet Valu to share Volume Rebates with franchisees, which is denied, the evidentiary record confirms that Pet Valu shared with franchisees Volume Rebates that it does receive. Any argument that the mark-up it was contractually entitled to apply somehow results in the Volume Rebate not being shared is without merit.

102. The Supreme Court's emphasis on proportionality in *Hyrniak* is relevant to the evidentiary record filed on this motion. In *Hyrniak*, the Court noted that the evidence on a summary judgment motion need not be equivalent to that at trial: a documentary record, particularly when supplemented by the new fact finding tools "is often sufficient to resolve material issues fairly and justly."¹³² Moreover, with respect to proportionality, the Court stated that the motion judge may consider the evidence available on the motion with the evidence that might be available at trial, with the following observation: "Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial."¹³³

103. Pet Valu has tendered comprehensive evidence, including complete details for the Top 100 products purchased by the plaintiff annually during the Class Period (see paragraph 55) and all of the contracts and other information relating to a Pet Valu's Top Ten suppliers (see paragraph 61). In a prescient moment, Justice Strathy

¹³² *Hyrniak, supra*, Pet Valu's Book of Authorities, Tab 4, at para. 57.

¹³³ *Ibid* at para. 58.

posited that a representative sampling of suppliers or products or both would be sufficient to answer the question regarding Volume Rebates.

104. He further reviewed the Top Ten supplier information and indicated it would "provide the plaintiff with a fair and representative sampling, at least in the first instance, for the purposes of the proposed summary judgment motion."¹³⁴

105. This evidence satisfies the principle of proportionality established in *Hymniak*. It enables this Honourable Court to dispose of the common issue regarding Volume Rebates through a proportionate, more expeditious and less expensive process. Moreover, because Pet Valu's next ten suppliers account for only 12.8% to 16% of its total purchases,¹³⁵ it would be disproportionate to require further production of Pet Valu.

106. If necessary, this Honourable Court may also exercise its power under Rule 20.04(2.1) to infer that the Top Ten and Top 100 samples are representative of Pet Valu's other suppliers and the plaintiff's other purchases, respectively.

B. PET VALU IS ENTITLED TO SUMMARY JUDGMENT IN RESPECT OF THE COMMON ISSUES IN THE CLASS PROCEEDING

107. Applying the principles of summary judgment outlined above, Pet Valu is entitled to summary judgment in respect of all of the common issues set out in the Certification Order of Justice Strathy dated June 29, 2011.

¹³⁴ Email from Justice Strathy to counsel, Exhibit "G" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2G, p.221.

¹³⁵ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.25-26, para. 49: The Top Ten Suppliers accounted for a high of 65.9% of Pet Valu's total shipments in 2004 and a low of 52.1% in 2011. The next ten suppliers accounted for a high of 16% in 2009 and a low of 12.8% in 2011.

(a) Pet Valu Did Not Have A Contractual Duty To Share Volume Rebates. Even If It Did, Pet Valu Shared Volume Rebates With Class Members

108. As outlined above in paragraphs 42 to 47, section 22(f) of the Franchise Agreement sets out that volume allowances (the Franchise Agreement's term for Volume Rebates), were to be allocated in the manner set out in the Pet Valu Franchise Business System. The November 2002 Memo, which forms part of the Pet Valu Franchise Business System, expressly provides that that all allowances (promotional, listing, special or volume allowances) may or not be shared with franchisees, at the sole discretion of Pet Valu.

109. The Pet Valu franchisee association, the CPC, was aware of and supported this allocation.¹³⁶ Mr. Rodger, the principal of the plaintiff, read the Pet Valu Franchise Business System prior to entering into his Franchise Agreement with Pet Valu.¹³⁷ Importantly, during the Class Period, franchisees achieved the gross profit margin set out in the November 2002 Memo.¹³⁸

110. Even if Pet Valu was obligated to share volume rebates with Class Members (which is denied), it more than fulfilled that duty for the following reasons:

- (a) Pet Valu shared with franchisees the Volume Discount provided by suppliers through its pricing structure. (See paragraphs 39 to 41 and 52, above);

¹³⁶ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.21, para. 41; Exhibit "E" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2E, p.209.

¹³⁷ Excerpts from the cross-examination of Robert Rodger held May 25, 2010, Exhibit "F" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Tab 2F, pp.211-212, Transcript p. 65, ll. 15-25 and p. 212 ll. 1-55.

¹³⁸ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.20, para. 39; Exhibit "D" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2D, pp.206-207.

- (b) Pet Valu did not claw these Volume Discounts amount through its mark-up; in fact, Pet Valu marked up volume discounted products less than non-volume discounted products (See paragraphs 53 to 55 above);
- (c) Some of items included in the Volume Discounts category of Pet Valu's pricing structure were not actually related to volume, and thus were not Volume Rebates. Despite this, they were still passed on. (See paragraph 56, above.); and

111. Moreover, the only Volume Rebates retained by Pet Valu were minimal, lump sum amounts given by two distributors for Pet Valu hitting certain volume targets. These amounts were *de minimis*, and the portion of them attributable to Class Member purchases is insignificant. Moreover, Pet Valu was contractually entitled to keep these amounts. (See paragraphs 61 to 63, above).

112. Although it is not a certified common issue, it is notable that franchisees received substantial benefits by being part of the Pet Valu franchise system. The KPMG Pricing Analysis makes it clear that franchisees paid significantly less for products purchased from Pet Valu than from competing suppliers.¹³⁹ The plaintiff himself bought approximately 90% of his products from Pet Valu, despite his complaints that better prices were available elsewhere.¹⁴⁰ When the plaintiff opened the competing "Hungry Pet" store, it failed within one year.¹⁴¹

113. The plaintiff itself was profitable during its operations during the Class Period. It would have been even more profitable if it had not misrepresented its true financial

¹³⁹ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.5, para. 17; KPMG Pricing Analysis, Pet Valu's Supplementary Cross-Motion Record, Tab 2A, p.108 at "Executive Summary".

¹⁴⁰ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, pp.15-16, para. 26; The amount of the plaintiff's outside purchases and total purchases can be found at Exhibit "A" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2A, at pp. 87-88.

¹⁴¹ Supplementary McNeely Affidavit, Pet Valu's Supplementary Cross-Motion Record, Tab 1, p.8, paras. 26-27.

position and had properly operated its business. Moreover, throughout the Class Period, franchisees had increasing gross profit margins and revenue.¹⁴²

114. Pet Valu had no contractual obligation to share Volume Rebates; however, Pet Valu did pass on significant Volume Discounts and other allowances and discounts to franchisees, which led to franchisees getting lower prices on products for resale in their stores. Pet Valu's conduct is above reproach and it is entitled to summary judgment on this common issue.

115. Further, Justice Strathy certified a common issue regarding mark-ups on private label products and distribution charges, conditional on the plaintiff establishing a breach of Pet Valu's purported duty to share Volume Rebates (common issue #2).¹⁴³ Because no such contractual duty exists, Pet Valu is entitled to summary judgment on this common issue as well.

116. Lastly, the plaintiff's claim of breach of contract is statute-barred under the *Limitations Act*. In addition, dozens of Class Members released their common law claims against Pet Valu in respect of breach of contract.

(b) Pet Valu Did Not Breach The Duty of Fair Dealing Under The *Wishart Act* By Failing To Share Volume Rebates With Class Members

117. Section 3(1) of the *Wishart Act* imposes on each party to a franchise agreement a duty of fair dealing in the performance and enforcement of that agreement. Pursuant to section 3(3) of the *Wishart Act*, the duty of fair dealing

¹⁴² McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.37, paras. 85-86.

¹⁴³ Common Issues Decision, *supra*, Pet Valu's Book of Authorities, Tab 2, para. 13.

includes the duty to act in good faith and in accordance with reasonable commercial standards.¹⁴⁴

118. This provision does not create a stand-alone duty that trumps all other contractual provisions.¹⁴⁵ Rather, the duty is expressly limited to the performance and enforcement of the franchise agreement.¹⁴⁶ Accordingly, the duty is imposed only to secure the performance of the contract the parties have made, not to replace or amend that contract by altering its express terms.¹⁴⁷

119. In the *TDL Group* decision, Justice Strathy granted summary judgment dismissing the plaintiff's claim that the franchisor breached the duty of good faith and fair dealing. The dispute involved the defendant franchisor's exercise of discretion under the franchise agreement. Justice Strathy confirmed that the duty of good faith and fair dealing simply requires that a franchisor exercise discretion reasonably, with a proper motive, and not in a manner that is arbitrary, capricious, or inconsistent with the reasonable expectations of the parties.¹⁴⁸ In that case, there was no evidence to suggest that the franchisor had acted unreasonably.¹⁴⁹

120. Justice Strathy expressly stated that "the decision of a franchisor to price the product at a level that generates a profitable return on its investment is not, on its own, an improper motive."¹⁵⁰ In that regard, His Honour also found nothing wrong with the franchisor having entered into a joint venture with a third party to supply a

¹⁴⁴ *Arthur Wishart Act (Franchise Disclosure)*, 2000, SO 2000, c 3, s.3(1) & (3) [*Wishart Act*], Schedule "B".

¹⁴⁵ *TDL Group*, *supra*, Pet Valu's Book of Authorities, Tab 5, para. 501.

¹⁴⁶ *Wishart Act*, s.3(1), Schedule "B".

¹⁴⁷ *TDL Group*, *supra*, Pet Valu's Book of Authorities, Tab 5, at para. 500.

¹⁴⁸ *Ibid* at para. 502.

¹⁴⁹ *Ibid* at paras. 522-523 & 531-532.

¹⁵⁰ *Ibid* at para. 522.

product to the franchisee at a price at which both joint ventures would make a substantial profit.¹⁵¹ Justice Strathy described this arrangement as “simply normal commercial activity – the balance between the franchisor’s share of the profits and the franchisee’s share is a matter to be determined in the market place.”¹⁵²

121. In the present case, there is no evidence that Pet Valu has exercised its discretion to deal with Volume Rebates improperly. Conversely, the evidence establishes that Pet Valu did not receive significant Volume Rebates from its suppliers and that Pet Valu shared with its franchisees Volume Rebates that it did receive.¹⁵³

122. In addition, Pet Valu applied a lower mark-up on products for which it received a Volume Rebate than the mark-up it applied on other products.¹⁵⁴ The mark-ups therefore do not “claw back” any such Volume Rebates. As in the *TDL Decision*, Pet Valu’s CEO, Mr. McNeely, confirmed that Pet Valu’s mark-ups are used to generate a return on capital and cover the expenses of creating and operating a distribution system.¹⁵⁵ Accordingly, Pet Valu’s application of a mark-up on Volume Discount products is a reasonable exercise of Pet Valu’s discretion under the Franchise Agreement.

123. There was no breach of the duty of good faith and fair dealing. As such, Pet Valu is entitled to summary judgment in respect of this common issue.

¹⁵¹ *Ibid* at para. 574.

¹⁵² *Ibid* at para. 574.

¹⁵³ See paras. 61 to 64 of this factum.

¹⁵⁴ See para. 55 of this factum.

¹⁵⁵ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.14, para. 21.

(c) Pet Valu Was Not Unjustly Enriched In Respect of Volume Rebates

124. Unjust enrichment comprises the following three elements: (i) enrichment of the defendant, (ii) a corresponding deprivation of the plaintiff, and (iii) the absence of a juristic reason for the enrichment.¹⁵⁶

125. There is no genuine issue requiring a trial with respect to the plaintiff's flawed claim for unjust enrichment. There has been no enrichment or corresponding deprivation because Pet Valu has shared with its franchisees a significant amount of the Volume Rebates that it did receive, including all Volume Discounts under its pricing structure. In any event, if there had been any such enrichment or deprivation, which is denied, the Franchise Agreement and the Pet Valu Franchise Business System would constitute a juristic reason for same.¹⁵⁷ Accordingly, Pet Valu is entitled to summary judgment in respect of this common issue.

(d) There Are No Damages In Respect of The Plaintiff's Breach Of Contract, Breach Of The Duty Of Good Faith, and Unjust Enrichment Claims

126. As addressed above, contrary to the unsupported accusations of the plaintiff, there is no "pot of gold" with respect to Volume Rebates.

127. Pet Valu shared with franchisees Volume Discounts from its pricing structure. For example, the plaintiff received \$14,147.32 in volume discounts on its Top 100 products purchased during the Class Period.¹⁵⁸ The plaintiff also received Co-op Discounts, E&I Discounts, and various Temporary Vendor Promo Discounts. Even

¹⁵⁶ *Garland v. Consumers' Gas Co.*, 2004 SCC 25, Pet Valu's Book of Authorities, Tab 7, at para. 30 [*Garland*]; *TDL Group, supra*, Pet Valu's Book of Authorities, Tab 5, at para. 535.

¹⁵⁷ *TDL Group, supra*, Pet Valu's Book of Authorities, Tab 5, at paras. 544 & 552.

¹⁵⁸ McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. I, Tab 2, p.35, para. 78; Exhibit "K" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. II, Tab 2K, p.424.

though the plaintiff and other franchisees were not contractually entitled to these discounts, Pet Valu shared them and ensured a reasonable gross profit margin for franchisees.¹⁵⁹

128. The plaintiff cannot point to any Volume Rebates from the pricing structure to which franchisees were entitled that they did not receive.

129. In respect of other Volume Rebates received by Pet Valu, the review of Pet Valu's Top Ten suppliers, which constitute over 50% of Pet Valu's sales, demonstrates that other Volume Rebates were rare, one-off, and financially insignificant. Moreover, there is no contractual entitlement to these amounts.

130. Pet Valu provided substantial financial benefit to its franchisees, including passed-on Volume Rebates, lower prices, the return of expired stock, and margin relief. Franchisees had strong, increasing margins and increased sales during the Class Period. There have been no damages suffered by Class Members. As such, Pet Valu is entitled to summary judgment on this common issue.

(e) Pet Valu Had No Duty Of Good Faith To Disclose Information Concerning Volume Rebates to Class Members

131. As discussed above in paragraph 118, the duty of good faith, whether at common law or under statute, does not create a stand-alone duty that trumps all other contractual provisions.¹⁶⁰ Rather, the duty is expressly limited to the performance and enforcement of the franchise agreement.

¹⁵⁹ See Exhibit "J" to the McNeely Affidavit, Pet Valu's Cross-Motion Record, Vol. II, Tab 2J.

¹⁶⁰ *TDL Group, supra*, Pet Valu's Book of Authorities, Tab 5, para. 501.

132. Pet Valu had no contractual duty to provide information concerning Volume Rebates to Class Members. Pet Valu outlined the treatment of volume allowances in the Pet Valu Franchise Business System, where it retained discretion to deal with volume allowances as it saw fit.

133. The Pet Valu franchisees were all aware of the November 2002 Memo. All franchisees received a copy of the Pet Valu Franchise Business System. Mr. Rodger, the principal of the plaintiff, acknowledged reading the System. The franchisees were updated on their average gross profit margins on June 12, 2009 by Pet Valu upon the request of the CPC for the information.

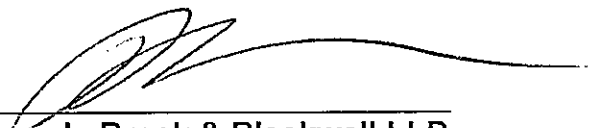
134. This common issue is a duplicative re-casting of the duty of good faith issue addressed above in paragraphs 117 to 123. There can be no freestanding duty to disclose conduct which is entirely legal and permissible. Moreover, even if there was a duty, which is denied, there are no independent damages resulting from its breach. Either the Class Members are entitled to the Volume Rebates or they are not. Failing to disclose information concerning the Volume Rebates does not result in any loss separate and apart from any loss from the actual entitlement. As such, Pet Valu is entitled to summary judgment in respect of this common issue.

PART IV - ORDER REQUESTED

135. Pet Valu respectfully submits that an order should be made dismissing all of the plaintiff's claims as against Pet Valu. Pet Valu further requests its costs in respect of this motion and the action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 20, 2014



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287 (Certification Decision).
2. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941 (Common Issues Decision)
3. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 3475 (Costs Endorsement on Certification)
4. *Hymiak v. Mauldin*, 2014 SCC 7
5. *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252, aff'd by 2012 ONCA 867, leave to appeal to SCC refused, 2013 CarswellOnt 6050
6. *Garland v. Consumers' Gas Co.*, 2004 SCC 25

SCHEDULE "B"
RELEVANT STATUTES

1. Rules of Civil Procedure, RRO 1990, Reg 194

RULE 20 SUMMARY JUDGMENT

WHERE AVAILABLE

...

To Defendant

20.01(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

...

DISPOSITION OF MOTION

General

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13 (3).

2. Class Proceedings Act, 1992, SO 1992, c 6

Court may determine conduct of proceeding

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate. 1992, c. 6, s. 12.

Aggregate assessment of monetary relief

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence; and
- (c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

- (a) there are apparent grounds for relief;
- (b) the delay was not caused by any fault of the person seeking the relief; and
- (c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

Judgment on common issues

27. (1) A judgment on common issues of a class or subclass shall,

- (a) set out the common issues;
- (b) name or describe the class or subclass members;
- (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
- (d) specify the relief granted. 1992, c. 6, s. 27 (1).

Effect of judgment on common issues

(2) A judgment on common issues of a class or subclass does not bind,

- (a) a person who has opted out of the class proceeding; or
- (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a). 1992, c. 6, s. 27 (2).

Idem

(3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

- (a) are set out in the certification order;
- (b) relate to claims or defences described in the certification order; and
- (c) relate to relief sought by or from the class or subclass as stated in the certification order. 1992, c. 6, s. 27 (3).

Costs

31. (1) In exercising its discretion with respect to costs under subsection 131 (1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. 1992, c. 6, s. 31 (1).

Liability of class members for costs

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims. 1992, c. 6, s. 31 (2).

3. Arthur Wishart Act (Franchise Disclosure), 2000, SO 2000, c 3

Fair dealing

3.(1) Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement. 2000, c. 3, s. 3 (1).

Right of action

(2) A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement. 2000, c. 3, s. 3 (2).

Interpretation

(3) For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards. 2000, c. 3, s. 3 (3).

4. Limitations Act, 2002, SO 2002, c 24, Sch B

BASIC LIMITATION PERIOD

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

SCHEDULE "C"
EXCERPT OF KPMG PRICING ANALYSIS



*Mr. Geoffrey Shaw
Pet Valu Canada Inc. ats 1250264 Ontario Inc.
September 19, 2013
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- Obtained the average amount charged by Pet Valu to Zone 1 franchisees for the corresponding Products and time periods. This amount was obtained from the Top 100 list provided by Pet Valu; and
- Compared the Pet Valu price to the price lists of the distributors.

In some cases, we found that Products included in our samples were sold by more than one distributor as indicated in the available price lists. Where this was noted, our analysis included the lowest price noted in the competing catalogues.

5 OUR FINDINGS

Based upon our samples and on an overall basis, our analysis has indicated that prices charged by Pet Valu are notably lower than the prices offered in price lists by Canadian distributors of pet supplies.

5.1 Summary of Findings

The following summarizes our analysis for each of the three samples.

5.1.1 Sample 1: Top 100 Products by Dollar Value Purchased by Store 2673

The analysis based upon purchases by 1250264 (Store 2673) indicates that for the sampled items, the prices charged by Pet Valu are on average by year between 6% and 14% lower than prices listed by the other distributors. The chart below summarizes our annual analysis in respect of Sample 1 (1250264 (Store 2673)).



Mr. Geoffrey Shaw
 Pet Valu Canada Inc. at 1250264 Ontario Inc.
 September 19, 2013
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Year	Number of Products Price- Matched	Percentage of Top 100 Products Sampled (excluding private label products) ¹⁰	Total Pet Valu Price of Products Price- Matched ¹¹	Total Distributor Price of Products Price- Matched ¹²	Price Difference	Price Difference
			\$	\$	\$	%
2007	20	30%	46,537	53,861	7,324	14%
2008	13	19%	17,177	19,314	2,138	11%
2009	20	27%	43,014	46,412	3,398	7%
2010	20	28%	47,751	50,590	2,838	6%
2011	20	25%	19,230	20,903	1,673	8%

5.1.2 Sample 2: Top 100 Products by Dollar Value Purchased by Pet Valu Franchisees

The analysis based upon purchases by Pet Valu franchisees indicates that for the sampled items, the prices charged by Pet Valu are on average by year between 7% and 14% lower than prices listed by the other distributors. The chart below summarizes our annual analysis in respect of Sample 2 (Pet Valu franchisees).

¹⁰ The percentage of top 100 products sampled represents the number of items price-matched divided by the number of the top 100 products that are not private label items.

¹¹ The Total Pet Valu Price of Sampled Items was calculated for the sampled Products by multiplying the total Zone 1 franchise cost noted on the top 100 sales listing for Store 2673 by the number of units shipped to Store 2673 each year.

¹² The Total Distributor Price of Sampled Items was calculated for the sampled Products by multiplying the distributor's catalogue price by the number of case packs shipped to Store 2673 each year.



Mr. Geoffrey Shaw
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Year	Number of Products Price-Matched	Percentage of Top 100 Products Sampled (excluding private label products) ¹³	Total Pet Valu Price of Products Price-Matched ¹⁴	Total Distributor Price of Products Price-Matched ¹⁵	Price Difference	Price Difference
			\$	\$	\$	%
2007	20	38%	2,171,656	2,513,695	342,039	14%
2008	19	35%	2,090,067	2,392,030	301,963	13%
2009	21	36%	2,380,131	2,570,023	189,892	7%
2010	22	39%	3,005,366	3,221,173	215,807	7%
2011	21	34%	1,413,289	1,523,577	110,288	7%

5.2 Findings For Sample 1: Top 100 Products by Dollar Value Purchased by Store 2673

Under Sample 1, purchases made by 1250264 (Store 2673) each year were used in selecting the Products to be tested. Based upon the comparison of the Pet Valu price for each sampled Product (as taken from Pet Valu invoices issued to 1250264 (Store 2673)) and the available price lists, a total of 93 Products were sampled between 2007 and 2011. For the 93 sampled Products, a total of 85 or 91% of the sampled Products had Pet Valu prices which were less than the prices indicated in the available price lists. The following chart summarizes the results of our analysis by year.

¹³ The percentage of top 100 products sampled represents the number of items price-matched divided by the number of the top 100 products that are not private label items.

¹⁴ The Total Pet Valu Price of Sampled Items was calculated for the sampled Products by multiplying the total franchise cost noted on the top 100 sales listing for Pet Valu Zone 1 franchisees by the number of units shipped to franchisees each year.

¹⁵ The Total Distributor Price of Sampled Items was calculated for the sampled Products by multiplying the distributor's catalogue price by the number of case packs shipped to Pet Valu franchisees each year.

SCHEDULE "D"
EXHIBIT "I" TO THE AFFIDAVIT OF ROBERT RODGER SWORN
FEBRUARY 13, 2012

Pet Valu - Peton Product Cost Model

ITEM	11693	15702	17184	13012	18437	18253	11632	12887	17210	26152
Case Pack	1	4	1	1	1	1	1	1	1	1
1 List price from vendor	59.88	71.36	12.02	8.72	11.03	19.06	40.00	14.02	22.61	10.38
2 + Inbound freight			0.25	0.24		0.01		1.47		
3 + Duty										
4 + Other costs to land the product in Peton warehouse			1.06							
5 - Volume Discount	5.69	1.61					11.00			
6 - Co-Op Amount										
7 - E - Discount -(ongoing expense reimbursements)	1.50	0.54		0.13	0.25					0.23
8 - I - Discounts - (ongoing off-invoice discount)	12.00			0.39	1.41		2.18		1.70	1.32
9 = Realized Cost	40.69	69.21	13.33	8.44	9.37	19.07	26.82	15.49	20.91	8.83
10 - Temporary Vendor Promo Deal (E & I)										
11 + Foreign Exchange			0.80					0.93		0.53
12 = NR Cost (net realizable cost) [Peton's replacement cost]	40.69	69.21	14.13	8.44	9.37	19.07	26.82	16.42	20.91	9.36
13 Realized Cost (as above)	40.69	69.21	13.33	8.44	9.37	19.07	26.82	15.49	20.91	8.83
14 + Foreign Exchange			0.80					0.93		0.53
15 + Additional Freight (from receiving to picking warehouse)										
16 + Markup										
17 + Additional Surcharge										
18 + Wholesale Profit	7.32	5.41	3.01	1.18	2.63	2.41	3.28	3.10	0.37	2.93
19 + Wholesale Expenses										
20 = Cost Before Private Label Fund Surcharge	48.01	74.62	17.14	9.62	12.00	21.48	30.10	19.52	21.28	12.29
21 + Private Label Fund Surcharge			1.71							
22 - Other Allowance (ongoing)										
23 - Damaged Goods Allowance (ongoing)										
24 = Store Cost (will be shown on the Invoice)	48.01	74.62	18.85	9.62	12.00	21.48	30.10	19.52	21.28	12.29
25 - E-Deals										
26 - I-Deals										
27 = Net Store Cost	48.01	74.62	18.85	9.62	12.00	21.48	30.10	19.52	21.28	12.29
28 - Price Subsidy		1.82							2.69	
29 = Store Invoice Line Cost	48.01	72.80	18.85	9.62	12.00	21.48	30.10	19.52	18.59	12.29
30 + Promotion Fund Charge	1.44	2.18	0.57	0.29	0.36	0.64	0.90	0.59	0.56	0.37
31 + Distribution Charge	3.85	4.93	2.11	0.62	1.03	1.70	2.88	1.80	1.28	1.03
32 = Franchise Invoiced Cost of Merchandise	53.30	79.92	21.52	10.52	13.39	23.82	33.88	21.90	20.43	13.69
Retail Price (unit)	74.99	23.99	40.99	11.99	19.99	32.99	55.99	34.99	24.99	19.99
Retail Price (Case)	74.99	95.96	40.99	11.99	19.99	32.99	55.99	34.99	24.99	19.99
Gross Profit	21.69	16.04	19.47	1.47	6.50	9.17	22.11	13.08	4.56	6.30
This is Exhibit "I" referred to in the affidavit of Robert Rodger sworn before me, this 13th day of February 2012	28.9%	16.7%	47.5%	12.2%	33.0%	27.8%	39.5%	37.4%	18.2%	31.5%

This is Exhibit "I" referred to in the affidavit of Robert Rodger sworn before me, this 13th day of February 2012

[Signature]

Pet Valu – Peton Product Cost Model

The simulation shown shows how the franchise price of merchandise is developed from the vendor list cost to the retail price in our systems. These are actual examples of items and their cost components that were in our system in early 2010.

1. The List price from the vendor's price list or communication with Peton's buyer is entered.
2. Inbound Freight to get the merchandise to a Peton warehouse is added.
3. Duty on product from outside of Canada is added if applicable.
4. Other costs to bring the product to Peton warehouses (such as brokerage fees) is added.
5. Volume discounts offered by the vendor as rebates or allowances are deducted. These often relate to purchasing in full truckloads which Peton commits to doing on an ongoing basis.
6. Cooperative marketing allowances or discounts offered by the vendor are deducted.
7. Ongoing Expense reimbursement discounts are deducted. These relate to amounts vendors have offered in respect of maintaining items in a certain number of stores, or some other activity that creates an expense.
8. Ongoing off-invoice deals are deducted. These are negotiated for long periods of time by the Peton buyers that are not tied to any specific type of performance by Peton or its customers.
9. At this point, the Realized Cost is established after making the additions and deductions above. This cost forms the starting point for pricing to Peton's customers, including Pet Valu franchisees.
10. For Peton's internal purposes, Temporary vendor promotions are deducted. When Peton purchases merchandise on which a temporary deal is taken, it reflects the deal in the system for as long as stock purchased at that deal is in its warehouses, even though Peton will not have an opportunity to replace that stock at the deal price.
11. Foreign exchange is applied to convert the cost to the currency of its customers. (Canadian dollars for Canadian customer and U.S. dollars for U.S. customers)
12. Net Real Cost is the cost that Peton uses to value its inventory for its operational management purposes.

13. The Realized cost (as established in 9. above) is the starting point for developing the prices to be charged to its customers. From here on, the example will focus on developing the prices Pet Valu Canada Inc. ultimately charges its Pet Valu franchisees, and applies to its corporate Pet Valu stores. This differs for Paulmac's franchises and corporate stores and for Pet Valu International (U.S.) stores.
14. Foreign exchange is applied to covert any products purchased in U.S. dollars to Canadian dollars.
15. Additional Freight may be added if product is received in one warehouse and subsequently shipped to another for picking. This has mostly been used for product shipped to the Winnipeg warehouse.
16. Mark-up has, to my knowledge, never been used.
17. An Additional Surcharge has sometimes been used on products shipped to remote Northern Ontario Stores.
18. Peton adds its wholesale profit. This amount varies from item to item and is set so as to maximize Peton's profit while keeping the prices below the market price from other wholesalers to the best of the information available to Peton.
19. Other Wholesale expenses may be added. This field is rarely used.
20. This is the point where the cost base for the Private Label Surcharge is calculated.
21. The Private Label Surcharge of up to 10% of the cost established in 20. is added.
22. Other allowances may be applied by Peton at this point -- this is rarely used.
23. Damaged goods allowances that vendors will give in place of returned goods credit is applied. This is rarely used.
24. This is the store cost amount that will appear on the item lines of the franchisee's invoice.
25. Temporary expense reimbursement deals that were taken by Peton in 10 above are passed on by offering them to franchisees for the same length of time that they were offered to Peton, but at different times. The timing offset allows Peton to receive deal stock before passing the deals on, and meet promotional timing of flyers or other marketing programs to maximize the value of the deals.
26. Temporary Off-- Invoice deals are offered with the same timing criteria as in 25.
27. The Net Store Cost is what the franchisee will pay PSCI for the item.

28. Price Subsidies are given to stores for items where the market retail price established by PPCI for that store provides for less than a break-even amount on the variable cost for the item. These are shown on the item line of the invoice and reduce the price to the franchisee.
29. The Store Invoice Line Cost is what is shown on the invoice line for the item.
30. The Promotion fund charge is calculated on the total Store Invoice Line Cost of the invoice and added to the merchandise cost on the invoice. It is 3% of that cost.
31. The Distribution Charge is calculated on the total extended retail price shown on the invoice and added to the merchandise cost on the invoice. It is 5.14% of that total extended retail price.
32. The result of all of the above is what the franchisee pays for merchandise on the invoice.

SCHEDULE "E"
SAMPLE OF THE TOP 100 PRODUCTS PURCHASED BY THE PLAINTIFF

"Top 100" For the Year 2008

						Volume-Discount Data							Non-Volume-Discounted Products		Volume-Discounted Products			
Item (Year-Rank)	Cases/Packs Shipped	List Price from Vendor	Inbound Freight	Duty Amount	Other Costs to Land the Product	Volume Discount per Unit	Total Volume Discount on Shipment	Co-Op Amount	I&E Discount	Temporary Vendor Promotion	Net Realized Cost per Unit (incl. Foreign Exchange)	Mark-Up (Wholesale Profit)	Net Realized Cost on Shipments	Markup on Shipments	Net Realized Cost on Shipments	Markup on Shipments	Private Label Fund Surcharge	Net Store Cost (after Freight and I&E Deals)
2008-001	347	\$19.35	\$0.29	\$0.00	\$1.97	\$0.00		\$0.00	\$0.00	\$0.00	\$21.61	\$12.47	\$7,498.67	\$4,327.09			\$3.41	\$37.49
2008-002	254	\$24.86	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$1.24	\$0.00	\$24.60	\$11.24	\$6,247.38	\$2,854.96			\$0.00	\$35.84
2008-003	191	\$24.86	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$1.24	\$2.00	\$22.52	\$10.97	\$4,300.56	\$2,095.27			\$0.00	\$35.57
2008-004	126	\$42.69	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$2.99	\$0.00	\$39.73	\$5.30	\$5,005.98	\$667.80			\$0.00	\$45.03
2008-005	227	\$16.00	\$0.02	\$0.00	\$0.00	\$0.00		\$0.00	\$0.80	\$0.00	\$15.83	\$7.30	\$3,593.14	\$1,657.10			\$0.00	\$23.13
2008-006	167	\$18.08	\$0.41	\$0.00	\$1.35	\$0.00		\$0.00	\$0.00	\$0.00	\$19.84	\$8.50	\$3,313.28	\$1,419.50			\$2.83	\$31.17
2008-007	104	\$48.52	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$3.40	\$0.00	\$45.15	\$6.02	\$4,695.60	\$626.08			\$0.00	\$51.17
2008-008	161	\$21.24	\$0.54	\$0.00	\$1.16	\$0.00		\$0.00	\$0.00	\$0.00	\$23.86	\$5.03	\$3,841.07	\$809.83			\$2.89	\$31.78
2008-009	233	\$9.83	\$0.18	\$0.00	\$2.62	\$0.00		\$0.00	\$0.00	\$0.00	\$12.63	\$6.85	\$2,942.79	\$1,596.05			\$1.95	\$21.43
2008-010	108	\$38.58	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$5.79	\$0.00	\$32.79	\$5.79	\$3,541.32	\$625.32			\$0.00	\$38.58
2008-011	122	\$23.52	\$0.29	\$0.00	\$1.97	\$0.00		\$0.00	\$0.00	\$0.00	\$25.78	\$7.29	\$3,145.16	\$889.38			\$3.31	\$36.38
2008-012	215	\$11.97	\$0.18	\$0.00	\$2.62	\$0.00		\$0.00	\$0.00	\$0.00	\$14.77	\$4.21	\$3,175.55	\$905.15			\$1.90	\$20.88
2008-013	194	\$9.60	\$0.18	\$0.00	\$2.62	\$0.00		\$0.00	\$0.00	\$0.00	\$12.40	\$6.08	\$2,405.60	\$1,179.52			\$1.85	\$20.33
2008-014	593	\$4.21	\$0.32	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$4.53	\$2.12	\$2,686.29	\$1,257.16			\$0.00	\$6.65
2008-015	104	\$18.77	\$0.29	\$0.00	\$1.97	\$0.00		\$0.00	\$0.00	\$0.00	\$21.03	\$11.53	\$2,187.12	\$1,199.12			\$3.26	\$35.82
2008-016	71	\$31.23	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$4.68	\$0.00	\$27.64	\$12.62	\$1,962.67	\$896.02			\$0.00	\$40.26
2008-017	55	\$52.38	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$6.28	\$0.00	\$46.10	\$6.28	\$2,535.50	\$345.40			\$0.00	\$47.38
2008-018	55	\$51.90	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$6.22	\$0.00	\$45.68	\$6.21	\$2,512.40	\$341.55			\$0.00	\$46.89
2008-019	371	\$5.25	\$0.01	\$0.00	\$0.00	\$0.00		\$0.00	\$0.27	\$0.00	\$5.19	\$2.33	\$1,925.34	\$864.43			\$0.00	\$7.52
2008-020	105	\$28.75	\$0.02	\$0.00	\$0.00	\$0.00		\$0.00	\$2.01	\$0.00	\$26.76	\$3.35	\$2,809.80	\$351.75			\$0.00	\$30.11
2008-021	181	\$5.40	\$0.08	\$0.00	\$2.09	\$0.00		\$0.00	\$0.00	\$0.00	\$7.57	\$7.41	\$1,370.17	\$1,341.21			\$1.50	\$16.48
2008-022	65	\$48.52	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$3.40	\$0.00	\$45.15	\$6.03	\$2,934.75	\$391.95			\$0.00	\$51.18
2008-023	62	\$38.58	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$5.79	\$0.00	\$32.79	\$5.79	\$2,032.98	\$358.98			\$0.00	\$38.58
2008-024	56	\$39.21	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$2.75	\$0.00	\$36.49	\$4.60	\$2,043.44	\$257.60			\$0.00	\$41.09

"Top 100" For the Year 2008

Volume-Discounted Products							Non-Volume-Discounted Products			Volume-Discounted Products								
Item (Year Rank)	Case Packs Shipped	List Price from Vendor	Inbound Freight	Duty Amount	Other Costs to Land the Product	Volume Discount per Unit	Total Volume Discount on Shipment	Co-Op Amount	I&E Discount	Temporary Vendor Promotion	Net Realized Cost per Unit (incl. Foreign Exchange)	Mark-Up (Wholesale Profit)	Pet Value's Net Realized Cost on Shipments	Markup on Shipments	Pet Value's Net Realized Cost on Shipments	Markup on Shipments	Private Label Fund Surcharge	Net Store Cost (after Freight and I&E Deals)
2008-025	239	\$9.91	\$0.00	\$0.00	\$0.00	\$0.99	\$238.61	\$0.00	\$0.49	\$0.00	\$8.43	\$11.27			\$2,014.77	\$303.53	\$0.00	\$9.70
2008-026	84	\$11.30	\$0.18	\$0.00	\$2.62	\$0.00		\$0.00	\$0.00	\$0.00	\$14.10	\$12.86	\$1,184.40	\$1,080.24			\$2.70	\$29.66
2008-027	76	\$28.87	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$4.33	\$0.00	\$24.54	\$6.00	\$1,865.04	\$456.00			\$0.00	\$30.54
2008-028	61	\$19.39	\$0.79	\$0.00	\$1.22	\$0.00		\$0.00	\$0.00	\$0.00	\$22.26	\$9.47	\$1,357.62	\$577.67			\$3.17	\$34.90
2008-029	65	\$28.87	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$4.33	\$0.00	\$24.54	\$6.00	\$1,595.10	\$390.00			\$0.00	\$30.54
2008-030	192	\$9.00	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$0.88	\$0.90	\$7.22	\$1.16	\$1,386.24	\$222.72			\$0.00	\$9.28
2008-031	163	\$4.98	\$0.08	\$0.00	\$2.02	\$0.00		\$0.00	\$0.00	\$0.00	\$7.08	\$2.71	\$1,154.04	\$441.73			\$0.98	\$10.77
2008-032	162	\$4.03	\$0.08	\$0.00	\$2.18	\$0.00		\$0.00	\$0.00	\$0.00	\$6.29	\$3.01	\$1,018.98	\$487.62			\$0.93	\$10.23
2008-033	38	\$33.64	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$5.05	\$0.00	\$29.76	\$13.28	\$1,131.06	\$504.64			\$0.00	\$43.04
2008-034	58	\$27.67	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$3.32	\$0.00	\$24.35	\$3.88	\$1,412.30	\$225.04			\$0.00	\$28.23
2008-035	138	\$7.12	\$1.44	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.67	\$8.21	\$3.18	\$1,132.37	\$438.84			\$0.00	\$12.08
2008-036	90	\$17.65	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$2.65	\$0.00	\$15.60	\$2.65	\$1,404.00	\$238.50			\$0.00	\$18.25
2008-037	57	\$27.67	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$3.32	\$0.00	\$24.35	\$3.82	\$1,387.95	\$217.74			\$0.00	\$28.17
2008-038	204	\$2.68	\$1.64	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$4.49	\$2.12	\$916.53	\$432.48			\$0.66	\$7.27
2008-039	144	\$4.79	\$0.08	\$0.00	\$2.09	\$0.00		\$0.00	\$0.00	\$0.00	\$6.96	\$4.31	\$1,002.24	\$620.64			\$1.13	\$12.40
2008-040	31	\$49.97	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$6.00	\$0.00	\$43.97	\$5.99	\$1,363.07	\$185.69			\$0.00	\$44.96
2008-041	35	\$42.65	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$2.99	\$0.00	\$39.69	\$5.29	\$1,389.15	\$185.15			\$0.00	\$44.98
2008-042	31	\$49.97	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$6.00	\$0.00	\$43.97	\$5.99	\$1,363.07	\$185.69			\$0.00	\$44.96
2008-043	56	\$12.32	\$0.18	\$0.00	\$2.38	\$0.00		\$0.00	\$0.00	\$0.00	\$14.88	\$10.55	\$833.28	\$590.80			\$2.54	\$27.97
2008-044	36	\$40.12	\$0.00	\$0.00	\$0.00	\$1.81	\$65.16	\$0.00	\$0.60	\$0.00	\$37.71	\$3.48			\$1,357.66	\$125.28	\$0.00	\$41.19
2008-045	86	\$14.60	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$14.60	\$2.60	\$1,255.60	\$223.60			\$0.00	\$17.20
2008-046	33	\$30.98	\$0.04	\$0.00	\$0.00	\$0.00		\$0.00	\$0.61	\$0.00	\$31.63	\$12.59	\$1,043.67	\$415.47			\$0.00	\$44.22
2008-047	31	\$26.84	\$0.27	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.63	\$27.54	\$3.20	\$853.72	\$99.20			\$0.00	\$31.39
2008-048	38	\$36.31	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$5.45	\$0.00	\$30.86	\$5.45	\$1,172.68	\$207.10			\$0.00	\$36.31

"Top 100" For the Year 2008

Data 12/7/2007																			
Volume-Discounted Products										Non-Volume-Discounted Products		Volume-Discounted Products		Non-Volume-Discounted Products		Volume-Discounted Products		Non-Volume-Discounted Products	
Item (Year Rank)	Cases Shipped	List Price from Vendor	Inbound Freight	Duty Amount	Other Costs to Land the Product	Volume Discount per Unit	Total Volume Discount on Shipment	Co-Op Amount	I&E Discount	Temporary Vendor Promotion	Net Realized Cost per Unit (incl. Foreign Exchange)	Mark-Up (Wholesale Profit)	Per Value's Net Realized Cost on Shipments	Markup on Shipments	Per Value's Net Realized Cost on Shipments	Markup on Shipments	Private Label Fund Surcharge	Net Store Cost (after Freight and I&E Deals)	
2008-049	64	\$16.85	\$0.01	\$0.00	\$0.00	\$0.00		\$0.00	\$1.35	\$0.00	\$16.13	\$5.35	\$1,032.35	\$342.40			\$0.00	\$21.48	
2008-050	31	\$32.20	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$4.83	\$0.00	\$28.50	\$14.68	\$883.38	\$455.08			\$0.00	\$43.18	
2008-051	31	\$33.64	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$5.05	\$0.00	\$29.76	\$13.28	\$922.71	\$411.68			\$0.00	\$43.04	
2008-052	49	\$26.90	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$3.22	\$0.00	\$23.68	\$3.72	\$1,160.32	\$182.28			\$0.00	\$27.40	
2008-053	134	\$5.58	\$0.13	\$0.00	\$0.69	\$0.00		\$0.00	\$0.00	\$0.00	\$6.66	\$2.58	\$891.90	\$345.72			\$0.92	\$10.16	
2008-054	210	\$4.13	\$0.31	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$4.44	\$1.80	\$932.40	\$378.00			\$0.62	\$6.86	
2008-055	116	\$7.64	\$0.69	\$0.00	\$0.00	\$1.53	\$177.48	\$0.00	\$0.00	\$0.00	\$7.07	\$3.94			\$820.35	\$457.04	\$0.00	\$11.01	
2008-056	52	\$25.28	\$0.02	\$0.00	\$0.00	\$0.00		\$0.00	\$1.77	\$0.00	\$23.53	\$2.95	\$1,223.56	\$153.40			\$0.00	\$26.48	
2008-057	72	\$17.65	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$2.65	\$0.00	\$15.00	\$2.65	\$1,080.00	\$190.80			\$0.00	\$17.65	
2008-058	23	\$45.54	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$45.54	\$6.69	\$1,047.42	\$153.87			\$0.00	\$52.23	
2008-059	20	\$59.68	\$0.00	\$0.00	\$0.00	\$1.34	\$26.80	\$0.00	\$0.45	\$0.00	\$57.79	\$5.78			\$1,155.80	\$115.60	\$0.00	\$63.57	
2008-060	117	\$7.95	\$0.30	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$8.25	\$1.70	\$965.25	\$198.90			\$0.00	\$9.95	
2008-061	40	\$29.23	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$3.51	\$0.00	\$25.72	\$4.03	\$1,028.80	\$161.20			\$0.00	\$29.75	
2008-062	113	\$10.48	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$1.58	\$0.00	\$8.90	\$1.57	\$1,005.70	\$177.41			\$0.00	\$10.47	
2008-063	61	\$10.13	\$0.18	\$0.00	\$2.62	\$0.00		\$0.00	\$0.00	\$0.00	\$12.93	\$6.55	\$788.73	\$399.55			\$1.95	\$21.43	
2008-064	60	\$20.31	\$0.01	\$0.00	\$0.00	\$0.00		\$0.00	\$1.43	\$0.00	\$18.89	\$1.63	\$1,133.40	\$97.80			\$0.00	\$20.52	
2008-065	35	\$37.75	\$0.32	\$0.00	\$0.00	\$4.00	\$140.00	\$0.00	\$4.04	\$0.00	\$30.03	\$5.42			\$1,051.05	\$189.70	\$0.00	\$32.45	
2008-066	33	\$20.00	\$2.21	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$23.10	\$11.05	\$762.25	\$364.65			\$0.00	\$34.15	
2008-067	34	\$37.75	\$0.32	\$0.00	\$0.00	\$4.00	\$136.00	\$0.00	\$4.04	\$0.00	\$30.03	\$5.42			\$1,021.02	\$184.23	\$0.00	\$32.45	
2008-068	28	\$31.04	\$0.04	\$0.00	\$0.00	\$0.00		\$0.00	\$0.63	\$0.00	\$31.67	\$10.91	\$886.70	\$305.48			\$0.00	\$42.58	
2008-069	174	\$4.70	\$0.37	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$5.07	\$1.17	\$882.18	\$203.58			\$0.00	\$6.24	
2008-070	37	\$18.36	\$0.41	\$0.00	\$1.53	\$0.00		\$0.00	\$0.00	\$0.00	\$20.30	\$8.04	\$751.10	\$297.48			\$2.83	\$31.17	
2008-071	128	\$7.79	\$0.27	\$0.00	\$0.00	\$0.00		\$0.00	\$0.47	\$0.00	\$7.59	\$1.06	\$971.52	\$135.68			\$0.00	\$8.65	
2008-072	37	\$18.40	\$0.41	\$0.00	\$1.54	\$0.00		\$0.00	\$0.00	\$0.00	\$20.35	\$7.99	\$752.95	\$295.63			\$2.83	\$31.17	


"Top 100" For the Year 2008

Item (Year- Rank)	Case Packs Shipped	List Price from Vendor	Inbound Freight	Duty Amount	Other Costs to Land the Product	Volume Discount Data		Co-Op Amount	I&E Discount	Temporary Vendor Promotion	Net Realized Cost per Unit (incl. Foreign Exchange)	Mark-Up (Wholesale Profit)	Non-Volume-Discounted Products		Volume-Discounted Products		Private Label/Fund Surcharge	Net Store Cost (after Freight and I&E Deals)
						Volume Discount per Unit	Total Volume Discount on Shipment						Net Realized Cost on Shipments	Markup on Shipments	Net Realized Cost on Shipments	Markup on Shipments		
2008-073	29	\$42.69	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$2.99	\$3.00	\$36.73	\$5.37	\$1,065.17	\$155.73			\$0.00	\$45.10
2008-074	29	\$26.81	\$1.85	\$0.00	\$0.00	\$0.00		\$0.00	\$1.61	\$2.68	\$25.34	\$7.25	\$735.00	\$210.25			\$0.00	\$35.38
2008-075	62	\$8.28	\$0.19	\$0.00	\$1.12	\$0.00		\$0.00	\$0.00	\$0.00	\$9.59	\$6.20	\$594.58	\$384.40			\$1.58	\$17.37
2008-076	31	\$37.75	\$0.32	\$0.00	\$0.00	\$4.00	\$124.00	\$0.00	\$4.04	\$0.00	\$30.03	\$5.42			\$930.93	\$168.02	\$0.00	\$32.45
2008-077	80	\$5.12	\$0.08	\$0.00	\$2.18	\$0.00		\$0.00	\$0.00	\$0.00	\$7.38	\$4.65	\$590.40	\$372.00			\$1.20	\$13.23
2008-078	27	\$38.87	\$0.03	\$0.00	\$0.00	\$0.00		\$0.00	\$2.72	\$0.00	\$36.18	\$3.47	\$976.86	\$93.69			\$0.00	\$39.65
2008-079	40	\$28.75	\$0.02	\$0.00	\$0.00	\$0.00		\$0.00	\$2.01	\$0.00	\$26.76	\$3.35	\$1,070.40	\$134.00			\$0.00	\$30.11
2008-080	25	\$39.71	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$5.95	\$0.00	\$33.76	\$5.96	\$844.00	\$149.00			\$0.00	\$39.72
2008-081	23	\$34.86	\$0.02	\$0.00	\$0.00	\$0.00		\$0.00	\$2.79	\$0.00	\$33.37	\$10.43	\$767.59	\$239.89			\$0.00	\$43.80
2008-082	46	\$16.65	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$16.65	\$2.76	\$765.90	\$126.96			\$1.94	\$21.35
2008-083	98	\$7.00	\$0.14	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$7.14	\$2.50	\$699.72	\$245.00			\$0.00	\$9.64
2008-084	32	\$31.63	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$4.74	\$0.00	\$26.89	\$5.10	\$860.48	\$163.20			\$0.00	\$31.99
2008-085	37	\$18.89	\$0.02	\$0.00	\$0.00	\$0.00		\$0.00	\$2.84	\$0.00	\$16.71	\$8.61	\$618.37	\$318.57			\$0.00	\$25.32
2008-086	31	\$31.32	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$4.69	\$0.00	\$26.63	\$4.70	\$825.53	\$145.70			\$0.00	\$31.33
2008-087	48	\$13.64	\$0.02	\$0.00	\$0.00	\$0.00		\$0.00	\$0.68	\$0.00	\$13.50	\$5.89	\$647.96	\$282.72			\$0.00	\$19.39
2008-088	39	\$28.42	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$1.71	\$0.00	\$26.71	\$0.46	\$1,041.69	\$17.94			\$0.00	\$27.17
2008-089	32	\$19.89	\$0.02	\$0.00	\$0.00	\$0.00		\$0.00	\$1.00	\$0.00	\$19.67	\$10.12	\$629.32	\$323.84			\$0.00	\$29.79
2008-090	38	\$20.51	\$0.01	\$0.00	\$0.00	\$0.00		\$0.00	\$1.64	\$0.00	\$19.64	\$6.24	\$746.14	\$237.12			\$0.00	\$25.88
2008-091	23	\$42.68	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$5.12	\$0.00	\$37.56	\$6.12	\$863.88	\$140.76			\$0.00	\$43.68
2008-092	44	\$21.95	\$0.01	\$0.00	\$0.00	\$0.00		\$0.00	\$1.53	\$0.00	\$20.43	\$2.41	\$898.92	\$106.04			\$0.00	\$22.84
2008-093	161	\$5.30	\$0.44	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$5.74	\$2.24	\$924.14	\$360.64			\$0.00	\$7.98
2008-094	143	\$5.35	\$0.44	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$5.79	\$2.46	\$827.97	\$351.78			\$0.00	\$8.25
2008-095	169	\$4.81	\$0.00	\$0.00	\$0.00	\$0.00		\$0.00	\$0.10	\$0.21	\$4.50	\$0.78	\$760.50	\$131.82			\$0.00	\$5.49
2008-096	58	\$13.99	\$0.04	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$14.03	\$4.15	\$813.74	\$240.70			\$1.82	\$20.00

"Top 100" For the Year 2008


						Volume-Discounted Data							Non-Volume-Discounted Products		Volume-Discounted Products			
Item (YYYY- Rank)	Case Packs Shipped	List Price from Vendor	Inbound Freight	Duty Amount	Other Costs to Land (the Product)	Volume Discount per Unit	Total Volume Discount on Shipment	Co-Op Amount	I&E Discount	Temporary Vendor Promotion	Net Realized Cost per Unit (incl. Foreign Exchange)	Mark-Up (Wholesale Profit)	Net Value's Net Realized Cost on Shipments	Markup on Shipments	Net Value's Net Realized Cost on Shipments	Markup on Shipments	Private Label Fund Surcharge	Net Store Cost (after Freight and I&E Deals)
2008-097	31	\$20.62	\$0.54	\$0.00	\$1.14	\$0.00		\$0.00	\$0.00	\$0.00	\$23.19	\$4.97	\$718.95	\$154.07			\$2.82	\$30.98
2008-098	42	\$13.23	\$1.66	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$15.49	\$5.16	\$650.40	\$216.72			\$0.00	\$20.65
2008-099	24	\$34.02	\$0.52	\$0.00	\$0.00	\$0.00		\$0.00	\$0.00	\$0.00	\$34.54	\$2.84	\$828.96	\$68.16			\$0.00	\$37.38
2008-100	22	\$40.97	\$0.00	\$0.00	\$0.00	\$1.84	\$40.48	\$0.00	\$0.61	\$0.00	\$38.52	\$2.29			\$847.44	\$50.38	\$0.00	\$40.81


SCHEDULE "F"
SAMPLE LETTERS AND AGREEMENTS FROM THE TOP TEN
SUPPLIERS



August 22, 2012

Dear Karen,

 has had a distribution relationship with Pet Valu Canada Inc. since 2003.

During our distribution relationship,  has not provided a volume rebate, our agreement does not include a volume rebate, and we have no intention to offer a volume rebate in the future.

Sincerely,




[illegible]

August 28, 2012

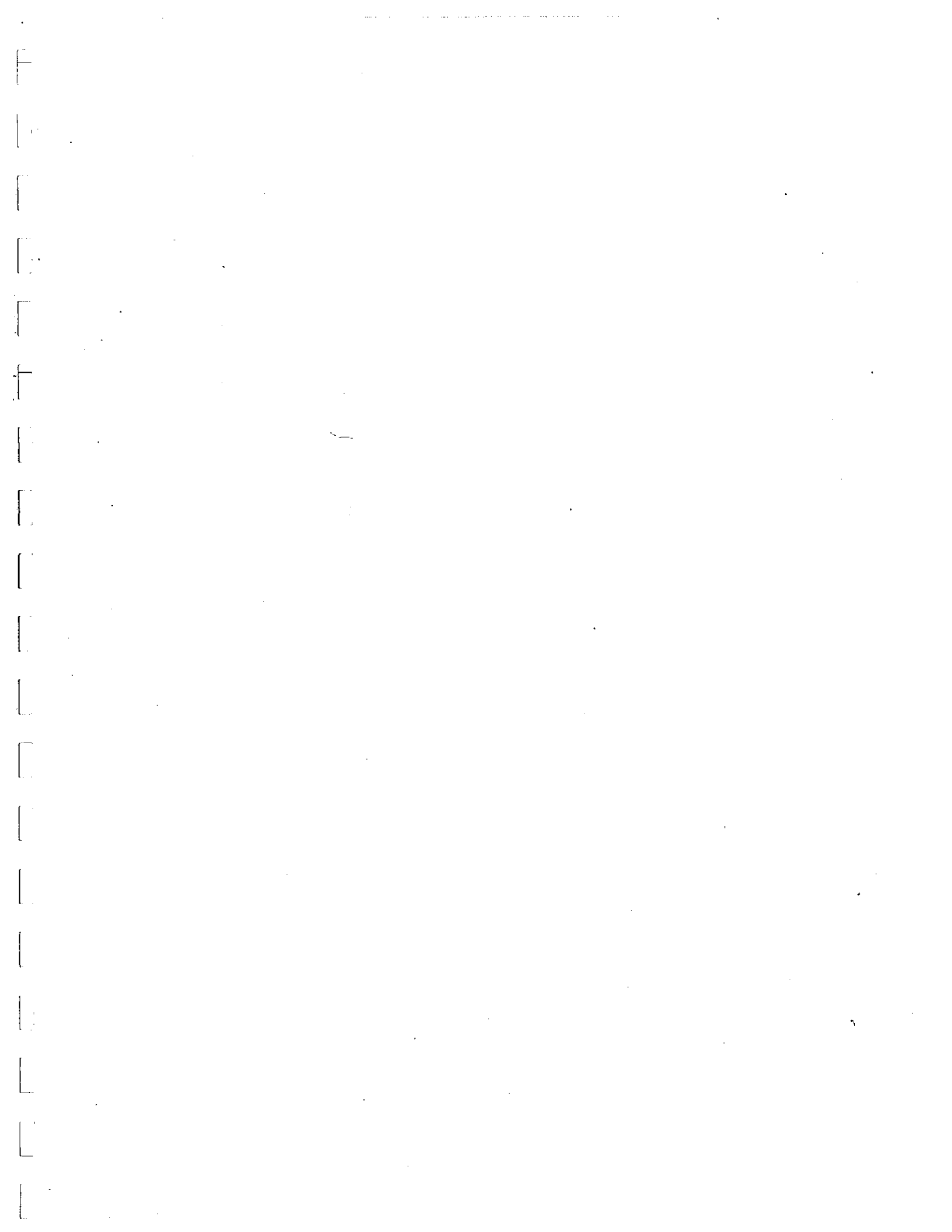
[REDACTED]

Karen Rushton,

[REDACTED] is a true Net Net vendor to Pet
Valu Canada Inc. and we do not provide any volume rebates in either of our quarterly
pricing, or standard pricing structures.

Sincerely

[REDACTED]



1.

STANDARD
DISTRIBUTOR AGREEMENT

This Agreement is made this 20th day of JULY, 2009, between [REDACTED] and Distributor (named below). [REDACTED] and Distributor wish to identify the conditions to the right of Distributor to purchase and distribute the pet products, manufactured by or on behalf of [REDACTED].

[REDACTED] and Distributor agree that Distributor must comply with each of the provisions of this Distributor Agreement.

1. The Distributor referred to in this Distributor Agreement is:

[Name of Company] Pet Valu Canada Inc. and Subsidiaries

[Street Address] 130 Royal Crest Court

[City, State and Zip Code] Markham, Ontario, Canada L3R 0A1

[Telephone Number] 905-946-1200 [Fax Number] 905-513-8774

[E-Mail] dferguson@petvalu.com

[Check one] ☐ Sole proprietorship ☐ Partnership ☒ Corporation ☐ LLC

Peton Distributors Inc. purchases and distributes merchandise on behalf of its affiliates in Canada including (but not limited to): Pet Valu Canada Inc., Paulmac's Pet Food Inc., and Your Petschoice Inc. ("The Group"); and their respective franchisees, as applicable.

2. The geographic area representing the approved territory assigned to Distributor ("Territory") will be considered the Provinces in Canada in which the Group operates corporate and/or franchised stores and services those stores with direct deliveries. The Territory is not exclusive to Distributor; the number of distributors assigned to any particular Territory shall be determined by [REDACTED] and may be changed from time to time. At any time and at its sole discretion, [REDACTED] may assign additional distributors to any territory, in whole or in part.
3. Distributor shall sell [REDACTED] only to Approved Retailers (defined below) operating retail stores or outlets located within its Territory and only for resale at retail within its Territory; Distributor may sell [REDACTED] to other retailers with the prior written approval of [REDACTED], which shall be given or withheld at [REDACTED]'s sole discretion.

4. Distributor may not appoint any subdistributor, wholesaler, or other person to sell, directly or indirectly, any [REDACTED] for sale to any retailer or any other person, without the prior written consent of [REDACTED], which shall be given or withheld at [REDACTED]'s sole discretion. [REDACTED] may, at its sole discretion and with prior notice, withdraw, with or without cause, its authorization of the appointment of any subdistributor by Distributor. Any such subdistributor(s), wholesaler(s) or other person(s) shall sell [REDACTED] only to Approved Retailers (defined below) operating retail stores or outlets located within the Territory and only for resale at retail within the Territory. Such subdistributor(s), wholesaler(s) or other person(s) shall not, directly or indirectly, sell (or permit the sale of) any [REDACTED] outside of the Territory.
5. Distributor shall maintain a place of business in the Territory which shall include a distribution facility (warehouse, delivery truck, etc.) adequate to handle all sales, service and promotion of [REDACTED] and to otherwise conduct its business. Distributor shall maintain its warehouse in a neat, clean and orderly manner. All [REDACTED] will be stored by Distributor in an appropriate insect and rodent controlled environment.
6. Subject to the provisions of paragraph 7 below, the words "Approved Retailers" mean and include only the following:
 - (a) All veterinarians, animal hospitals, breeding kennels, boarding kennels and/or dog and cat groomers in the Territory who use [REDACTED] in connection with the operation of their businesses within the Territory and/or who sell [REDACTED] to their retail customers for use (and not resale) within the Territory.
 - (b) All pet supply stores, pet stores, farm and feed stores and similar establishments within the Territory whose primary business is the sale of pets, pet products, and/or animal feeds and who sell [REDACTED] to their retail customers for use (and not resale) within the Territory.
 - (c) All hardware stores that have an existing pet supplies department who sell [REDACTED] to their retail customers for use (and not resale) within the Territory.
 - (d) All military exchanges or commissaries that sell [REDACTED] to their retail customers for use (and not resale) within the Territory.
 - (e) All health food stores (i.e., retailers whose business consists of a minimum of 80% natural and/or organic foods or merchandise) with an existing pet supplies area or department who sell [REDACTED] to their retail customers for use (and not resale) within the Territory.

- (f) All freestanding lawn and garden centers that have an existing pet supplies department who sell [REDACTED] to their retail customers for use (and not resale) within the Territory.
- (g) All other retail stores approved in advance in writing by [REDACTED]; *provided, however*, that said retail stores sell [REDACTED] to their retail customers for use (and not resale) within the Territory.

7. *Intentionally omitted.*

8. Distributor shall use commercially reasonable efforts to promote, at all times, the sale and use of [REDACTED] within the Territory. Without limiting Distributor's obligations, Distributor shall:

- (a) Schedule sales personnel for [REDACTED] sales training seminars on a regular basis as mutually agreed upon by the parties.
- (b) Participate in all [REDACTED] promotional activities, as mutually agreed upon.
- (c) Supply point-of-sale items to Approved Retailers including brochures, posters, signs, banners, door decals, etc. as made available in reasonable quantities from [REDACTED]. Quantities may be adjusted at [REDACTED]'s discretion.
- (d) When in attendance at trade, dog, or cat shows, Distributor must display [REDACTED] in a manner not less than representative of volume of [REDACTED] sold by Distributor vs. competitive products sold by Distributor and must participate in the show's specials or product introductions.

9. *Intentionally omitted.*

10. Distributor must carry and actively and vigorously promote the sale of [REDACTED] in the Territory. A minimum approved product selection to be agreed to in advance. If required by [REDACTED], Distributor will: (i) work with [REDACTED] to prepare periodic business plans outlining the methods Distributor will use to promote and expand the sale of [REDACTED] in the Territory; (ii) maintain a reasonable minimum inventory of [REDACTED] and (iii) provide [REDACTED] with timely, complete and accurate data.
11. During the Term of the Agreement, Distributor must order [REDACTED] products in full truckload quantities only, consisting of a minimum of 41,500 pounds.
12. Distributor shall place all orders on a timely basis allowing enough shipping time to prevent out-of-stock conditions. [REDACTED] will endeavor to ship all orders of [REDACTED] brand products within ten (10) days of receipt. Orders showing ASAP delivery and received

by 3:00 p.m., Central Time, on the Friday prior to the [REDACTED] period closing date, will be included in that period's business. Any orders received after 3:00 p.m. on Friday (Central Time), may or may not be able to be shipped and included in the current period for reporting purposes. Notwithstanding anything herein to the contrary, [REDACTED] will use reasonable efforts to ship properly ordered product on a timely basis, but shall not be liable if it does not do so.


13. All [REDACTED] branded product orders of more than forty-one thousand five hundred pounds (41,500 lbs) (approximately one container) include freight to Distributor's warehouse in truckload lots with a maximum four-hour unloading time. Additional unloading time will be billed to Distributor at [REDACTED]'s cost. All claims for freight damage must be made at time of delivery. Unloading is the sole responsibility of Distributor.
14. Subject to prior credit approval by [REDACTED] (credit approval is at [REDACTED]'s sole discretion), and to the provisions of paragraph 17 hereof, the credit terms of [REDACTED] are: 2%10 days, from invoice date and net 30 days. All payment terms are based upon invoice date. [REDACTED] reserves the right to refuse shipment on all accounts over thirty (30) days or on all accounts not strictly adhering to [REDACTED]'s credit policies and procedures. Past due accounts are subject to a 1.5% per month service charge.


Distributor shall remit payment to the following address (or to such other address as [REDACTED] may advise Distributor in writing):

Distributor shall remit payment to the address on the invoice.

15. [REDACTED] requires appropriate documentation prior to the issuance of any credits to the Distributor. For delivery related issues (damages, short-dated, mis-shipments), these must be noted at the time of delivery. For customer return requests, donations, marketing programs and similar matters, documents should be prepared and submitted in compliance with the current policies of [REDACTED] within 14 days of event. [REDACTED] reserves the right to have credited product safely held for review by [REDACTED] District Manager within 14 business days of notification by Distributor. Distributor reserves the right to dispose of any unsalable product 30 calendar days after initial notification to [REDACTED]. [REDACTED] agrees to issue credits to Distributor no later than 30 business days after inspection of unsalable product, or in the case of Marketing programs, 30 calendar days after submission of Distributor documentation.

- (a) [REDACTED] will provide an off-invoice damage allowance of 1% of gross invoice amount to cover all "Normal Defective Goods" claimed by Distributor's customers. Normal Defective Goods include, but are not limited to, isolated occurrences of: blown cans, mold, greasy bags, defective bag seals, rodent and insect damage, and past-date spoilage (other than cases resulting from receipt by Distributor of Short-Dated Product). Normal Defective Goods do not include product recalls or stop-ship orders initiated by [REDACTED] or Distributor as a result of quality deficiencies. [REDACTED] will provide appropriate credits for damages beyond Normal Defective Goods, providing that they were not the result of negligence by Distributor or Distributor's customers.

- (b) There is no charge to Distributor for pallets, disposable totes or other shipping material.
- (c) [REDACTED] agrees to supply information and import documentation on a timely basis as required by Canadian regulatory agencies and amended from time to time. These currently include, but are not limited to: Country of Origin; HS Classification; Annual NAFTA Certificate (prior to December 15 for the following year); fully completed Canada Customs Invoice to accompany all shipments; and any certificates required by the Canadian Food Inspection Agency for the importing of food products into Canada.
16. Distributor shall supply, at the times and in the formats noted below, three data files to [REDACTED]. These data files are described below in clauses (a), (b) and (c) of this paragraph 16.
- (a) A customer master list with one record for each store to which Distributor has shipped [REDACTED] during the reporting period. Each store record must include the following data:
- (i) Distributor's customer identification number for the store to which the product was shipped.
 - (ii) Store name in upper and lower case.
 - (iii) Store street address.
 - (iv) Store city.
 - (v) Store Province using the standard 2-alpha case abbreviation.
 - (vi) Store 6-character Canadian postal code.
 - (vii) Store 3-digit area code and 7-digit telephone number with no parentheses, hyphens or spaces.
- (b) A period (4 week) sales detail report that includes all sales of [REDACTED] [REDACTED] during the reporting period. Each sales record must include the following data:
- (i) Distributor's customer identification number for the store to which the product was shipped.
 - (ii) Name of the store to which the product was shipped.
 - (iii) [REDACTED] SKU number of the product shipped.
- 

- (iv) Full description of the product.
 - (v) Specific week number and period number of the sale to the customer based on 4-week periods corresponding to Distributor calendar.
 - (vi) The quantity sold of each SKU (converted into pounds or into such other units as [REDACTED] may advise Distributor from time to time).
 - (vii) The quantity sold of each SKU converted to Distributor Cost multiplied by shipment quantity.
- (c) A period sales summary report that includes the following totals for [REDACTED] only:
- (i) The total number of stores reported in the period sales detail report.
 - (ii) The total number of sales records reported in the period sales detail report.
 - (iii) The total number of quantities sold (of "Each(es)") reported in the period sales detail report.
 - (iv) The total number of pounds sold reported in the period sales detail report;
 - (v) The total number of dollars sold reported in the period sales detail report.
- (d) The data files referred to in clauses (a), (b) and (c) of this paragraph 16 shall be provided to [REDACTED] in dBase, ASCII or Microsoft (Access or Excel) fixed width format or other electronic format as mutually agreed upon in writing.
- (e) The data files referred to in clauses (a), (b) and (c) of this paragraph 16 shall be e-mailed to [REDACTED] at an e-mail address provided by [REDACTED] no more than 14 business days following the close of each period or by other means no more than 14 business days following the close of each period as [REDACTED] may approve in writing.
17. This Agreement shall be deemed effective on the date written above and shall continue for one year unless terminated by either party upon thirty (30) days written notice to the other party. If written termination notice is not given by either party to the other, this Agreement shall automatically renew for additional one-year periods. Notwithstanding the above term and renewal provisions, this Agreement may be terminated by either party without cause, at any time prior to its expiration date, or any renewal expiration date upon giving the other party thirty (30) days prior written notice. Either party may terminate this Agreement for cause (*including, but not limited to*, the other party's
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failure to comply with any of the terms and conditions of this Distributor Agreement) immediately following ten (10) days prior notice and opportunity to cure.

After written notice of termination (with or without cause), all shipments will be on a prepaid basis and all outstanding balances will be paid in full.

18. *Intentionally Omitted.*
19. The parties agree that Distributor is an independent contractor, and specifically acknowledge that it is understood that neither Distributor nor [REDACTED] shall be responsible for the debts or operations of the other and that except as set forth herein, neither Distributor nor [REDACTED] has authority to bind or act on behalf of the other. Neither Distributor nor [REDACTED] is an agent of the other, and no agent or employee of either Distributor or [REDACTED] shall be deemed an agent or employee of the other.
20. The waiver by either party of any right of either party hereunder, at any time, shall not serve to waive any other such right nor shall such waiver operate as a waiver of the right so waived at any future date in connection with another default by the other party hereunder.
21. This Distributor Agreement supersedes and constitutes a novation of any and all other agreements by or between the parties which may be found to have been entered into prior to the date hereof or contemporaneous herewith regarding the subject matter of this Distributor Agreement. This Distributor Agreement is a final expression of the entire agreement of Distributor and [REDACTED] and is intended also as the complete and exclusive statement of all of the terms of that agreement. No modification of this Distributor Agreement shall be binding unless such modification shall be in writing, signed by the parties expressly assenting to the modification. All such modifications, if any, on behalf of [REDACTED] must be signed on behalf of [REDACTED] by an authorized officer and signed on behalf of the Distributor by an authorized officer of the Distributor.
 - (A) In consideration of the commitments made herein by the Distributor, [REDACTED] agrees that the Distributor shall be entitled to purchase [REDACTED] from [REDACTED], during the term of this Agreement and any extension thereof, at "[REDACTED] Distributor Pricing" being pricing no less favorable than that granted to any other distributor by [REDACTED] with respect to any part of the Territory. A copy of a price list detailing current [REDACTED] distributor pricing is attached to this Agreement as Schedule "A". [REDACTED] agrees to provide the Distributor with 30 days prior written notice of any pricing change to [REDACTED].
 - (B) All notices, requests or other communications required or permitted to be given under this Agreement shall be in writing and may be hand delivered or transmitted by facsimile and addressed as follows:
 - 1) In the case of the Distributor at the address and fax number provided on the first page of this agreement, Attention: Dan Ferguson, Sr. Director - Merchandising.

- 2) In the case of [REDACTED] at: [REDACTED]
Attention: [REDACTED] Fax No: [REDACTED]

Or at such other address or fax number as either party hereto may have specified in writing and given to the other party. All notice, requests, or other communications shall be deemed to be received on the date of delivery, if delivered on a business day during usual business hours, or if not a business day during such usual business hours, on the business day next following the day of delivery. All notices, requests or other communications sent by facsimile shall be deemed to be delivered at the time of transmission if sent during usual business hours, or if not sent during such usual business hours, then at the opening of business on the next business day.

22. This Distributor Agreement may be executed in counterparts; each of which when so executed and delivered shall be deemed an original and such counterparts together shall constitute one instrument.
23. This Distributor Agreement is binding on successors or assigns of the parties, provided that Distributor may not assign this Distributor Agreement without [REDACTED]'s prior written consent (in [REDACTED]'s sole and absolute discretion) and that [REDACTED] may assign this Distribution Agreement to any other affiliate of [REDACTED] without the consent of Distributor. Distributor acknowledges that it is anticipated that [REDACTED] may reorganize the structure of its petcare business and may consolidate certain entities as a result.
24. This Distributor Agreement and the rights and obligations of the parties hereto shall be governed and construed in accordance with the laws of the state of [REDACTED] without regard to its conflict of laws.

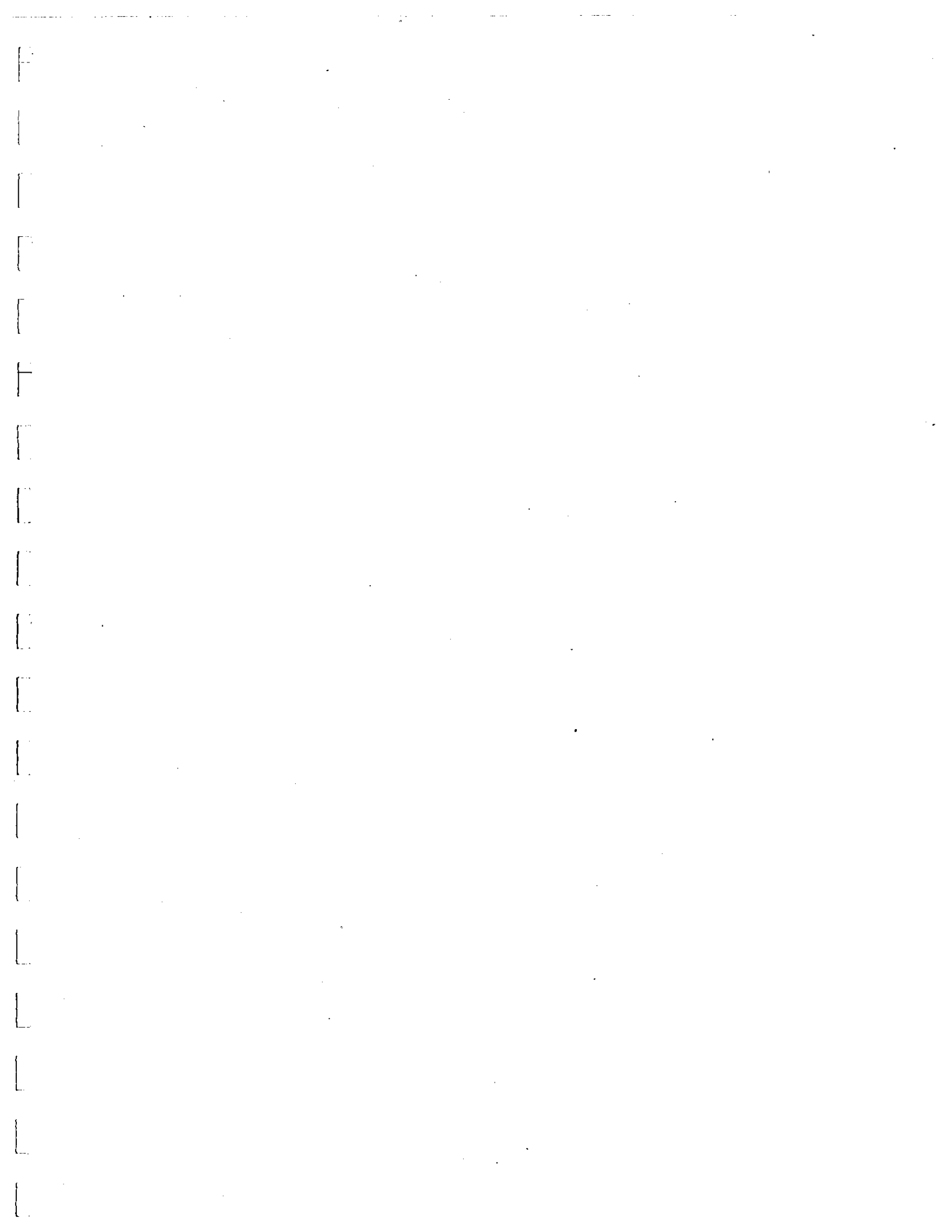
IN WITNESS WHEREOF, the parties have duly executed this Agreement in duplicate as of the day and year first noted below.

Signed: July 20, 2009
[Insert date actually signed]

Distributor
By: [Signature]
Name: David Stauble
Title: Sr. Vice President, Merchandising

Signed: _____
[Insert date actually signed]

[REDACTED]
By: _____
Name: _____
Title: _____



Pet Valu
ATTN: Frank Tassone
130 Royal Crest Court
Markham, Ontario L3R 0A1

This letter is to serve as a written confirmation of our marketing agreement, as originally agreed to on 1/28/11 and final discussion points fine tuned on 4/1/11:

- New Discount Structure of 11% off invoice – No additional off invoice discounts will be provided.
- 3% Co-op monthly marketing fund (to be termed "off invoice" on check) to be spent at [REDACTED] discretion to strategically grow our mutual business within your market. This fund is only available if the growth targets which accompany this letter are being met. In order to qualify for these extra marketing funds Pet Valu is required to match the above mentioned discount with at least 3% of their own monies and can be spent on demo personal, co-op advertising, or store discounts. This co-op fund is separate from the [REDACTED] Frequent Buyer Program.

- Damage/Return Allowance: 1.75% off invoice on all purchases billed back to [REDACTED] on a monthly basis. Our national average for consumer returns is below the 1.75% that we are offering. Any damage which occurs during transit must be noted on the bill of lading at the time of receiving and submitted on our shortage/damage form within 48 hours to our Operations team, or it will not be honored.

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After your review of this letter please let me know if you have any questions. If not please sign the letter below and mail a hard copy back to me at the address below. Thank you for all the work you have put into this process and I look forward to working with you in the future mutually growing our business.

Sincerely,

(Name/Position)

Pet Valu

1250264 ONTARIO INC. and PET VALU CANADA INC.
Plaintiff Defendant

Court File No: CV09-392962-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FACTUM OF THE MOVING
PARTY/DEFENDANT,
PET VALU CANADA INC.**

(SUMMARY JUDGMENT)

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