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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

1250264 ONTARIO INC.

Plaintiff

- and -

PET VALU CANADA INC.

Defendant

FACTUM OF THE PLAINTIFF

(MOTION FOR SUMMARY JUDGMENT)

October 6, 2014

SOTOS LLP
180 Dundas Street West
Suite 1200
Toronto, Ontario, M5G 1Z8

Louis Sokolov (LSUC#34483L)
Jean-Marc Leclerc (LSUC#43974F)
Shane Murphy (LSUC#60230E)

Tel: (416) 977-0007
Fax: (416) 977-0717

Lawyers for the plaintiff

TO: **CASSELS BROCK & BLACKWELL LLP**
2100 Scotia Plaza,
40 King Street West
Toronto ON M5H 3C2

Geoffrey B. Shaw (LSUC#26367J)
Derek Ronde (LSUC#46978W)
Tel: (416) 869-5982/5428
Fax: (416) 350-6916/(416) 640-3063

Lawyers for the Defendant, Pet Valu Canada Inc.

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PART I - OVERVIEW

1. This is a motion for summary judgment in which the Court will have to answer two fundamental questions in determining liability – whether Pet Valu's contract with its franchisees (the "franchise agreement") obligated it to pass on the savings realized from "volume allowances", and, if so, whether it breached its contract. Contrary to the approach of Pet Valu, this is a simple case of contractual interpretation and evaluation of uncontested evidence. Indeed, most of the submissions that Pet Valu makes in its factum distract from the core issues at stake and most of the evidence that Pet Valu relies upon is irrelevant to the real issues.

2. A fair reading of the franchise agreement as a whole supports the interpretation that Pet Valu was required to pass on volume allowances to the franchisees. The franchise agreement repeatedly emphasized the importance of Pet Valu's "substantial purchasing power," the contractual obligations of franchisees to work to enhance this power, and promises by Pet Valu to use its buying power "to obtain lower prices for the benefit of all Pet Valu stores." Indeed, it was the collective purchasing power of the franchisees that, in large part, enabled Pet Valu to extract the discounts from the suppliers.

3. The volume allowances were offered as a key reason for prospective franchisees to buy a Pet Valu franchise and join a large system.[1] In exchange, Pet Valu sought to gain significant fees and royalties from the franchisees that they would not have to pay if they were independent pet stores.[2] The objective was to permit the franchisee to reap collective benefits from the lower prices obtainable by the group's purchases.[3]

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1 Affidavit of P. Davis, sworn July 21, 2014, at para 9 . Reply Motion Record of the Plaintiff, Vol. 1, Tab 1. Mr. Davis has stated that "Bigger buyers can negotiate and obtain better prices than smaller buyers", and at para. 16: "I joined the Pet Valu System to benefit from the system's collective purchasing power".

2 Affidavit of P. Davis, sworn July 21, 2014, at para. 9; see also Certification reasons, para. 42.

3 Affidavit of P. Davis, sworn July 21, 2014 at para. 9: "Bigger buyers can negotiate and obtain better prices than smaller buyers."

4. The right to obtain the value of volume allowances was a fundamental term in the franchise agreement. Indeed, the undisputed evidence in this case is that "cost of goods is of vital importance to franchisees."[4] As Justice Strathy wrote in his certification decision:

> [I]t does not take an expert economist to know that with maximum retail prices fixed by Pet Valu and constrained by a competitive market, the cost of goods is a vital factor in the profitability of every franchisee. Considering that the franchisee has an obligation to make significant payments to Pet Valu before seeing any profits, the issue of the franchisee's entitlement to share in Volume Rebates is a factor that vitally affects its profitability.[5]

5. Pet Valu posits an interpretation of the franchise agreement that would give it unfettered discretion to do whatever it wanted with volume allowances. This interpretation is unreasonable because it fails to take into account the language of the agreement as a whole. Indeed, it is telling that Pet Valu focuses on a document *external* to the contract, as opposed to the contract itself. Moreover, Pet Valu is asking the Court to countenance a reading of the contract that fundamentally fails to express to franchisees that they are not entitled to volume allowances. If that was Pet Valu's intent, it could have easily drafted the contract to make it clear. Pet Valu's failure to do so should not provide it with some interpretive advantage in this case. This is particularly the case where, as here, Pet Valu *also* acted contrary to the *Arthur Wishart Act* by failing to properly disclose in good faith its policy on volume rebates in the disclosure document it gave to prospective franchisees.

6. In contrast to the plain wording of the contract, Pet Valu's admitted practice was to set prices "**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."[6] This was contrary to its obligation under the franchise agreement. Indeed, Justice Strathy on the certification analyzed as follows how Pet Valu's

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4 Certification reasons, para. 72.

5 Certification reasons, para. 42.

6 Certification reasons, para. 40 (emphasis added) ("The amount of this wholesale profit varies from item to item and is set so as to maximize Pet Valu's profit while keeping the price below the market price at which the same product is available from other wholesalers."). Peton Distributors Inc. ("Peton") is a wholly owned subsidiary of Pet Valu which supplies products sold by Pet Valu franchisees.

conduct, if proven, would give rise to breach of contract:

> If Pet Valu has a contractual obligation to share these benefits with franchisees, a proposition for which there is at least some basis in fact, and if it has used those benefits to maximize its profits as opposed to reducing the cost its franchisees pay for goods, again for which there is some basis in fact, then every single franchisee was at risk of loss as a result of Pet Valu's conduct.[7]

7. Pet Valu's damages analysis is also seriously flawed. Notwithstanding its admission that it had no systems in place designed to track amounts owing to franchisees as volume allowances,[8] and that it never prepared any reports to calculate the amount of volume allowances payable to franchisees,[9] it audaciously claims that there have only been **two** examples of volume allowances in the entire class period, totalling only $122,403.21 for the entire system.[10] By contrast, Pet Valu's system-wide sales in 2009 alone were $222 million.[11] On Pet Valu's theory, "volume allowances" represent only a tiny fraction of a percentage of Pet Valu's overall business. The absurdity of this is patent. No franchisee would have expected to pay substantial fees and royalties to Pet Valu in exchange for promises about volume allowances on cost of goods that were, in effect, non-existent.

8. Pet Valu's analysis is based on an unreasonably narrow and inaccurate interpretation of "volume allowance." As defined in the common issues, "volume allowances" include "all volume-based rebates, allowances and discounts given by suppliers and manufacturers to Pet Valu [...] and includes any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system [...]").[12] For example, if Pet Valu purchases a product for $5.00 with the benefit of its substantial

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7 Certification reasons, para. 107.

8 Cross-examination of T. McNeely, August 20, 2014, Q. 272.

9 Cross-examination of T. McNeely, August 20, 2014, Q. 274 ("Q. Did Pet Valu prepare reports to calculate the amount of volume allowances payable to franchisees? A. Prepare reports, no. [...]")

10 Affidavit of T. McNeely, sworn August 3, 2012 at paras. 57-59, Cross-Motion Record of the Defendant, Vol. 1, Tab 2; Affidavit of T. McNeely, sworn September 20, 2013 at paras. 4-5, Supplementary Cross-Motion Record, Tab 1.

11 Plaintiff's motion record, February 3, 2012, p. 113.

12 Endorsement by Justice Strathy regarding common issues, March 8, 2011 (Plaintiff's summary judgment motion record, February 13, 2013, para. 8.)

purchasing power, and a smaller retailer must pay $20.00 to purchase the same product, there is a "volume allowance" of $15.00. By contrast, Pet Valu asserts that it can appropriate the value of volume allowances by imposing "markups" on franchisees. Under Pet Valu's analysis, it would be entitled to resell to the franchisee for $19.00 (a "markup" of $14.00) claiming that, by calling it a "markup", it is not a "volume allowance".[13] Pet Valu's interpretation of "volume allowances", in addition to being belied by the plain reading of the certified common issues, is contrary to any notion of commercial reasonableness and common sense.

9. By contrast, the plaintiff's damages analysis is properly rooted in the evidentiary record in a pricing comparison that Pet Valu itself produced in June 2014 for the purposes of its summary judgment motion. The comparison reviews the costs and prices charged by a small, 23 store pet food chain called Bosley's,[14] to the costs and prices charged by the much larger Pet Valu system, which at the time consisted of approximately 320 stores.[15]

10. While Pet Valu relies on the comparison to argue that the representative plaintiff paid *less* for supplies by purchasing through Pet Valu than he would have paid if he purchased through Bosley's, it misses the mark because it ignores the relative *cost differences* between the low price at which Pet Valu purchases products (with the benefit of its "substantial purchasing power") compared to the higher price at which Bosley's paid, as a smaller buyer.

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[13] Cross-examination of T. McNeely, August 20, 2014, Q. 339, p. 127.. See also, Pet Valu's factum states that this very basic and common-sense proposition – a proposition that was tentatively endorsed by the Court in the production motion – is "an impossible leap of logic." See Pet Valu factum, para. 41(f). The Court held as follows in the production motion :

> "If the low LPV [list price from vendor] 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." (See Endorsement, June 26, 2014, p. 2).

[14] Cross-examination of T. McNeely, August 20, 2014, Q. 502, p. 176.

[15] Cross-examination of T. McNeely, August 20, 2014, Q. 572.

11. By contrast, the plaintiff's expert evidence reasonably and properly considers these cost differences in the analysis of the price that franchisees were charged. When the relative cost differences are considered, the analysis shows material, deleterious differences to Pet Valu franchisees.[16] Pet Valu's overall costs for purchasing goods was lower than Bosley's, yet Pet Valu did not pass on the benefit of its purchasing power to franchisees when compared to Bosley's costs. The plaintiff's expert has applied this sample data to the plaintiff's overall top 100 purchases to calculate a 9.8% difference in the cost of goods the representative plaintiff should have been charged.

12. Pet Valu has insisted (and the parties agreed) that the summary judgment issues would be determined on the basis of the representative plaintiff's data. The plaintiff's expert has used the Bosley-Pet Valu data comparison to quantify the overall impact on the representative plaintiff's cost of goods – his damages claim. The analysis illustrates there are significant volume allowances that have not been allocated to franchisees, contrary to Pet Valu's obligations under the franchise agreement. The analysis also quantifies the plaintiff's claim in its motion for summary judgment.

PART II - ISSUES

13. A list of the certified common issues is attached at Tab "A". At their core, the common issues ask two fundamental questions: (1) does Pet Valu have a contractual obligation to pass on the savings it realized from volume discounts, and (2) did Pet Valu breach the franchise agreement by failing to do so? Two additional questions concern the aggregate damages that flow from the breach of contract and whether Pet Valu improperly failed to disclose sufficient information about volume rebates to franchisees.

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[16] See expert report of E. Soriano dated July 21, 2014, para. 86 [Reply motion record of the plaintiff, Volume II of II, July 21, 2014, p. 268.]

PART III - ANALYSIS (FACTS AND LAW)

14. The plaintiff's position, in summary, is that there is a clear contractual obligation for Pet Valu to pass on savings it realizes from volume allowances. The franchise agreement repeatedly emphasizes Pet Valu's buying power and refers to using its power to "collectively and severally benefit the operation of Pet Valu stores." By contrast, Pet Valu's contractual analysis ignores all of this background information in favour of an ambiguously-worded manual that is collateral to the contract. There is compelling evidence from Pet Valu's records showing that it failed to pass on considerable amounts of volume rebates to the representative plaintiff. The representative plaintiff's damages claim has been quantified through this representative analysis. Pet Valu has submitted no contrary evidence to the plaintiff's mathematical calculations of aggregate damages. It has failed to lead trump. Its cross-motion for summary judgment should be dismissed, and the plaintiff should be granted its motion for summary judgment, consistent with the Ontario Court of Appeal's decision in *King Lofts Toronto I Ltd. v. Emmons*.[17]

1. Applicable principles of contractual interpretation

(A) The Supreme Court of Canada's decision in *Sattva Capital Corp.*

15. The Supreme Court of Canada recently summarized rules of contractual interpretation in *Sattva Capital Corp. v. Creston Moly Corp.*[18] The court held "the overriding concern is to determine 'the intent of the parties and the scope of their understanding" by "reading the contract as a whole, consistent with the surrounding circumstances known at the time of formation of the contract."[19]

16. In this case, the critical surrounding circumstance is the importance of the low cost of goods to

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17 2014 ONCA 215.

18 2014 SCC 53.

19 *Ibid.*, para. 47.

franchisees in deciding to buy into the Pet Valu business. In this regard, the undisputed evidence of Peter Davis, a class member who operated a Pet Valu store in Kingston, is as follows:

> I joined the Pet Valu system in 1994 (and renewed in 2008) for many different reasons. I wanted my business to benefit from a recognized brand like Pet Valu. But there are many independent pet food stores that are successful as well, and they are not required to pay significant fees and royalties to a franchisor. I wanted more than just a recognized brand. One additional significant advantage that I perceived in joining the Pet Valu system was that I would benefit from its collective purchasing power. Bigger buyers can negotiate and obtain better prices than smaller buyers.[20]

(B) The nature of the relationship created by the agreement

17. The Supreme Court in *Sattva Corporation* also held that "the meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement."[21]

18. In this case, the nature of the relationship between franchisor and franchisee mandates that the contract be interpreted through the lens of the franchisor's duty of good faith. This is because there is an explicit obligation of fair dealing imposed upon Pet Valu by section 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*,[22] which states that "every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement." The duty of fair dealing "includes the duty to act in good faith and in accordance with reasonable commercial standards."[23]

19. The *Wishart Act* was passed because of the need to protect franchisees from unfair dealing. In this regard, the Court of Appeal has stated:

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[20] Affidavit of P. Davis, sworn July 21, 2014, para. 9. See also para. 10 the "cost of goods was a critical aspect of my business's profitability. It was my biggest expense." He stated in his affidavit too that as a member of the CFC, "the CFC sought to confront Pet Valu on the need to provide stores with a greater share of the profits" (para. 8). On the basis of the CFC minutes, Justice Strathy found that "minutes of meetings of the executive committee of the C.F.C. demonstrate a concern that Pet Valu had not shared its profits with its franchisees, that the share of the 'profit pie' had not reached the store level, and that store margins were unacceptably low" (certification reasons, para. 72).

[21] *Sattva Corporation, supra* at para. 48 (emphasis added).

[22] S.O. 2000, c. 3.

[23] *Arthur Wishart Act*, s. 3(3).

> "[t]he purpose of the Act is to protect franchisees. The provisions of the Act are to be interpreted in that light;"[24]
>
> the *Wishart Act* is intended "to level the legal playing field between franchisees and franchisors by protecting franchisees when they enter into franchise agreements;"[25]
>
> "the entire purpose of the Act […] is to protect the interests of franchisees;"[26]

20. Separate and apart from the explicit requirements of the *Wishart Act*, the Court of Appeal has recognized that the very nature of the relationship between franchisor and franchisee imposes a duty of good faith on the franchisor:

> The relative position of the parties as outlined by Iacobucci J. in Wallace also exists in the typical franchisor-franchisee relationship. First, it is unusual for a franchisee to be in the position of being equal in bargaining power to the franchisor: See *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357 (C.A.), per Goudge J.A. at para 16*; Machias v. Mr. Submarine Ltd.*, [2002] O.J. No. 1261 (S.C.J.) at para. 109. The second characteristic, inability to negotiate more favourable terms, is met by the fact that a franchise agreement is a contract of adhesion. As I have indicated, a contract of adhesion is a contract in which the essential clauses were not freely negotiated but were drawn up by one of the parties on its behalf and imposed on the other. Further, insofar as access to information is concerned, the franchisee is dependent on the franchisor for information about the franchise, its location and projected cash flow, and is typically required to take a training program devised by the franchisor. The third characteristic, namely that the relationship continues to be affected by the power imbalance, is also met by the fact the franchisee is required to submit to inspections of its premises and audits of its books on demand, to comply with operation bulletins, and, often is dependent on, or required to buy, equipment or product from the franchisor. It is hardly surprising, therefore, that a number of courts, including the Manitoba Court of Appeal in *Imasco Retail Inc. (c.o.b. Shoppers Drug Mart) v. Blanaru*, [1995] 9 W.W.R. 44 (Man. Q.B.), aff'd, [1997] 2 W.W.R. 295 (C.A.) have recognized that a duty of good faith exists at common law in the context of a franchisor-franchisee relationship.[27]

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[24] *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para. 26 ("*Salah*"); *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478 ("*Midas*") at para. 30; *6792341 Canada Inc v. Dollar It Ltd.* (2009), 95 O.R. (3d) 291 (C.A.) ("*Dollar It*") at paras. 12, 13 and 72; and *Personal Service Coffee Corp. v. Beer et al.* (2005), 256 D.L.R. (4th) 466 (ONCA) at para. 28 ("*Personal Service Coffee*").

[25] *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656 ("*MDG Kingston*") at para. 1.

[26] *Dollar It, supra* at para. 12. See also, the comments of Matheson J. in the recent case of *2176693 Ontario Ltd. v. Cora Franchise Group Inc.* 2014 ONSC 600 holding that "[f]ranchise agreements are contract of adhesion and it has been recognized repeatedly that the *AWA* is intended to mitigate and alleviate the power imbalance that exists between franchisors and franchisees." [citations omitted]. Furthermore, see Strathy J. (as he then was) in *779975 Ontario Ltd. v. Mmmuffins Canada Corp.* (2009), reflex, 62 B.L.R. (4th) 137 (S.C.), at para. 10:

> The AWA is remedial legislation that was designed to address the inequality in bargaining power between franchisees, who were frequently small business people, often lacking in commercial experience, and franchisors, who were typically more sophisticated and substantial corporate organizations. It was a legislative response to the commercial disasters that had befallen some franchisees, who found that the reality of the franchise life was far from the rosy picture painted by the franchisor's marketing force.

[27] *Shelanu Inc. v. Print Three Franchising Corporation*, 2003 CanLII 52151 (ONCA), para. 66.

21. The significant disparity in bargaining power between franchisor and franchisee is analogous to that in the relationship between employer and employee. In *O'Neill v. General Motors of Canada*,[28] this Court held that "the terms of the contract at issue in this case must be interpreted through the lens of good faith,"[29] concluding that the duty of good faith "is an integral tool in the interpretation of the employment contract, regardless of the specific terms of the contract, flowing from the inherent power imbalance between employee and employer, which exists not only when the contract is formed, but throughout its performance."[30] The franchise agreement in this case must similarly be interpreted through the lens of good faith.

2. Analysis of Contract as a Whole

22. The court in *Sattva Capital* held that the contract must be "read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances." In analyzing a contract, "the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purpose and commercial context."[31]

23. These principles are consistent with Justice Strathy's formulation of the common issues:

> As I said during my submissions, in my view, it is not appropriate to limit this common issue by looking at one clause of the Franchise Agreement in isolation. In determining whether Pet Valu had a duty to share volume rebates with class members, the court will be entitled to look at, among other things, all the terms of the contract.[32]

24. Here, as set out below, the franchise agreement is replete with references to Pet Valu's "substantial purchasing power" arising from the collective purchases of Pet Valu franchisees. Moreover, Pet Valu assures franchisees that its power is intended to "collectively and severally benefit the operation of Pet Valu stores" and promises to "allocate" volume allowances to franchisees.

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28 2013 ONSC 4654.

29 *Ibid.*, para. 76.

30 *Ibid.*, para. 75.

31 *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 64.

32 2011 ONSC 1941, para. 11.

(A) Recitals in the Pet Valu franchise agreement

25. The recitals make four separate references to Pet Valu's "purchasing power" and make clear that the source of the power is from the franchisees:

> "AND WHEREAS [Pet Valu] has substantial purchasing power in relation to products for resale, equipment, services, and operating supplies;"
>
> "AND WHEREAS the said purchasing power results from [Pet Valu's] ability to negotiate with suppliers promotional or other merchandising activities at and through all Pet Valu stores [...]"
>
> "AND WHEREAS the said purchasing power is diminished in the event that one or more Pet Valu franchisees either fails to co-operate with the commitments negotiated by [Pet Valu] with suppliers of products or services or attempts to negotiate directly with such suppliers;"
>
> "AND WHEREAS there exists an obligation on the part of the Franchisee and all other franchisees of the Pet Valu System, to enhance the collective purchasing power and the business image of all Pet Valu stores;"[33]

26. The "purchasing power" in the recitals refers to the "collective" purchasing power of Pet Valu, arising from the purchases of "all Pet Valu stores." If all Pet Valu stores funnel their purchases through Pet Valu, this enhances Pet Valu's collective purchasing power. Franchisees are required to enhance Pet Valu's purchasing power.[34]

27. "Pet Valu System" is defined in the franchise agreement to include the "buying power and buying systems of [Pet Valu] which collectively and severally benefit the operation of Pet Valu stores."[35]

28. The franchise agreement describes the recitals as particularly significant. The very first paragraph of the agreement states that the recitals "set forth the basis of the relationship between the Parties, record the fundamental understandings between the Parties, and document the anticipation and

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33 Plaintiff's motion record, February 13, 2012, p. 172.

34 See also affidavit of P. Davis, sworn July 21, 2014, para. 11: "Throughout the operation of my business, I also understood that Pet Valu emphasized the importance of requiring franchisees to enhance the system's collective purchasing power. Pet Valu always sought to emphasize the importance of adding to Pet Valu's collective purchasing power, rather than taking away from it."

35 *Ibid.*, p. 177 (emphasis added).

reliance of the Parties upon these understandings and truths."[36]

(B) Pet Valu's obligation to allocate volume allowances

29. Section 22(f) states that volume allowances granted by suppliers "shall be allocated all as more particularly set forth in the Pet Valu Franchise Business System."[37] [emphasis added]. In his certification reasons, Justice Strathy held that "the use of the term 'allocated' implies that they will be distributed or used for a specific purpose."[38]

30. The franchise agreement does not define the expression "volume allowance." The concept of an "allowance" includes the payment of money or a discount on price. *Collins English Dictionary* defines the two concepts as follows: "an amount of something, *esp.* money or food, given or allotted usually at regular intervals; a discount, as in consideration for something given in part exchange or to increase business; rebate."

31. "Volume allowance" is tied to the representations made in the franchise agreement. Pet Valu represents that it has "substantial purchasing power" because it buys large volumes of products. If suppliers provide money or discounts to Pet Valu arising out of its voluminous purchases, Pet Valu promises to allocate this money to franchisees for the collective benefit of all franchisees. That is a summary of Pet Valu's obligations under the franchise agreement when its obligations are understood "in harmony with the rest of the contract and in light of its purpose and commercial context."[39]

32. Section 27(a) of the franchise agreement ties back to the recitals of the agreement too. Pet Valu promises that its collective purchasing activity is "to obtain lower prices for the benefit of all Pet Valu stores":

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[36] Plaintiff's motion record, February 13, 2012, p. 171.

[37] Plaintiff's motion record, February 13, 2012, p. 211.

[38] *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287.

[39] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 64.

> The Franchisee Acknowledges that the ability of [Pet Valu] to coordinate and consolidate buying activities and to obtain lower prices for the benefit of all Pet Valu stores by purchasing in larger quantities on a centralized basis is a fundamental component of the Pet Valu System.[40]

3. Pet Valu's Breach of its Obligation

33. Pet Valu breached the franchise agreement in this case by failing to allocate volume rebates to franchisees to "collectively and severally benefit the operation of Pet Valu stores." Instead, Pet Valu sought to maximize its profits on sales of supplies to franchisees, trying to price at or below the price charged by competing wholesalers, but always believing that it nevertheless had unfettered discretion to do whatever it wanted with volume allowances.[41]

(A) Pet Valu's contractual interpretation is incorrect

34. Contrary to the plain wording of the franchise agreement as a whole, Pet Valu claims that the franchise agreement does not require it to allocate volume allowances to franchisees.[42]

35. Pet Valu relies on a collateral document (an external franchise manual) which it argues gives it the power to do whatever it wants with volume allowances, and asserts it is imported into the contract by virtue of s. 22(f) of the franchise agreement which states that "volume allowances [...] shall be allocated all as more particularly set forth in the Pet Valu Franchise Business System.[43]

36. Pet Valu's argument is fundamentally flawed for at least six reasons. First, as discussed above, and as recognized by Justice Strathy, the contract cannot be fairly and accurately interpreted by taking a single provision out of context from the agreement as a whole and ignoring all of the provisions that

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40 Plaintiff's motion record, p. 214.

41 See above, paras. 5, 6, and infra, para. 6.

42 Paragraph 24 of its defence states: "In any event, Pet Valu denies that it is under any contractual or statutory obligation to generally pass on the alleged benefits of [Pet Valu's] purchasing power to the plaintiff."

43 Plaintiff's motion record, p. 211.

support the inference that the intent of the parties was that the franchisees would receive the benefit of the volume allowances.

37. Second, section 22(f) expresses an intention to ***distribute*** volume allowances to franchisees, ***not to withhold them***: "volume allowances […] shall be allocated all as more particularly set forth in the Pet Valu Franchise Business System."[44] The word "allocate" means "to distribute according to a plan; allot."[45] The concept of "distribute" means to give away; it is inconsistent with any notion of withholding.

38. Third, the critical passage in the manual relied on by Pet Valu does not come close to clearly explaining to franchisees that they are not entitled to volume allowances. To the contrary, the manual itself says that the direction is "***subject to the terms and conditions of respective franchise agreements***."[46] It therefore cannot override the repeated promises made in the franchise agreement that the benefit of volume allowances will be "allocated" to the franchisees.[47]

39. Fourth, Pet Valu's interpretation of section 22(f), giving it unlimited discretion to price as it sees fit, would render meaningless its explicit promises to "obtain lower prices for the benefit of all Pet Valu stores by purchasing in larger quantities," described as a "fundamental component" of the Pet Valu system. This is contrary to well-settled principles of contractual interpretation.[48]

40. Fifth, the language in the manual does not remove rights to volume allowances. The policy is

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44 *Ibid.* (emphasis added).

45 *American Heritage Dictionary of the English Language*, Houghton Mifflin Company, 4th ed. "allocate".

46 Affidavit of T. McNeely, sworn August 3, 2012 at para. 38 and Exhibit "C" thereto at p. 190.

47 See *B.G. Checo, supra*. See also in *Fairview Donut*, where Justice Strathy held that changes to the operating manual "are not permitted to amend the franchise agreement by taking away the franchisee's legal rights or imposing new obligations" (para. 435).

48 *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 (Court holding that it is a fundamental principle of contractual interpretation that a court should reject an interpretation of a contract that would render one of its terms ineffective).

described as only "interim."[49] It states that volume allowances "may be included or not included in the landing cost of specific products."[50] The policy itself is ambiguous, as it leaves open the possibility that volume allowances will indeed be included in the "landing cost." Also, there is no description of the timing, or what "specific products" may be involved.

41. Finally, the franchise agreement is a contract of adhesion. If Pet Valu planned on keeping an unfettered discretion to deal with volume allowances, it could have and should have stated this clearly and unambiguously in the contact it drafted. To the extent that there is ambiguity surrounding who gets the benefit of the volume allowance, it must inure to the benefit of the franchisees.

42. This principle is particularly applicable in this case because Pet Valu failed to disclose its policy regarding volume rebates, contrary to its obligation of good faith and fair dealing required by the *Wishart Act*. The *Wishart Act* contains a requirement for franchisors to provide a description of the franchisor's policy regarding volume rebates. Section 6 of the *Arthur Wishart Act* regulation states that the franchisor must include "a description of the franchisor's policy, if any, regarding volume rebates," *and* must also disclose "whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly."[51]

43. As described by Justice Strathy, "the statute does not prohibit the franchisor from receiving rebates, but it must disclose whether it receives them and, if so, whether it shares them."[52] Many other franchisors are able to clearly explain their policy regarding volume rebates.

44. In this case, the Pet Valu disclosure document only describes whether franchisees are entitled to receive volume rebates arising from the volume of purchases they make directly from Pet Valu, as

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[49] Affidavit of T. McNeely, sworn August 3, 2012 at para. 38 and Exhibit "C" thereto at p. 189.

[50] Affidavit of T. McNeely, sworn August 3, 2012 at para. 38 and Exhibit "C" thereto at p. 190.

[51] *Ontario Regulation 581/00*, s. 6(8).

[52] Certification reasons, para. 27.

opposed to its distributors. It states: "[Pet Valu] does not provide volume rebates to its franchisees in respect of purchases of Merchandise, Equipment or Operating Supplies from [Pet Valu]."[53] In this regard, Justice Strathy observed:

> [I]nterestingly, while the [sentence reproduced above] indicates that Pet Valu does not provide rebates to franchisees in respect of the franchisees' purchases from Pet Valu, it does not specifically mention that the prices negotiated by [Pet Valu] with its suppliers include Volume Rebates that are provided by those suppliers."[54]

45. At the same time, the disclosure document lauds the importance of Pet Valu's significant purchasing power, which enables it to obtain volume discounts from suppliers:

> [Pet Valu's wholly-owned subsidiary] Peton Distributors Inc. supplies the vast majority of the products sold by the Pet Valu franchised stores. By virtue of its significant purchasing power, Peton Distributors Inc. is able to take advantage of volume discounts offered by suppliers.[55]

46. By contrast, other franchisors clearly express the real information sought by the regulation, which is whether the franchisor receives volume rebates from suppliers, and whether franchisees are entitled to be paid these amounts. For example, in *Fairview Donut Inc. v. The TDL Group Corp.*,[56] 2012 ONSC 1252, Tim Horton's disclosure document stated:

> [Tim Horton's] receives rebates and other benefits from various suppliers as a result of the purchase of goods and services by [Tim Horton's] for its Licensees or for direct purchase by the Licensees from designated manufacturers. **Most rebates and other commissions or other benefits received by [Tim Horton's] are retained by it for its own benefit.**"[57]

47. Having failed to properly disclose its policy on volume rebates to franchisees in its disclosure document, any ambiguity in the franchise agreement regarding volume allowances should weigh decidedly in favour of the franchisees.

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53 Plaintiff's motion record, February 13, 2012, p. 266.

54 Certification reasons, para. 31.

55 Plaintiff's motion record, February 13, 2012, p. 254 (emphasis added).

56 2012 ONSC 1252.

57 *Ibid*. at para. 479. (emphasis added)

4. Pet Valu failed to Allocate Volume Allowances to Franchisees

48. In his certification decision, Justice Strathy described a process to assess volume allowances using a representative group of products. He held that "if Pet Valu has a contractual obligation to share these benefits with franchisees [...] and if it had used those benefits to maximize its profits as opposed to reducing the cost its franchisees pay for goods, then every single franchisee was at risk of loss as a result of Pet Valu's conduct."[58] He held that a "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."[59] 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. **If, on the contrary, entitlement was established, the result could well be applicable to all other rebates, subject only to an accounting**."[60]

49. Consistent with Justice Strathy's reasons, the parties agreed to a representative process in this case. Both parties seek summary judgment on the basis of the representative data. The plaintiff agrees with the statement in Mr. McNeely's affidavit that "the issue of Volume Rebates ought to be examined in two ways: (i) by examining a representative sampling of Pet Valu's supplier agreements; and (ii) **by analyzing how Pet Valu approached the pricing of a representative group of products sold to a representative franchisee (in this case, the Plaintiff)**."[61]

50. To these ends, Pet Valu produced costing information about the plaintiff's "top 100" purchases for every year in the class period. A sample of this chart, containing information for the representative plaintiff's "top 100" purchases for 2009, is included at Tab D of Pet Valu's factum.

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58 Certification reasons, para. 107.

59 Certification reasons, para. 109.

60 Certification reasons, para. 109 (emphasis added).

61 Affidavit of T. McNeely, sworn August 3, 2012, para. 47.

51. The plaintiff's basic theory of "volume allowances" is illustrated by this simple example derived from the evidentiary record:[62]

Pet Valu cost: $25.98	Competitor cost: $45.42
Pet Valu sells to franchisees for $44.90	Competitor sells to franchisees for $49.05

52. Using the above example, Pet Valu is able to purchase the product for $19.44 less than its smaller competitor ($45.42 - $25.98). The volume allowance is $19.44. As described above, rather than allocating this amount to the franchisee, Pet Valu's pricing policy seeks to maximize its profit, while pricing at or below the price offered by wholesalers. Pet Valu sells to a franchisee for $44.90, slightly below the competitor's price of $49.05 this example, Pet Valu's profit on the cost of goods is $18.92 ($44.90 - $25.98).

53. By contrast, if Pet Valu allocated the $19.44 volume allowance to franchisees, the following result would occur:

Pet Valu cost: $25.98	Competitor cost: $45.42
Pet Valu sells to franchisees for $29.61 [$49.05 - $19.44]	Competitor offers to sell for $49.05

54. In this example, Pet Valu's profit on the cost of goods is $3.63 ($29.61 - $25.98).

55. This example illustrates two principles:

(a) First, Pet Valu is indeed allowed to mark up the cost of products. It permissibly applies a markup in this example. However, Pet Valu is not allowed to mark up its products in a

[62] See p. 170 of Pet Valu's fourth supplementary cross-motion record, dated June 16, 2014.

way to "wipe out" the volume allowance that it is contractually required to allocate to franchisees.

(b) Pet Valu does not have an unlimited right to markup. Any markup must first take into account an allocation of Pet Valu's purchasing power benefit to franchisees.

(A) Pet Valu may mark up but it cannot wipe out the volume allowance in the process

56. Pet Valu's motion materials are replete with references to its right to mark up products. It argues that markups are totally irrelevant to the common issues and must be ignored because Justice Strathy declined to certify a common issue about markups. With respect, this argument is fallacious. As described above, the plaintiff does not dispute Pet Valu's right to mark up. However, Pet Valu cannot use its right to mark up to wipe out a franchisee's right to be allocated volume allowances. To the contrary, Pet Valu's mark up right must be read in conjunction with the class members' rights to volume allowances.

57. That is precisely what Justice Strathy held in connection with mark-ups of Pet Valu "private label" products, where Pet Valu has the right under the contract to mark up private label products up to 10%. Common issue 2(a) asks if Pet Valu breached its contractual duty by "charging **a mark-up** on private label products **without giving Class Members credit for their proportionate share of Volume Rebates in respect of such products**" (emphasis added).

58. While Justice Strathy rejected the plaintiff's argument on certification that Pet Valu had no right to charge any markup on products sold to franchisees,[63] he did not hold that Pet Valu had the right to apply unlimited markups to its costs of goods. Indeed, he expressly defined "volume rebates" broadly in the common issues to include "any direct or indirect discounts of the price at which goods are supplied to the Pet Valu system." Even Mr. McNeely states in his first affidavit that the common issues

[63] Certification reasons, para. 49.

in the action "simply boil down to the question of volume-related pricing, whether characterized as allowances, rebates or discounts, allegedly received by Pet Valu from its suppliers."[64]

59. Justice Strathy also held that "the more significant factor in the pricing is not the desire to make the goods available to franchisees at the lowest possible cost, but rather the desire by Pet Valu to maximize its own profits without making the price uncompetitive. **Since Pet Valu sets the price at which goods are sold to franchisees, it can determine whether all or any part of Volume Rebates are passed on to franchisees**."[65] That is the markup problem illustrated by the pricing examples. Pet Valu's right to mark up does not mean the plaintiffs have no entitlement to be paid volume allowances. The rights must be read in conjunction with each other.

60. The absurdity of Pet Valu's arguments is apparent when its contractual obligations are considered. Pet Valu's position is that it has an unlimited right to mark up products sold to franchisees, combined with its assertion that it has unfettered discretion to do whatever it wants with volume allowances, would give it unlimited discretion to price products to franchisees in any way it sees fit. That is a patently incorrect analysis of Pet Valu's obligations under the contract, ignoring and giving no meaning to the multiple, overlapping obligations to allocate Pet Valu's purchasing power to franchisees and to "obtain lower prices for the benefit of all Pet Valu stores."

(B) Franchisee gross profits from sale of goods remained flat while Pet Valu's gross profits more than tripled

61. The pricing example described above also illustrates that the price at which Pet Valu chooses to sell products to franchisees can result in wildly different allocations of profit regarding cost of goods. In the first example, Pet Valu's profit is $18.92. In the second example, Pet Valu's profit is $3.63.

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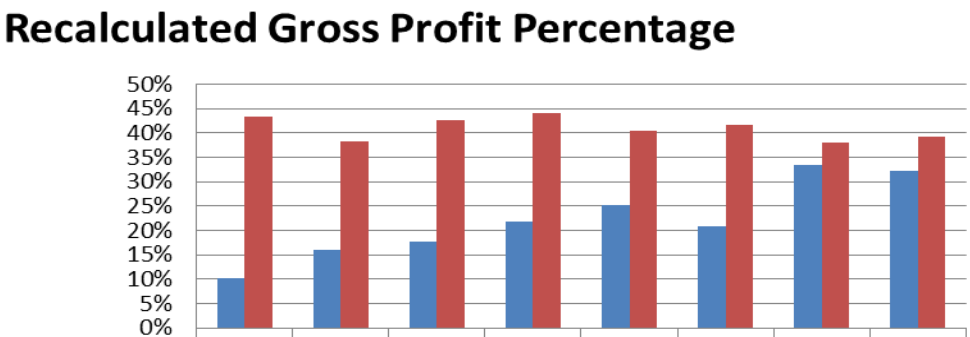
64 Affidavit of T. McNeely, sworn August 3, 2012, para. 3.

65 Certification reasons, para. 41 (emphasis added).

62. As described above, the undisputed evidence is that "cost of goods is of vital importance to franchisees."[66] Peter Davis's undisputed evidence is that "cost of goods was a critical aspect of my business's profitability. It was my biggest expense."[67]

63. During the class period, the representative plaintiff's gross profit percentage on the sale of "top 100" products from 2004-2011 remained relatively flat, ranging from 38.15% to 44.01%.[68] By contrast, Pet Valu's gross profit percentage realized on sales of products to the representative plaintiff increased from 10.22% in 2004 to 32.32% in 2011, **a 216% increase,** or a multiple of more than three.[69] The experts agree on these calculations.[70] Pet Valu's gross profits on the sale of goods increased year-over-year, while the plaintiff's remained steadily constant.[71] This trend is illustrated graphically below, with Pet Valu's profits represented by the blue bar, and the plaintiff's by the red:



	2004	2005	2006	2007	2008	2009	2010	2011
Recalculated Pet Valu Gross Profit Percentage	10.22%	16.08%	17.84%	21.83%	25.17%	20.96%	33.37%	32.32%
Recalculated Franchisee Gross Profit Percentage	43.26%	38.40%	42.58%	44.01%	40.46%	41.65%	38.15%	39.30%

66 Certification reasons, para. 72.

67 Affidavit of P. Davis, sworn July 21, 2014, para. 10.

68 Second Supplementary Motion Record of the plaintiff, dated September 11, 2014, p. 30.

69 *Ibid.*

70 There were numerous errors in the "top 100" datasheet initially produced by Pet Valu. In his first expert report, Mr. Soriano identified these errors. In response, Pet Valu produced a corrected datasheet. Based on the corrected datasheet, the parties' experts now agree on the gross profit percentage realized by the plaintiff's store and by Pet Valu. See expert report of E. Soriano, dated September 10, 2014; Plaintiff's Second Supplementary Motion Record.

71 *Ibid.*

(C) The plaintiff's Bosley's analysis

64. Determining the amount of "volume allowance" obtained by Pet Valu is, of necessity, a comparative exercise. If Pet Valu purchases a product for a low price, while a competitor with less buying power purchases a product for a higher price, the difference between the two represents Pet Valu's volume buying power. Pet Valu's pricing policy is likewise a comparative exercise, seeking to price products to franchisees by "keeping the price below the market price at which the same product is available from other wholesalers."[72]

65. Justice Strathy's certification reasons suggested a process by which the volume allowance analysis would proceed on the basis of a representative sample of products. The parties agreed to have the case decided summarily on this basis. The plaintiff's expert has used comparative data from Pet Valu's own records to show material differences between the cost structure of a smaller chain, compared to the much larger Pet Valu chain in order to determine the nature and extent of Pet Valu's volume allowances. In particular, in April 2010, Pet Valu acquired Bosley's Pet Food plus, a smaller, 23-store pet food chain and pet food and supply distributor in British Columbia.[73] Mr. McNeely deposed that "**this is a unique circumstance in which Pet Valu has limited insight into list price information offered by suppliers to another pet specialty distributor**."[74]

66. Pet Valu has prepared a comparison between the prices that the representative plaintiff was charged in 2009 for his "top 100" purchases and the prices charged for these same products by Bosley's. A redacted copy of the chart is attached as Tab "B." An unredacted version of the chart can

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72 Certification reasons, para. 40.

73 *Ibid.*, para. 31.

74 *Ibid.* (emphasis added).

be found at page 170 of Pet Valu's June 16, 2014 record.

67. Pet Valu relies on this comparison of "top 100" prices for 2009 in its cross-motion on summary judgment. Pet Valu argues the data shows that the representative plaintiff paid 9 percent less than it would have paid as a Bosley's franchisee for the same products in 2009.[75] However, like with Pet Valu's other expert reports, this misses the mark because it does not take into account the different prices that Pet Valu and Bosley were able to negotiate to purchase these supplies: crucial evidence to assess the amount of volume allowance.

68. The plaintiff's analysis compares these factors. It compares the costs that Pet Valu and Bosley's paid to purchase the products with the prices that Pet Valu and Bosley's offered to its franchisees. This analysis demonstrates that Pet Valu's product cost is $7,294.85 less than Bosley's cost for the same products,[76] yet Pet Valu charged prices to its franchisees that were only $4,792.71 less than the price that Bosley charged to its franchisees.[77] The net impact of this representative sample of products is that Pet Valu retained an incremental benefit compared to Bosley's totalling $2,502.14.[78]

69. Reducing Pet Valu's wholesale prices to eliminate the incremental gross profit amount of $2,502.14 results in reducing Pet Valu's gross profit percentage in 2009 for the "top 100" products from 19.0% to 14.6%.[79] If the same price adjustments are applied to the plaintiff's overall "top 100" purchases between 2004-2011, the net impact is that "Pet Valu's gross profit (on the sales of the top

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75 *Ibid.*, para. 32.

76 Expert report of E. Soriano dated July 21, 2014, para. 86 [Reply motion record of the plaintiff, Volume II of II, July 21, 2014, p. 268]; see also expert report of E. Soriano dated September 10, 2014, p. 1 [Second supplementary motion record of the plaintiff, September 11, 2014, p. 22].

77 Expert report of E. Soriano dated July 21, 2014, para. 87 [Reply motion record of the plaintiff, Volume II of II, July 21, 2014, p. 268]; see also expert report of E. Soriano dated September 10, 2014, p. 1 [Second supplementary motion record of the plaintiff, September 11, 2014, p. 22]

78 Expert report of E. Soriano dated July 21, 2014, para. 88 [Reply motion record of the plaintiff, Volume II of II, July 21, 2014, p. 268]; see also expert report of E. Soriano dated September 10, 2014, p. 1 [Second supplementary motion record of the plaintiff, September 11, 2014, p. 22]

79 Expert report of E. Soriano dated September 10, 2014, p. 22.

100 products sold to the [representative plaintiff's] store) would have been reduced by $106,788 and the [representative plaintiff's] gross profit would have increased by the same amount."[80] This is a 9.8% reduction to the cost that the representative plaintiff paid to purchase products from Pet Valu.[81]

70. The plaintiff's amended Notice of Motion dated August 15, 2014 particularizes its claim for aggregate damages based on a 9.8% reduction to the cost of goods:

> An award of aggregate damages to class members, representing at least an 9.8% reduction (or such other amount as may be specified by the plaintiff after production of relevant data by Pet Valu) to the Net Store Cost for each year (or portion of a year) during which the class member operated a Pet Valu franchise.[82]

71. The "top 100" purchases represent only a subset of the representative plaintiff's overall purchases.[83] Therefore, if the 9.8% reduction is applied to the total sales of the representative plaintiff between 2005-2009, the representative plaintiff would have earned $218,622 more in gross profit (and income).[84]

72. Pet Valu has not challenged the calculations of the plaintiff in arriving at the 9.8% result.

5. Pet Valu's Analysis of Volume Rebates is Flawed

73. Pet Valu's analysis of "volume rebates" is limited to a comparison between prices offered by wholesalers, on the one hand, to prices offered by Pet Valu to its franchisees, on the other. [85] Pet Valu argues that these comparisons show that "Pet Valu's prices to franchisees are lower than competing

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80 Expert report of E. Soriano dated September 10, 2014, p. 23.

81 Expert report of E. Soriano dated September 10, 2014, p. 23 ("Based on the analysis in Schedule 1, the overall, weighted average price adjustment is 9.8% (i.e. applied to the Net Store Cost) [...] Based on the premise that the "*Percentage Reduction to Net Store Cost*" for the Rodger Store (9.8% as noted above) is representative of the percentage applicable to other class members, each class member's total price reduction can be calculated if we are provided with the dollar value of that class member's total purchases from Pet Valu over the Class Period.")

82 Amended Notice of Motion for summary judgment, dated August 15, 2014.

83 Pet Valu has provided information that the "top 100" products accounted for only 31.1% of the representative plaintiff's total sales See answer to undertakings arising from the cross-examination of J. McAuley, dated September 22, 2014, at Schedule "A".

84 Expert report of E. Soriano dated September 10, 2014, p. 23.

85 Affidavit of T. McNeely, sworn June 16, 2014, para. 29.

distributors' prices"[86] and that there is no breach of contract.

74. Pet Valu's analysis is flawed because it ignores the issue of whether volume allowances are being properly distributed to its franchisees. The contract does not state that Pet Valu simply has to offer franchisees a lower price than competing distributors, no matter how small.[87] The contract requires Pet Valu to give franchisees the savings reaped from the volume allowances. Similarly, Pet Valu's expert evidence does not take into account the cost at which Pet Valu purchased the product – the fruits of Pet Valu's "substantial purchasing power" which franchisees contractually agree to enhance, giving rise to volume allowances.

75. Pet Valu criticisms of the plaintiff's Bosley analysis are hollow. While it asserts that it could not be expected to calculate volume allowances by reference to costing information that it did not know at the time, it ignores the fact that the parties have agreed to an analysis of a representative sample of products and agreed that the plaintiff's experience is representative of the class. The Bosley analysis may be imperfect but it is the best evidence available, in no small part because Pet Valu operated its system as if it had no such obligations to allocate volume allowances under the franchise agreement.

6. Irrelevant Issues Arising out of Pet Valu's Factum

(A) ***TDL* decision:** Pet Valu's factum is replete with issues that are irrelevant to the certified common issues. For example, Pet Valu repeatedly cites the *TDL* decision in its factum without any regard to the different contractual language in that case and this one. There was no promise to share volume allowances in *TDL*. There are many such promises in the Pet Valu franchise agreement.

76. Similarly, Pet Valu cites the *TDL* decision for the proposition 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

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[86] Pet Valu summary judgment factum, p. 13.

[87] See also analysis of "outside purchases," *infra*.

improper motive […] the balance between the franchisor's share of the profits and the franchisee's share is a matter to be determined in the marketplace." These quotations are from Justice Strathy's analysis of *Competition Act* claims made in that case. There are no such claims in this case.

(B) **"Cherry Picking"/"Private label" products:** Paragraph 72 of Pet Valu's factum states that the plaintiff should not "cherry pick" pricing of individual products. It also cites the *TDL* decision for the proposition that a franchisor does not have an obligation to price every product to ensure a profit is made. Equally, Pet Valu also states that the plaintiff cannot quantify "private label" volume rebates because these products are unique to Pet Valu and are not carried by other retailers.

77. This submission is a red herring because the plaintiff's analysis is not based on "cherry picking" at all. The plaintiff's damages claim is not based on a one-to-one comparison of product costs in every case, or a claim that it is entitled to make a profit on each and every product. Rather, consistent with the representative approach the parties agreed to in this case, and with the overall approach the court adopted in *TDL*, the plaintiff's approach is based on extrapolating results from the Bosley's analysis to the **overall** basket of goods sold by the representative plaintiff. This makes arguments about the alleged uniqueness of a particular sub-set of the overall basket of products irrelevant.[88]

(C) **Pet Valu's purchasing power:** Somewhat strangely, Pet Valu now states in its affidavit evidence and factum that "it is a fallacy to suggest that Pet Valu had substantial purchasing power in the North American market,"[89] even though the franchise agreement contains express representations by Pet Valu to the contrary which state that "**AND WHEREAS PCVI** has substantial purchasing

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[88] The plaintiff denies the alleged uniqueness of Pet Valu's private label products is relevant to the analysis of volume rebates. The cross-examination of Mr. McNeely clearly demonstrated that Pet Valu's current arrangements with one of its most important private label suppliers were premised on volume purchasing power. Pet Valu makes arrangements with a third party supplier to produce its dog and cat food products. This same third party supplier also supplies private label products to wholesale competitors of Pet Valu. See Cross-Examination of T. McNeely, August 21, 2014, Q. 837-841.

[89] Pet Valu factum, para. 41(d).

power in relation to products for resale, equipment, services, and operating supplies."[90] In addition, Pet Valu's arguments that it somehow did not have purchasing power are contradicted by the Bosley's analysis.

(D) Limitations: There is no basis for Pet Valu's limitation argument. It is not a certified common issue. It has not even been pleaded by Pet Valu in its Statement of Defence. In any event, Mr. McNeely acknowledged on cross-examination that Pet Valu has never disclosed the cost of its goods to franchisees.[91] Before this litigation, franchisees never had the opportunity to determine if they had suffered damages by Pet Valu's failure to pass on volume rebates. The underlying issue is discoverability. The plaintiffs could not have discovered the nature of damage before obtaining Pet Valu's costs. The plaintiff has also pleaded fraudulent concealment at paragraph 56 of its amended statement of claim, due to the good faith and special relationship existing between a franchisor and franchisee. These facts, together with Pet Valu's failure to disclose its policy regarding volume rebates, contrary to the *Wishart Act*, engage the doctrine of fraudulent concealment, as described by the Ontario Court of Appeal in *Halloran v. Sargeant*.[92]

(E) "Outside purchases": Pet Valu says franchisees were free to make purchases from other wholesalers (described as "outside purchases"), thus giving franchisees the freedom to choose to purchase products elsewhere if they are not pleased by Pet Valu's prices. This argument misses entirely the purpose for which franchisees bought into the Pet Valu system. Peter Davis's evidence was that:

> I joined the Pet Valu system to benefit from the system's collective purchasing power. I did not contemplate an arrangement where I would pay fees to Pet Valu, on the one hand, while sourcing product from outside distributors, on the other, thus receiving no collective purchasing power from Pet Valu. Otherwise, I may well have chosen to be an independent retailer, buying from outside distributors without having to pay royalties

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90 Plaintiff's motion record, February 13, 2012, p. 172.

91 Cross-Examination of T. McNeely, August 20, 2014, Q. 225.

92 2002 CanLII 45029 (ONCA).

> and other fees to Pet Valu.[93]

(F) **Releases:** Pet Valu submits that a significant number of former franchisees have signed comprehensive releases. There is no certified common issue regarding releases. In any event, Pet Valu acknowledges that the releases are legally ineffectual to result in a release of rights under the *Arthur Wishart Act*. Peter Davis's undisputed evidence was that he was told by the CEO of Pet Valu that "my rights in the class action would not be affected by the [release] because I could not forego my rights under the *Arthur Wishart Act*."[94] Pet Valu concedes that franchisees cannot waive rights under the *Wishart Act*, but argues that franchisees waived their common law contractual rights.[95] This argument is incorrect because it wrongly presumes that good faith and fair dealing obligations owed under the statute can be separated from the obligations under the contact. Justice Matheson rejected a similar argument in a franchise case,[96] concluding:

> Further, in considering the scheme of the *AWA*, it must be recognized that some of the rights found in the *AWA* are codifications of common law rights. **The suggestion that the general release should be read down to release only non-statutory rights invites considerable debate and confusion about the status of all overlapping claims**.[97]

7. Plaintiff's request for aggregate damages

78. Common issue #5 asks: "What is the aggregate amount of damages for the breaches of any of the duties referred to in common issues 1, 2 and 3 above [...]." Based on the Bosley's analysis, the plaintiff requests an award of aggregate damages to class members, representing at least an 9.8% reduction (or such other amount as may be specified by the plaintiff after production of relevant data by

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93 Affidavit of P. Davis, sworn July 21, 2014, para. 16.

94 *Ibid.*, para. 74.

95 Cross-Examination of T. McNeely, August 20, 2014, Q. 560 ("Q. MR. LECLERC: I mean, if Pet Valu's position in this litigation is that by signing these releases, they weren't giving up any rights under the class action. A. I never said that. MR. SHAW: The position is that the Arthur Wishart Act says what it says, but these releases are effective irrespective any aspect of any claim, class proceeding or not, that is based on claims unrelated to, or I shouldn't say unrelated to, that don't follow the Arthur Wishart Act. … MR. LECLERC: So there's been no waiver of any Arthur Wishart Act rights by class members in this case? MR. SHAW: We're not seeking that.)

96 *2176693 Ontario Ltd. v. Cora Franchise Group Inc.,* 2014 ONSC 600 at para. 23.

97 *Ibid.*, para. 23 (emphasis added).

Pet Valu) to the Net Store Cost for each year (or portion of a year) during which the class member operated a Pet Valu franchise.

79. In *Ramdath v. George Brown College,*[98] this Court observed that "aggregate damages should be more the norm, than the exception", and set out the following framework for analyzing whether aggregate damages should be granted in a particular case:

> The key to understanding aggregate damages is in understanding that the measurement criterion is not what's accurate but what's reasonable. In striking a balance between accuracy (or as the OLRC put it, "the risk of imposing liability upon the defendants for an amount that exceeds the injury actually inflicted") and access to justice ("the possibility of denying recovery to persons who have been injured") the legislature intentionally tilted the balance in favour of access to justice. Hence the focus in s. 24(1) on whether all or part of the defendant's monetary liability can *reasonably* be determined without proof by individual class members.
>
> The key issue, said the OLRC, is "the type of evidence that should be required before a court makes an aggregate assessment". And the answer is "not whether evidence is put forward in common or individual form, but rather whether the proof submitted is *sufficiently reliable* to permit a *just determination* of the defendant's liability."
>
> In my view, the overarching proposition can be re-stated as follows:
>
> The court may award aggregate damages under s. 24(1)(c) of the CPA if the evidence put forward by class counsel issufficiently reliable to permit a just determination of all or part of the defendant's monetary liability without proof by individual class members.
>
> In deciding whether aggregate damages should be awarded, that is, whether all or part of the defendant's monetary liability can reasonably be determined without proof by individual class members, the court should consider the following factors: the reliability of the non-individualized evidence that is being presented by the plaintiff; whether the use of this evidence will result in any unfairness or injustice to the defendant (for example, by overstating the defendant's liability); and whether the denial of an aggregate approach will result in "a wrong eluding an effective remedy" and thus a denial of access to justice.[99]

80. The plaintiff's request for aggregate damages meets these criteria. The evidence is support of the aggregate assessment is reliable because it is based on a valid methodology applied to objective and representative data. It is fair to the defendant because it is rooted in a procedural agreement between the plaintiff and defendant that provides that this case will be decided on the basis of the representative

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98 *Ramdath v. George Brown College*, 2014 ONSC 3066 (CanLII), para. 1

99 *Ibid*, paras. 44-47

plaintiff's data. [100] Conversely, the denial of aggregate damages in this case would frustrate access to justice because Pet Valu has failed to maintain records of the volume allowances that it obtained.

81. The plaintiff's request for aggregate damages satisfies the requirement in Section 24(c) of the *Class Proceedings Act* that "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". Given Pet Valu's agreement and insistence that the issues be determined both on the basis of a representative sample of products, and on the basis of the representative plaintiff's own purchases, unlike other cases, there is no legal impediment in this case to determining the liability of some or all class members.

82. Pet Valu's original Bosley's analysis only compared pricing for 2009. The plaintiff's expert extrapolated the 2009 results to available data for the class period because that was the only data the plaintiff had been provided. The plaintiff requested comparison data for other years of the class period, which was eventually produced by Pet Valu on October 1st. The plaintiff's remaining goal will be to compare available data for other years in the class period to obtain a more accurate evaluation of the Bosley's data. The plaintiff intends to provide this additional evidence at the return of its motion on October 29th. That is why the relief sought in the plaintiff's Amended Notice of Motion is described as representing "at least" a 9.8% reduction to the Net Store cost each year, "or such other amount as may be specified by the plaintiff after production of relevant data by Pet Valu." [101]

PART IV - CONCLUSION AND ORDER REQUESTED

83. The plaintiff's approach to contractual interpretation takes into account the language of the

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[100] Indeed, Pet Valu has consistently insisted that the merits of this dispute be decided on the basis of the representative plaintiff's data. See Pet Valu's Factum on the Production Motion dated March 7, 2014, paras. 5 and 41 ("By definition the plaintiff is held to be the representative of all class members…the plaintiff has sought to certify an issue regarding aggregate damages. As such, this request [by the plaintiffs for top 100 data for all class members] is antithetical to both the object of certifying a class and the aggregate damages common issue.")

[101] Amended Notice of Motion for summary judgment, dated August 15, 2014.

contract as a whole and the surrounding circumstances to provide powerful evidence that Pet Valu's bargain in the franchise agreement required Pet Valu to use its substantial purchasing power to collectively and severally benefit the operation of Pet Valu stores. By agreement of the parties, the issues in this class action are to be determined on the basis of a representative sample of products. Pet Valu sought to dismiss the class action on the basis of these samples but its analysis fails to take into account the critical cost component. The plaintiff's analysis is the only approach that takes these factors into account, and Pet Valu has not responded substantively to the plaintiff's expert analysis of the Bosley's data. It has failed to lead trump. Its cross-motion should be dismissed and judgment should be awarded in favour of the plaintiff, consistent with the Ontario Court of Appeal's decision in *King Lofts Toronto I Ltd. v. Emmons*.[102] The plaintiff requests judgment on the common issues and an award of aggregate damages to class members, representing at least an 9.8% reduction [...] to the Net Store Cost for each year (or portion of a year) during which the class member operated a Pet Valu franchise."

84. The plaintiff requests its costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 6, 2014

Louis Sokolov
Jean-Marc Leclerc
Shane P. Murphy

Of Counsel to the Plaintiff

[102] 2014 ONCA 215 (Court of Appeal agreeing that summary judgment motions judge had power to award summary judgment on a motion for summary judgment even if there is no cross-motion before the court).

SCHEDULE A – CERTIFIED COMMON ISSUES

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

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

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

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

3. Are all Class Members entitled to the benefits and protections of sections 3 and 4 of the Arthur Wishart Act (Franchise Disclosure) 2000, S.O. 2000, c. 3 (the "A.W.A.") by virtue of the choice of law provision in the Franchise Agreement?

4. Has the defendant breached the duty of fair dealing under section 3 of the A.W.A. by any of the conduct described in common issues 1 and 2 above, if so found?

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

6. What is the aggregate amount of damages for the breaches of any of the duties referred to in common issues 1, 2 and 4 above, or the aggregate amount of compensation for unjust enrichment, if so found?

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

   (i) whether the defendant or its affiliates receives Volume Rebates in respect of purchases which are made by the defendant or its affiliates for wholesale to the Class Members;
   (ii) the defendant's policy in respect of the allocation of Volume Rebates to Class Members and, in particular, whether the defendant complied with sections 22(e) and (f) and 23(c) of the Franchise Agreement;
   (iii) the amount of Volume Rebates received by the defendant or its affiliates during the Class Period;
   (iv) the amount of Volume Rebates retained by the defendant or its affiliates and the amount, if any, that was shared with Class Members;
   (v) the criteria that were used by the defendant to determine how much of the Volume Rebates were retained and how much, if any, were shared with the Class Members?

8. If the answer to common issue 7 is yes, is the plaintiff entitled to an order requiring the defendant to disclose such information forthwith and what damages, if any, is the defendant required to pay for the breach of such duty?

SCHEDULE B – CASES AND BOOKS CITED

1. *405341 Ontario Limited v. Midas Canada Inc.*, 2010 ONCA 478
2. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 287
3. *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2011 ONSC 1941
4. *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2014 ONSC 600
5. *6792341 Canada Inc v. Dollar It Ltd.* (2009), 95 O.R. (3d) 291 (ONCA)
6. *BG Checo Internationa. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12
7. *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 1252
8. *Halloran v. Sargeant*, 2002 CanLII 45029 (ONCA)
9. *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215
10. *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656
11. *O'Neill v. General Motors of Canada*, 2013 ONSC 4654
12. *Personal Service Coffee Corp. v. Beer et al.* (2005), 256 D.L.R. (4th) 466 (ONCA)
13. *Ramdath v. George Brown College*, 2014 ONSC 3066
14. *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53
15. *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673
16. *Shelanu Inc. v. Print Three Franchising Corporation*, 2003 CanLII 52151 (ONCA)
17. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4

SCHEDULE C – LEGISLATION

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.

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.

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.

Rights cannot be waived

11. Any purported waiver or release by a franchisee of a right given under this Act or of an obligation or requirement imposed on a franchisor or franchisor's associate by or under this Act is void.

Arthur Wishart Act regulations (General), O. Reg. 581/00

6. For the purposes of clause 5 (4) (a) of the Act, every disclosure document shall include the following presented together in one part of the document:

8. A description of the franchisor's policy, if any, regarding volume rebates, and whether or not the franchisor or the franchisor's associate receives a rebate, commission, payment or other benefit as a result of purchases of goods and services by a franchisee and, if so, whether rebates, commissions, payments or other benefits are shared with franchisees, either directly or indirectly.