

COURT FILE NO.: CV-09-392962-CP

DATE: 20140404

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: 1250264 Ontario Inc., Plaintiff / Moving Party (“P”)

AND:

Pet Valu Canada Inc., Defendant / Responding Party (“PVCi”)

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *Allan D.J. Dick and Jean-Marc Leclerc* for P

Geoffrey B. Shaw and Derek Ronde for PVCi

HEARD: March 5 and 7, 2014

PRODUCTIONS MOTION

(A copy of this Endorsement has been attached to the Motion Record)

- 1. P’s motion for summary judgment on a portion of Common Issue No. 1 (i.e. whether PVCi is contractually required to share volume allowances) is dismissed.**

Reasons: There is no basis for the proposed bifurcation of the first common issue. PVCi did not agree to any such bifurcation; P did not bring a motion to amend the issue as certified; and there is no basis for the requested declaration because this particular remedy was not sought in the Statement of Claim. P’s motion for partial summary judgment is therefore dismissed but without costs. Any costs incurred by PVCi responding to this motion for partial summary judgment were incurred in any event by PVCi as part of its much broader cross-motion for summary judgment. Costs wasted by counsel for PVCi because its cross-motion for summary judgment had to be adjourned to accommodate P’s motion for productions are discussed and fixed below.

2. **PVCI's cross-motion for summary judgment is properly before the court but is adjourned to allow P to argue its productions motion.**

Reasons: Given that P's motion for partial summary judgment is dismissed and PCVI's cross-motion for summary judgment is ready to proceed, P asks that the latter be adjourned so that P can obtain further and better productions from PCVI and file its responding material. I am persuaded that a short adjournment is justified so that the production motion can at least be heard. Costs wasted by PCVI because its motion for summary judgment is being adjourned to accommodate P's productions motion are fixed at \$6500 all-inclusive.

3. **P's motion for productions is granted in part. Specifically, the request relating to the "List Price from Vendor" is granted; the requests relating to the production of Ex. J type spreadsheets for all class members and corporate stores, and product retail price information, are dismissed or deferred.**

Reasons:

(1) "List Price from Vendor"

As Justice Strathy made clear in his email direction of June 21, 2012, further productions may be sought by P if he can establish that the "sampling" methodology recommended by Strathy J. and adopted by the parties to date is "inadequate." I have been persuaded by P that the information contained in the Ex. J spreadsheet is inadequate with regard to the "List Price from Vendors" ("LPV") column. By my own count, and looking only at the 2008 spreadsheet, about 43 of the Top 100 products (25 'private label' products and 18 others) show an LPV that is significantly lower than the price charged to the franchisee (for example, \$19 versus \$38). If the low LPV is actually a specially reduced, volume-related LPV that is offered by the supplier to PVCI (through Peton) and not to other buyers, then this would arguably amount to a Volume Rebate that would arguably have to be shared with the franchisees.¹ P is entitled to more information about the LPV because it is obviously relevant both to the core issue of sharing Volume Rebates

¹ P's submission about the relevance of the LPV inquiry is not just a "guess" as suggested by PVCI. It appears from the numbers set out on Ex. J that with at least 43 of the Top 100 products, the LPV paid by PVCI may already include a generous volume-based pricing allowance that is then completely appropriated with an equally generous mark-up and not shared with the franchisee. Or, there may be some other explanation. But P is entitled to more information about the LPV pricing.

in Common Issue No. 1 and to the private label mark-up issue as described in Common Issue No. 2(a).²

The only proviso that must be imposed is that P's *initial* foray into the LPV inquiry be reasonably limited and focused so that PPCI is not unduly burdened with onerous production obligations. P's initial foray may show that the LPV inquiry is completely misguided and should not be pursued. P has agreed with this proviso. In my view, a focused one-page list of questions constitutes a fair and reasonable *initial* inquiry that can be further supplemented (with more questions) if the initial inquiry proves fruitful. P to provide the court and PPCI with such a one-page list of initial questions re LPV which (assuming no objections from PPCI) shall be attached as an Appendix to this Endorsement.

(2) Spreadsheets for all class members

I am not persuaded that additional Ex. J type spreadsheets must be produced for all of the class members at this time. P has not shown that the pricing and volume allowance information contained in Ex. J would be substantially different for the other franchisees. On the contrary, it was Justice Strathy's expectation that the Ex. J information might well provide a "representative sample" that would be sufficient for the adjudication of the common issues. If more individualized information is needed if the case moves beyond the common issues, for example, for the purposes of individualized damage assessments, then this request for individual class member spreadsheets can be revisited.

(3) Spreadsheets for corporate stores

Here again, I have not been persuaded that this information is needed or is relevant in any way for the common issues trial. The core issue is whether PPCI is contractually obliged to share Volume Rebates with its franchisees. What it does with its share of these Rebates (and whether it provides a larger share to its

² The fact that approximately 25% of the Top 100 products are private label products made especially for PPCI may or may not be a distinguishing factor in the identification or sharing of Volume Rebates. But P is entitled to more information on this point regardless of the product label. Recall that Strathy J. noted at para. 13 of his Common Issues Endorsement that there was a basis in fact for certifying a common issue as to "whether the prices paid by franchisees for private label products...had been artificially enhanced by the failure to give credit for the franchisee's share of Volume Rebates." The additional wrinkle being added here flows from P's submission that there may be a further category of Volume Rebates, i.e. those that were already built-into the LPV (because of PPCI's purchasing power), but not disclosed to or shared with the franchisees. This may or may not prove to be true. But the requested LPV information is relevant to the common issues and must be produced as described herein.

- Page 4 -

corporate stores) is not in issue and does not assist the court in the adjudication of the certified common issues.

(4) Retail price information

My initial reaction to this request is negative. Why should PPCI be required to generate retail price information that is within P's possession as a former franchisee? Counsel for P says the information is stored "in shoe-boxes" and is not readily retrievable. On the other hand, says P, PPCI can generate this information "with the push of a button." In my view, plaintiffs who mount class actions should be expected, as a general rule, to organize, analyze and present the information that is in their possession and that is relevant to the case. Absent any affidavit evidence from P as to why he is unable to do this, I must dismiss this request at this time. However, I will revisit this request if the necessary evidence is filed by P and PPCI agrees that it can generate this information with just "the push of a button."

Costs on the productions motion: In my view, P was successful on about two thirds of this motion given the relative importance of the LPV issue and the amount of time and effort expended on this issue in the written submissions and at the hearing. I therefore fix costs at \$5000 (two thirds of \$7500) payable by PPCI to P. Subtracting this amount from the earlier \$6500 costs award owing to PPCI, P is required to pay \$1500 in costs to PPCI.

Counsel should advise when they wish to proceed with the summary judgment motion.

Order to go accordingly.



Belobaba J.

Date: April 4, 2014

[Appendix re the initial one-page list of questions re LPV to follow.]