Court File No. CV-09-378780-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

578115 ONTARIO INC. O/A MCKEE'S CARPET ZONE
and NAISMITH INC.

Plaintiffs

and

SEARS CANADA INC., SEARS, ROEBUCK AND CO. and HOME COVERINGS BUYING GROUP INC.

Defendants

A N D B E T W E E N:

SEARS CANADA INC.

Plaintiff by Counterclaim

and

578115 ONTARIO INC. O/A MCKEE'S CARPET ZONE

Defendant to the Counterclaim

Proceeding under the *Class Proceedings Act, 1992*, S.O. *1992*, c.6 as amended

FACTUM OF THE PLAINTIFFS

December 3, 2013

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FACTUM OF THE PLAINTIFFS
RE: SETTLEMENT AND FEE APPROVAL
(MOTION RETURNABLE DECEMBER 6, 2013)

PART I – NATURE OF MOTION

1. This motion seeks approval of settlement of this Action, approval of payment of Representative Plaintiff Compensation, and approval of fees and disbursements requested by Class Counsel.

PART II – OVERVIEW

2. In 1998, Sears entered into a Management Services Agreement with HCBG to establish a network of independent floor covering retailers to operate as SFCCs. HCBG recruited independent retailers who then entered into franchise agreements with Sears. HCBG identified possible suppliers of floor covering products which were then recommended to Sears to be approved suppliers to the SFCCs.

3. HCBG negotiated agreements with suppliers of floor covering products who became approved suppliers to the SFCCs. The agreements between HCBG and suppliers included provisions for various allowances and rebates to Sears/HCBG between approximately 8% and 12% of purchases made by the SFCCs.

4. Sears entered into franchise agreements with Class Members. McKee's was a franchisee from 1999 to 2007. Naismith was a franchisee from 2000 to 2012. The form of the franchise agreements for all SFCCs were essentially identical.

5. Sears, Roebuck and Co. was a party to the franchise agreements because it owns the Sears trademarks.

6. The Plaintiffs' complaint is that Class Members did not know they were receiving only part of the rebate paid by approved suppliers to Sears/HCBG. The Plaintiffs say that receipt of what they call a "secret rebate" from approved suppliers was a breach of the duty that Sears/HCBG owed to franchisees at common law, under the *Arthur Wishart Act* and Alberta *Franchises Act*. The Plaintiffs allege that Sears/HCBG were unjustly enriched through receipt of these allegedly secret payments.

7. Sears admits that the *Arthur Wishart Act*, and similar legislation in other provinces, applies to its relationship with SFCCs. Sears maintains, however, that it was exempt from the disclosure provisions of the *Arthur Wishart Act* and regulations because "the franchise agreement is not valid for longer than one year and does not involve the payment of a non-refundable franchise fee": see section 5(7)(g)(ii) of the *Arthur Wishart Act*.

8. Sears admits that it received rebates from approved suppliers that exceeded the 4% paid-out to SFCCs, but denies that this was a breach of any contractual, statutory or common law duties owed to franchisees.

9. Sears furthermore maintains that it did disclose supplier rebates to its franchisees in section 14.2 of the franchise agreements, which references "… suppliers with whom Sears or HCBG has confirmed acceptance of volume rebate programs".

10. Sears and HCBG maintain that the *Arthur Wishart Act* only requires that the franchisor's policy with respect to volume rebates be disclosed and that there is no requirement for disclosure of the specific details of the rebates being received.

PART III – FACTS

A) Background

11. This is a certified class proceeding which involves:

Class:

all individuals or entities in Canada who/which entered into a license agreement with Sears Canada Inc. and Sears Roebuck and Co. (together "Sears") for operation of a "Sears Floor Covering Centre", from 1998 to

> January 30, 2010, excluding the Alberta Sub-class and Alberta Sub-class Members ("Class" or "Class Members"); and
>
> **Alberta Sub-class:**
>
> all individuals or entities in Alberta who/which entered into a license agreement with Sears Canada Inc. and Sears, Roebuck and Co. (together "Sears") for operation of a "Sears Floor Covering Centre", from 1998 to January 30, 2010.

(For purposes of settlement and throughout these materials, the definition of "Class" or "Class Members" includes the Alberta Sub-class and Alberta Sub-class Members.)

12. A Settlement Agreement was entered into on December 2, 2013. Class Counsel have developed a Distribution Plan which sets-out the proposed distribution of the net Settlement Funds to Eligible Class Members.

B) Summary of the Settlement Agreement

13. Settlement Funds of $1,575,000.00 will be held in trust. Representative Plaintiff Compensation and Class Counsel Fees and disbursements will be paid from Settlement Funds, with the balance being distributed to Eligible Class Members, *pro-rata* in accordance with total rebates received through participation in the SFCC program.

C) Factors Considered/Litigation Risk

14. Class Counsel undertook considerable investigation in pursuing this litigation and assessing the merits of the Settlement. In agreeing to Settlement, Class Counsel considered the following:

(i) information provided by the Plaintiffs and other Class Members;

(ii) information publicly available concerning the SFCC program;

(iii) information obtained from the Defendants pursuant to court orders requiring production of information and documentation;

(iv) information provided by the Defendants by way of voluminous documentary disclosure;

(v) information provided by the Defendants during examination for discovery;

(vi) information provided by the Defendants during the course of settlement discussions; and,

(vii) significant legal research regarding the theories of liability and damages as against the Defendants.

15. Class Counsel considered the Settlement in light of the significant procedural and litigation risks including:

(i) the risk that no recovery would be possible from the Defendants;

(ii) the risk that the Plaintiffs would not prevail against the Defendants at a common issues trial;

(iii) the risk that a court would require individual damage assessments, making proof for individual Class Members extremely onerous; and,

(iv) even in the event that the Plaintiffs were successful at all phases of the litigation, the possibility that the Defendants could file appeals in respect of multiple issues,

thus resulting in considerable delay in obtaining compensation for Class Members.

D) Distribution and Administration of Settlement

16. The Distribution Plan was developed by Class Counsel, with the input of counsel for Sears, as a simple, straightforward and fair way of distributing Settlement Funds to Class Members.

17. The Distribution Plan provides that Eligible Class Members will receive a *pro-rata* share of net Settlement Funds based on the rebates received through participation in the SFCC program.

18. Class Counsel are proposing to serve as Administrator. Class Counsel will remain subject to the supervision of the Court.

E) Representative Plaintiff Compensation

19. A request is being made for Plaintiff compensation in the amount of $20,000.00 for McKee's and $10,000.00 for Naismith. This is the type of extraordinary case that warrants compensation for the Plaintiffs for their efforts.

20. Some Class Members have expressed support for Representative Plaintiff Compensation. No Class Member has objected.

F) Class Counsel Fees and Disbursements

21. Class Counsel are seeking approval of payment of their fees, disbursements and applicable taxes in the total amount of $525,000.00.

i) Risks Undertaken by Class Counsel

22. By agreeing to pursue this matter on a contingency fee basis, Class Counsel assumed the risk of the time and expense which would be required to litigate the matter to conclusion, including appeals. When negotiations were entered into, Class Counsel assumed the risk that negotiations would not succeed and the time spent and expense incurred in that process would be wasted and would be in addition to the time and expense required to prosecute the Action.

ii) Time and Expenses Incurred by Class Counsel

23. Significant time and money have been expended by Class Counsel in pursuing this litigation. As of November 27, 2013, Class Counsel have docketed time having a value of $798,600.00, plus applicable taxes; and has incurred disbursements of $56,888.52, plus applicable taxes.

24. Class Counsel have funded all disbursements associated with this matter and have not applied to the Class Proceedings Fund for assistance.

25. Considerable work remains to be done by Class Counsel. The future involvement of Class Counsel includes:

(i) preparing for and attending the settlement approval hearing;

(ii) responding to questions from Class Members regarding the Settlement Agreement and Distribution Plan;

(iii) following-up to ensure a fair and efficient administration of the Settlement Agreement and Distribution Plan working cooperatively and collaboratively with the Administrator; and,

(iv) further application to the Court for directions as might be required under the Settlement Agreement and Distribution Plan.

iii) Appropriateness of Class Counsel Fees Sought

26. Class Counsel are seeking approval of payment of legal costs of 33.33% ($525,000.00) of the $1,575,000.00 Settlement Fund, which includes disbursements and applicable taxes.

27. The Plaintiffs support Class Counsel's payment request.

28. Some Class Members have expressed support for Class Counsel Compensation. No Class Member has objected.

PART IV – ISSUES AND LAW

A) Settlement Approval

29. The Settlement Agreement and Distribution Plan are fair, reasonable and in the best interests of the Class, and ought to be approved. The Settlement Agreement and Distribution Plan achieve the goals of the *CPA*, and provide fair and reasonable benefits to members of the Class.

(i) General Principles

30. In *Nunes v. Air Transat A.T. Inc.*, Cullity J. summarized the principles to be applied on a motion for settlement approval[1]:

(i) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;

(ii) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

(iii) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;

(iv) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

(v) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give and take, and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests

[1] *Nunes v. Air Transat A.T. Inc.*, 2005 CarswellOnt 2503 (S.C.J.) at para. 7; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2005] O.J. No. 1118 (S.C.J.)

of those affected by it when compared to the alternative of the risks and costs obligation;

(vi) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or to simply rubber-stamp a proposal; and,

(vii) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

31. The standard to be applied in determining whether to approve a settlement is one of reasonableness, not perfection. To merit approval, a settlement need fall within a "zone of reasonableness". The basic test is that "the court must find that in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it[2].

32. In determining whether to approve a settlement, the court may consider the following factors:

(i) the presence of arm's-length bargaining and the absence of collusion;

(ii) the proposed settlement terms and conditions;

(iii) the number of objectors and nature of objections;

(iv) the amount and nature of discovery, evidence or investigation;

(v) the likelihood of recovery or likelihood of success;

(vi) the recommendations and experience of counsel;

(vii) the future expense and likely duration of litigation;

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[2] *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No.1598 at 13 (Gen. Div.); and (1998), 40 O.R. (3d) 429 at 440-444 (Gen. Div.); aff'd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372

(viii) information conveying to the court the dynamics of, and the positions taken by the parties during the negotiations;

(ix) the recommendation of neutral parties, if any; and,

(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation[3].

33. These factors should be a guide in the process, and no more. In a particular case, some factors will have greater significance than others and weight should be attributed accordingly.

34. The role of the court is not to rewrite or modify the terms of the settlement, but only to approve or reject it[4].

(ii) Arm's-Length Bargaining and the Presumption of Fairness

35. The Settlement Agreement was negotiated in good faith at arm's-length by experienced counsel on both sides. Settlement negotiations were ongoing for many months, and a mediation session was held.

36. There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval. In order to reject the terms of the settlement and deem that the litigation ought to continue,

[3] *Nunes v. Air Transat A.T. Inc*., *supra*, at paras. 6, 7; *Dabbs v. Sun Life Assurance Company of Canada, supra*; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 at paras. 71-73 (S.C.J.)
[4] *Dabbs v. Sun Life Assurance Company of Canada*, *supra.*

the court must conclude that the settlement falls outside of a range or zone of reasonableness[5].

(iii) Settlement Benefits

37. The court must be assured that a settlement secures an adequate advantage for the class in return for the surrender of litigation rights against the defendants. The function of the court in reviewing a settlement is not to reopen and enter into negotiations with the parties. The court can indicate areas of concern and afford the parties the opportunity to answer those concerns with changes to the settlement. However, the court's power to approve or reject settlements does not extend to modifying the terms of a negotiated settlement[6].

(iv) Monetary Benefits

38. The proposed settlement will result in reasonable monetary compensation for all Eligible Class Members. All Eligible Class Members will receive a payment from the Settlement Fund *pro-rata* based on rebates received through participation in the SFCC Program.

(v) Discovery, Evidence and Investigation

39. On a motion for settlement approval, the court need not possess the evidence required to decide the merits of the issue, because compromise is proposed in order to avoid further

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[5] *Dabbs v. Sun Life Assurance Company of Canada, supra.*

[6] *Newberg on Class Actions*, 3rd ed. (Shepard's/McGraw-Hill, 1992) s.11.46; *Dabbs* v. *Sun Life Assurance Co. of Canada, supra*; *Manual of Complex Litigation*, 3rd ed. (Federal Judicial Centre: West Publishing, 1995) at s. 30.42 at 240

litigation. Instead, the court need only possess sufficient information to raise its decision above mere conjecture[7].

40. While the court requires sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement[8]. In this case, discovery was complete when settlement was achieved, and the matter was ready for trial.

41. In situations where the litigation may continue if the settlement is not approved, the court must be mindful that there are constraints to which parties can be expected to make a full disclosure of the strengths and weaknesses of their case[9].

42. The Court has been provided sufficient information to permit it to exercise its function of independently assessing the fairness and reasonableness of the Settlement Agreement and Distribution Plan.

(vi) Recommendation of Counsel / Litigation Risks

43. The recommendation of experienced counsel should be given great weight. Class Counsel and defence counsel have a unique ability to assess the potential risks and rewards of the

[7] Newberg on Class Actions, 3rd ed. (Shepard's/McGraw-Hill, 1992) s.11.45 at pp. 11-100, 11-111; *Ontario New Home Warranty Program v. Chevron Chemical Co*. (1999), 46 O.R. (3d) 130 at 152 (S.C.J.)
[8] *Dabbs v. Sun Life Assurance Co. of Canada, supra,* at paras. 15 and 24
[9] *Dabbs v. Sun Life Assurance Co. of Canada, supra,* at para.16

litigation[10]. Counsel in this case have considerable experience in class proceedings and complex litigation matters generally.

44. The courts have recognized that the practical value of an expedited recovery is a significant factor for consideration. In addition to the legal and factual risks, a practical concern favouring settlement includes the potential that a case would take several years to reach trial and exhaust all appeals[11].

45. Although Class Counsel are of the view that the Action has merit, the outcome of a common issues trial which would be required in the event that the settlement is not approved, would be uncertain.

(vii) Distribution

46. The Distribution Plan is fair and reasonable. All Eligible Class Members will receive a *pro-rata* payment from Settlement Funds.

C) Views of Class Members/Objectors

47. In analyzing the fairness of a settlement, the role of the Court is independent of the presence or absence of objectors. The test remains the same. The court must be satisfied that the settlement is fair, reasonable and in the best interest of those affected by it, regardless of whether or not objectors participate in the approval hearing process.

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[10] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 440 (Gen. Div.); aff'd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372; Manual for Complex Litigation, 3rd ed. (Federal Judicial Center: West Publishing, 1995) s. 30.42 at p. 240

[11] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 at 441 (Gen. Div.); aff'd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372

48. The presence or absence of objectors does not relieve the proponents of the settlement of their burden to establish that the settlement is fair.

49. The presence of even a large number of objectors does not spell doom for the settlement. In *Stewart v. General Motors of Canada Ltd.*, Justice Cullity reviewed 106 objections to settlement and ultimately concluded that the objectors failed to recognize that a settlement is a compromise and that there would be risks, delays and great expense in continuing with the litigation. The objectors did not seem to understand that the court did not have the power to amend the settlement[12].

D) Role of Objectors

50. Objectors to a class action settlement may be granted leave to participate in the approval hearing motion under section 14 of the *CPA.*

51. Objectors granted leave to participate are not parties to the action and, accordingly, do not have rights of parties respecting such matters as oral discovery or production of documents. In this respect, the role of the objector is to reflect the non-adversarial settlement approval process.

52. On the other hand, the section provides a broad discretion to the Court to allow the objectors to participate, "in whatever manner and whatever terms… the court considers appropriate"[13].

[12] *Stewart v. General Motors of Canada Ltd.*, 2008 CarswellOnt 6590 (S.C.J.), at para. 29
[13] *CPA*, s.14

E) Representative Plaintiff Compensation

53. The Class Proceeding Contingency Fee Retainer Agreements executed by the Plaintiffs allow for the possibility of a Representative Plaintiff Compensation payment, if approved by the court:

> **McKee's**
>
> McKee's Carpet Zone (and any additional representative plaintiff(s)) acknowledge that he/she is not entitled to receive any payment or fee for acting as a representative plaintiff in the Class Proceeding. However, Courts have on occasion awarded a fee in favour of a representative plaintiff in recognition of the individual's time and expense incurred in the conduct of the proceeding and Scarfone Hawkins LLP will make its best efforts to seek similar compensation on behalf of the representative plaintiff(s) in this Class Proceeding if so instructed by the representative plaintiff(s);
>
> **Naismith**
>
> Naismith acknowledges that it is not entitled to receive any payment or fee for acting as a representative plaintiff in the Class Proceeding. However, Courts have on occasion awarded a fee in favour of a representative plaintiff in recognition of the individual's time and expense incurred in the conduct of the proceeding and Scarfone Hawkins LLP will make its best efforts to seek similar compensation on behalf of the representative plaintiffs in this Class Proceeding if so instructed by the representative plaintiffs;

54. A request is being made for Representative Plaintiff Compensation in the amount of $20,000.00 for McKee's and $10,000.00 for Naismith, which request includes reimbursement of significant out-of-pocket costs incurred.

55. Class Counsel submit that this is the type of extraordinary case that warrants compensation for the Plaintiffs for their efforts.

56. While the *CPA* makes no specific reference to compensation for the representative plaintiff, courts in the United States have made "incentive awards" to the class representatives.

57. In Canada such awards are justified in special circumstances[14]. In *Windisman,* the representative plaintiff was active at all stages of the action and was awarded $4,000.00 which was deducted from the fund recovered on behalf of the class. The court said that the representative plaintiff in undertaking the proceeding on behalf of a wider group benefitted the wider group by his effort and that if the representative plaintiff was not compensated in some way for time and effort, the class would be enriched at the expense of the representative plaintiff to the extent of that time and effort. Where the representative plaintiff can show that he or she rendered "active and necessary assistance" to the preparation of presentation of the case which resulted in monetary success for the class, the representative plaintiff may be compensated for the time spent.

58. Awards of representative plaintiff compensation should not be seen as routine, however, where plaintiffs have devoted time and effort communicating with other Class Members, acting as liaison with counsel and assisting counsel at all stages of the proceeding, an award is justified.[15]

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[14] *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen.Div.)
[15] *McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.), at para. 20; *Windisman v. Toronto College Park Ltd., supra*; *Sutterland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (S.C.J.); *Belaire v. Daya* [2007] O.J. No. 4819 (S.C.J.), at para. 71

59. Any proposed payment should be closely examined because it will result in the representative plaintiff receiving an amount that is in excess of what will be received by any other member of the class he or she has been appointed to represent[16].

60. Recognition was found for representative plaintiffs in *Garland v. Enbridge, McCutcheon v. Cash Store Inc.* and *Fakhri v. Alfalfa's Canada Inc*[17].

61. The quantum of representative plaintiff compensation should never be in an amount so large as to create the impression that the representative plaintiff was put into a conflict-of-interest. The appropriate quantum will vary on a case-by-case basis depending on factors such as the terms of settlement or award at issue and the personal circumstances of the representative plaintiff.

62. The British Columbia Court of Appeal has ruled that a modest award of compensation in favour of a representative plaintiff is consistent with restitutionary principles and *quantum meruit*, without demonstration that the representative plaintiff has performed services of special significance.[18]

63. Such an approach enhances access to justice in that representative plaintiffs can expect some reasonable compensation for their efforts, and not be soured by the process for being financially worse off afterwards for their efforts.

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[16] *McCutcheon v. Cash Store Inc.* [2008] O.J. No. 5241 (S.C.J.), at para. 12
[17] *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (S.C.J.); *Fakhri v. Alfalfa's Canada Inc.* [2005] B.C.J. No. 1723 (S.C.J.)
[18] *Parsons v. Coast Capital Savings Credit Union,* 2010 BCCA 311, [2010] B.C.J. No. 1184

64. The Court of Appeal has indicated that any compensation paid to the representative plaintiff should be paid out of the settlement fund and not out of class counsel's fee, to avoid concerns with respect to fee splitting[19].

65. In *Robinson v. Rochester Financial Limited*, Justice Strathy indicated that compensation for representative plaintiffs should be reserved to those cases where, considering all circumstances, the contribution of the plaintiff has been exceptional. He outlined factors for consideration which include:[20]

(i) active involvement in the initiation of the litigation and retainer of counsel;

(ii) exposure to a real risk of costs;

(iii) significant personal hardship or inconvenience in connection with the prosecution of the litigation;

(iv) time spent and activities undertaken in advancing the litigation;

(v) communication and interaction with other class members; and

(vi) participation at various stages in the litigation, including discovery, settlement negotiations and trial.

66. In this case, McKee's was actively involved in the initiation of the litigation and retention of counsel. It spearheaded efforts on behalf of a small group of franchisees.

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[19] *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, 106 OR (3d) 37 at paras. 135-136
[20] *Robinson v. Rochester Financial Limited*, 2012 ONSC 911 at para. 43

67. Both McKee's and Naismith were exposed to a real risk of costs. Class Counsel did not provide an indemnity in favour of either Plaintiff in this case. This factor ought to be given great weight.

68. McKee's and Naismith suffered personal hardship and inconvenience in taking time away from their respective businesses in connection with the prosecution of this litigation. Rob travelled from Alberta to Toronto for examinations for discovery and mediation. Paul travelled to Alberta in order to assist in securing Naismith as a representative plaintiff for the Alberta Sub-class, and to assist in gathering evidence in support of the case.

69. McKee's and Naismith were involved in significant communication and interaction with other Class Members.

70. McKee's and Naismith were actively engaged at every stage of the litigation, including pleadings, discovery, settlement negotiations and trial. Both attended examinations for discovery. Both attended mediation. Both had numerous discussions with Class Counsel regarding settlement, and both were actively involved in preparation for trial.

71. This is a situation where the representative plaintiffs have gone well above and beyond the call of duty, and have done far more than what is expected of them.

72. When this Action was commenced, there was enormous apathy of the Class with no other individuals being prepared to step-forward and serve as Plaintiffs, and no other individuals being prepared to contribute to any adverse costs award in favour of the Defendants.

73. Serving as Plaintiffs in this Action involved exposure of private, personal financial information. Most individuals would be extremely reluctant to publicly share their personal financial information as the Plaintiffs did.

74. The Plaintiffs each spent significant time assisting Class Counsel in prosecuting this Action on behalf of the Class. An award of compensation is appropriate, particularly the small amounts that are being suggested, when compared to the time spent by them.

75. Several Class Members have a greater individual stake in the outcome of this Action than the representative plaintiffs do. The franchisees with the most significant stake in the SFCC program ought to have agreed to step-forward and serve as representative plaintiffs, however, that did not happen.

76. Were it not for the efforts of McKee's and Naismith, no litigation would have been commenced and there would have been no recovery in favour of the Class.

77. Representative plaintiffs should not benefit from serving, however, they should not be worse-off either. If representative plaintiffs are financially disadvantaged as a result of agreeing to act in a class proceeding, that will significantly impact upon access to justice in a very negative way.

F) Class Counsel Compensation

(i) Approval of Retainer Agreement

78. The right of representative plaintiffs to enter into contingent fee arrangements with Class Counsel is recognized in the *CPA*[21].

79. Section 33 of the *CPA* recognizes that Class Counsel may enter into a contingency fee arrangement with a representative plaintiff. Section 32(2) provides that an agreement respecting fees and disbursements between counsel and the class representative is not enforceable unless approved by the court. The agreement must be in writing, must state the terms under which the fees and disbursements are to be paid and must give an estimated fee. It must also state the method by which payment is to be made, whether by lump sum, salary or otherwise. Where the court does not approve the agreement, it may nevertheless determine the amount of fees and disbursements owing to counsel.

80. An agreement respecting fees and disbursements shall be in writing and shall:

(i) state the terms under which fees and disbursements shall be paid;

(ii) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(iii) state the method by which payment is to be made, whether by lump sum, salary or otherwise[22].

81. The Class Proceeding Contingency Fee Retainer Agreements entered into with the Plaintiffs comply with the *CPA* and ought to be approved.

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[21] *CPA*, s.33.
[22] *CPA*, s.32(1).

82. The Class Proceeding Contingency Fee Retainer Agreements between Class Counsel and the Plaintiffs call for a contingent fee of 25% of the total value of the settlement available to the Class.

83. The Class Proceeding Contingency Fee Retainer Agreements meet the requirements of the *CPA.*

(ii) Fees in Class Proceedings Generally

84. The Court should resist the temptation to engage in armchair quarterbacking when assessing the value of Class Counsel's time. The total time spent on this matter, by Class Counsel and their team to date, is approximately 1,859.74 hours, having a face value of $798,600.00.

85. This is not a case in which everyone from the most senior partner to the most junior clerk was thrown at the file in order to pump-up the fee. None of the lawyers engaged in unnecessary or redundant work. Class Counsel conducted themselves efficiently throughout.

86. In the context of the *CPA,* a premium on fees is the reward for taking on meritorious but difficult matters. The courts have recognized that the objectives of the *CPA* - judicial economy, access to justice and behaviour modification – are dependent, in part, upon counsel's willingness to take on class proceedings, which, in turn, depends on the incentives available to counsel to assume the risks and accept the financial burden of carrying class proceedings[23].

[23] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., supra*, at paras. 59-61; *Parsons v. Canadian Red Cross Society, supra,* at 287; *Kranjcec v. Ontario* 2006 CarswellOnt 5535 (S.C.J.) at para. 24

87. In *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, the court recognized that class counsel take on significant risk in undertaking a class proceeding on a contingency basis and that it is important to reward successful lawyers for accepting this risk[24].

88. A contingent fee retainer in the range of 25-33% is very common in class proceedings, as it has been in other kinds of litigation in Ontario for many years. There have been a number of instances in recent years in which this court has approved fees that fall within that range. These include:

- *Abdul Rahim v. Air France*[25]: 30%
- *Ainslie v. Afexa Life Sciences Inc.*[26]: 19.4%
- *Robertson v. ProQuest LLC*[27]: 24%
- *Osmun v. Cadbury Adams Canada Inc.*[28]: 25%
- *Pichette v. Toronto Hydro*[29]: 28.5%
- *Robertson v. Thompson Canada Ltd.*[30]: 36%
- *Cassano v. Toronto Dominion Bank*[31]: 20%
- *Martin v. Barrett*[32]: 29%

89. Personal injury litigation has been conducted in Ontario for many years based on counsel receiving a contingent fee up to 33%. In such litigation, it is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. The fee serves

[24] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., supra,* at para. 60
[25] *Abdul Rahim v. Air France*, [2011] O.J. No. 326
[26] *Ainslie v. Afexa Life Sciences Inc.,* [2010] O.J. No. 3302
[27] *Robertson v. ProQuest LLC,* [2011] O.J. No. 2013
[28] *Osmun v. Cadbury Adams Canada Inc.,* [2010] O.J. No. 2093
[29] *Pichette v. Toronto Hydro*, [2010] O.J. No. 315
[30] *Robertson v. Thompson Canada Ltd*., [2009] O.J. No. 2650
[31] *Cassano v. Toronto Dominion Bank*, [2009], 98 O.R. (3d) 542
[32] *Martin v. Barrett*, [2009] O.J. No. 2015

as an inducement to counsel to maximize recovery for the client and is regarded as fair to the client because it is based upon the "no cure, no pay" principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings. The contingent fee is recognized as fair because the client is usually concerned only with the result and the lawyer gets well-paid for a good result[33].

90. The reality of class proceeding litigation is that defendants tend to be well resourced and represented by larger law firms.

91. As Justice Strathy observed in this Action, Class Counsel faced "…formidable and seasoned opposition in the form of Mr. Millar and Mr. Chapman…".[34] The Defendants' counsel are very experienced lawyers, charging substantial hourly rates, with significant resources and no incentive to roll over and play dead.

92. As is the case here, Class Counsel are frequently associated with smaller firms and are invariably engaged on a contingent basis. Defendants frequently employ a strategy of wearing down the opposition by motioning everything, appealing everything and settling nothing. If class proceedings are to realize the goal of access to justice, Class Counsel must be liberally compensated to ensure that they take on challenging but difficult cases such as this one[35].

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[33] *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, at para. 64
[34] *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc.,* 2010 ONSC 5673 at para. 16
[35] *Baker (Estate) v. Sony BMG Music (Canada) Inc., supra,* at para. 66

93. There must be economic incentive to encourage counsel to take on litigation of this kind and this is a factor to be considered in assessing the reasonableness of the fee[36].

94. If first-class lawyers cannot be assured that the courts will support their reasonable fee requests, how can the court and the public expect them to take on risky and expensive litigation that can go for years before there is a resolution[37]?

95. This is one area where the court should free itself from the chains of the hourly rate. The result achieved for the class should generally be the most important test of the value of counsel's services[38].

96. One should consider the proposed fee from the perspective of the class member, both prospectively and retrospectively. Had it been possible for class counsel and class members to discuss the issue from the outset, would the class have considered the fee arrangement reasonable? If so, in light of the ultimate resolution, does the fee remain reasonable?

97. The factors that have traditionally been considered in determining the fees of class counsel were summarized by Cumming J. in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*[39]:

(i) the factual and legal complexities of the matters dealt with;

(ii) the risk undertaken, including the risk that the matter might not be certified;

(iii) the degree of responsibility assumed by class counsel;

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[36] *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) (417) (C.A.); *Parsons v. Canadian Red Cross Society*, *supra*; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., supra*, at paras. 59-61
[37] *Baker (Estate) v. Sony BMG Music (Canada) Inc., supra*, at para. 67
[38] *Baker (Estate) v. Sony BMG Music (Canada) Inc., supra,* at para. 68
[39] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd. supra,* at para. 67

(iv) the monetary value of the matters in issue;

(v) the importance of the matter to the class;

(vi) the degree of skill and competence demonstrated by Class Counsel;

(vii) the result achieved;

(viii) the ability of the class to pay;

(ix) the expectations of the class as to the amount of the fee; and

(x) the opportunity cost to class counsel and the expenditure of time in pursuit of the litigation and settlement[40].

The weight to be given to a particular factor varies from case to case.

(iii) Factors to Consider in Assessing Class Counsel Fees

98. The Court's responsibility on this motion is to determine a fee that is "fair and reasonable" in all of the circumstances[41].

99. As outlined in section 33 of the *CPA*, the fee awarded must be fair and reasonable in light of the risk undertaken by class counsel and the manner in which class counsel conducted the proceeding[42].

100. The case of *Serwaczek v. Medical Engineering Corp.* identified the following factors as being relevant in the assessment of legal fees:

(i) the time expended by the solicitor;

(ii) the legal complexity of the matters to be dealt with;

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[40] See also *Endean v. Canadian Red Cross Society*, [2000] BCJ No. 1254 (S.C.); *Wamboldt v. Northstar Aerospace (Canada*), [2009] O.J. No. 2583 (S.C.J.), at para. *33; Smith Estate v. National Money Mart*, [2011] O.J. No. 1321, 2011 ONCA 233 (C.A.).
[41] *Parsons v. Canadian Red Cross Society (2000), supra*, at paras 13 and 56
[42] *CPA*,ss. 33(7), 33(9)

(iii) the degree of responsibility assumed by the solicitor;

(iv) the monetary value of the matters in issue;

(v) the importance of the matter to the client;

(vi) the degree of skill and competence demonstrated by the solicitor;

(vii) the results achieved;

(viii) the ability of the client to pay; and

(ix) the client's expectations as to the amount of the fee[43].

101. Other important factors are the time spent and the risks incurred by counsel, the agreement between counsel and the representative plaintiff and the level of fees awarded in other proceedings of a similar nature.

102. The matter was important to the Class. The monetary value of the matter was significant, with $1,575,000.00 in recovery being obtained.

103. The degree of responsibility assumed by Class Counsel was also significant, in light of the size of the Class and the amount at issue. Class Counsel was ultimately responsible and accountable for the prosecution of the litigation.

104. The factual and legal complexities of the matter were significant. The issues in the Action were unique and required thorough investigation.

105. This Action asserts a novel claim. There is no specific law on many of the points in issue, in particular the nature and extent of disclosure required to be made to franchisees, and

[43] *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada* (1998), 40 O.R. (3d) 83 at 88 (Gen. Div.); *Serwaczek v. Medical Engineering Corp*. (1996), 3 C.P.C. (4th) 386 at 393 (Gen. Div.)

whether it is sufficient for the franchisor to disclose the fact of rebates but not the particulars of rebates being received from suppliers.

106. Sears and HCBG vigorously defended the proceeding and strenuously advanced the following arguments on issues of liability:

(i) all franchise agreements entered into were in compliance with the *Arthur Wishart Act* in Ontario and all applicable law in other provinces;

(ii) Class Members outside Ontario could not rely on the *Arthur Wishart Act* with respect to a pre-contractual duty of disclosure;

(iii) there was no pre-contractual duty of good faith with respect to any Class Members whether located in Ontario or outside Ontario;

(iv) any duty to disclose contained in the *Arthur Wishart Act* applied only to franchise agreements entered into after January 31, 2001;

(v) all franchise agreements entered into between Sears and franchisees disclosed the fact of volume rebate programs and that there was and is no legal obligation to provide particulars of the rebates being received;

(vi) all SFCC franchisees received significant benefits from the payments by approved suppliers under the SFCC program;

(vii) all franchisees were fully aware that Sears/HCBG were receiving volume rebates from approved suppliers as same was customary in the industry;

(viii) several SFCC franchisees reviewed the supplier rebate payment agreements with HCBG at the invitation of HCBG;

(ix) all SFCC franchisees knew or reasonably ought to have known that approved suppliers were paying volume rebates to Sears/HCBG;

(x) there was no breach of the franchise agreement, nor any implied term that Sears/HCBG would disclose details of all volume rebates to franchisees;

(xi) there was no breach of duty as alleged by the Plaintiffs;

(xii) that Sears/HCBG met the requirements of disclosure applicable to them under the *Arthur Wishart Act* and the Alberta *Francises Act*;

(xiii) Sears and HCBG were exempt from the disclosure requirements of section 5 of the *Arthur Wishart Act*, by virtue of section 5(7)(g)(ii) of the Act;

(xiv) that neither the common law duty nor the statutory duty of good faith and fair dealing set-out in section 3 of the *Arthur Wishart Act* and section 7 of the Alberta *Franchises Act* requires the specific disclosure of commissions, rebates or other beneficial payments;

(xv) that there was no unjust enrichment of Sears or HCBG as monies received by Sears and HCBG were used by them to operate the SFCC program and to provide benefits to all Class Members including McKee's and Naismith;

(xvi) that no Class Member suffered deprivation;

(xvii) that the claims of the Class were barred by *laches* and delay in addition to the expiry of applicable limitation periods; and

(xviii) all franchise agreements entered into between Sears and franchisees contained "entire agreement" and "no representations" provisions in favour of Sears/HCBG.

107. Sears/HCBG also vigorously defended on the basis of no causation and damages, and alleged that Class Members were contributorily negligent. HCBG cross-claimed against Sears.

108. At mediation, Sears/HCBG advanced that Class Members ought to receive only a nominal amount through settlement, because:

(i) no Class Member could prove damage or loss;

(ii) no Class Member could prove that they would have pursued some different course-of-conduct had specific disclosure of the details of the volume rebate programs been provided to them. Indeed, Sears and HCBG maintained that had there been specific disclosure, all Class Members would have followed the same course-of-conduct;

(iii) Sears and HCBG were entitled to a discount in respect of all Class Members that were no longer in existence and, as such, ineligible to receive any portion of funds recovered by way of settlement or judgment; and

(iv) a substantial litigation risk discount must apply given live issues of liability.

109. Class Counsel developed and executed an aggressive strategy designed to bring this Action forward for certification and then through documentary and oral discovery. The credibility and efforts of Class Counsel brought the Defendants to the bargaining table and ultimately to settlement.

110. The risks undertaken by Class Counsel and the opportunity cost were sizable.

111. In this Action, the Court has been advised that the present actual rate of Sears' senior counsel, Mr. Millar, is $750.00 per hour. Ms. Seidenberg's (2008 call) present actual rate is $350.00 per hour. Ms. Sumakova's (2012 call) present actual rate is $225.00 per hour.

112. It is likely the case that Sears has paid fees significantly in excess of what will be paid to Class Counsel in the event that Class Counsel's compensation request is approved.

113. This was a difficult, hard-fought piece of litigation of which the outcome was by no means assured. This Court case-managed this Action for over three years, conducted a number of case conferences and presided over many motions and is familiar with the procedural and substantive challenges that exist.

114. The positions taken by the Defendants from time-to-time were highly adversarial and the positions were aggressively and effectively advanced. The settlement was certainly not a "cake-walk" for Class Counsel. It was hard work and the risk of failure of the resolution strategy was also present.

115. Class Counsel were insistent that if the matter was not resolved, the case would proceed to trial. This was not posturing. The satisfactory result in the Action was due to the preparedness of Class Counsel to go to the wall and to conduct a trial if a satisfactory

settlement could not be achieved. The resolve of Class Counsel was demonstrated to the Defendants throughout and resulted in a better and more effective settlement for the Class.

(iv) Class Counsel Remuneration Request

116. Class Counsel are requesting approval of their legal fees, disbursements, and taxes in the amount of $525,000.00, including disbursements and taxes. The amount requested represents 33.33% of the Settlement Fund available to Class Members. The net fee to be received by Class Counsel is approximately 26% of the value of the settlement as a whole.

(v) Litigation Risk Assumed by Counsel

117. The litigation risk assumed by counsel is materially related to the complexity of the proceedings. A more complex proceeding requires that class counsel invest more time and resources in pursuing the litigation:

> Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some consideration must also be given to the commitment of resources made by the Class Counsel and the impact that this will have in the event the litigation is unsuccessful[44].

115. The risks involved in pursuing the class litigation must be assessed as they existed when the litigation commenced, and as it continued. Risk cannot be assessed with the benefit of hindsight[45].

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[44] *Parsons v. Canadian Red Cross Society*, *supra*, at para, 293
[45] *Gagne v. Silcorp Ltd*., *supra.*

116. In addition to the traditional analysis which addresses litigation risk, the court has considered "certification risk" and "resolution strategy risk" as substantial factors to consider in assessing whether the proposed fees in a class proceeding are fair and reasonable[46].

117. As outlined above, Class Counsel assumed considerable substantive and procedural risks in undertaking this Action, including the risk of the Court refusing to certify the Action.

(vi) Results Achieved

118. One of the most important factors on a fee approval motion is the result achieved in relation to the amount at issue and the complexity of the case. Some assessment must be made of what the plaintiff was able to obtain, in relation to what the case was really "worth"[47].

119. The result achieved is a relevant consideration in assessing whether the fees sought by counsel are fair and reasonable[48].

(vii) Conduct of Proceeding by Class Counsel

120. In determining a fee award, the court may consider the manner in which counsel has conducted the proceeding. Class Counsel have conducted this Action in a manner that has resulted in significant savings for the Class. For example, the decision by Class

[46] *Parsons v. Canadian Red Cross Society*, *supra.*
[47] *Ainslie v. Afexa Life Sciences Inc.*, *supra.*
[48] *Parsons v. Canadian Red Cross Society*, *supra.*

Counsel to fund all disbursements and to not apply to the Class Proceedings Fund for assistance resulted in a substantial increased recovery for the Class[49].

121. Class Counsel has pursued the litigation efficiently and shared the responsibilities and costs as efficiently as possible in order to reduce the duplication of effort.

122. This Court determined that the claim for costs of the certification motion was "well within the boundaries of the amounts that have been awarded for contested certification motions in recent years", and that "the motion was conducted in an efficient manner".[50]

123. The "ask" of the Plaintiff for costs of the certification motion, inclusive of fees, disbursements and taxes, was $113,580.45. The award made by Justice Strathy was $105,000.00 being approximately 92.5% of the request.[51] This demonstrates the efficiency with which this Action has been prosecuted, and the fairness and reasonableness of Class Counsel's "ask" for compensation for the Action as a whole.

(viii) Proper Fee Compensation

124. Class Counsel fees may be determined through percentage-based calculation. A percentage fee arrangement promotes the policy objective of judicial economy in that it encourages efficiency in the litigation and discourages unnecessary work that might otherwise be done simply to increase the lawyer's base fee. In *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada*, the court addressed the benefits of a percentage-based fee arrangement:

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[49] *CPA*, s. 33(9)
[50] *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc.,* 2010 ONSC 5673 at paras. 12 and 13
[51] *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc., supra* at paras. 10 and 19

> A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending on the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted a seven to ten day trial. Fee arrangements that reward efficiency and results should not be discouraged[52].

125. Using a percentage-based calculation in determining class counsel fees "properly places the emphasis on the quality of representation, and the benefit conferred to the class[53].

126. In *Stone Paradise Inc. v. Bayer Inc. et al.,* the court recognized that there has recently been a shift in the academic community towards abandoning the lodestar and multiplier approach to class counsel fees in favour of percentage fees. Justice Rady cited, with approval, the following passage from "Rethinking the Approval of Class Counsel's fees in Ontario Class Actions" (prepared for the 2006 Class Actions Without Borders conference by Professor Benjamin Alarie):

> The first recommendation is to de-emphasize the use of the lodestar method of determining the compensation of class counsel. In most Ontario class actions, the retainer agreement between class counsel and representative plaintiffs provides for a contingency fee calculated on a percentage of the settlement or judgment. Unless a compelling case can be mounted for regarding this agreement as unsuitable, compensation at the rate agreed to by the representative plaintiff should be the court's starting point in deciding a "fair and reasonable fee." First resort should not be made to the base fee and multiplier method, because of the considerable incentives class counsel and defendants have for tacit collusion in allowing class

[52] *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada, supra,* at page 88
[53] *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd., supra,* at para. 107

> counsel's base fee to rise to a level conducive to settlement, and the inefficiencies this endangers. If this recommendation is taken up, and the percentage method (if agreed to by the representative plaintiff and class counsel) is specified in the retainer agreement, there are four specific concerns judges should consider. First, the court should examine whether there is any reason to think that the compensation provided for by the retainer agreement does not represent a fair and reasonable return to class counsel given what was known *ex ante* about the strength of the case, the costs of making the case, and the likelihood of success. This may be a difficult determination to make; nevertheless courts should strive to make accurate determinations in this regard. Second, the court should consider whether the settlement takes the form of coupons or in-kind benefits to class members. If so, the court should discount the judgment appropriately. Third, if there is a reversionary interest to the defendant of the settlement fund, then the court should consider allowing class counsel to recover the stated percentage only of the amount actually distributed to class members. Finally, the court should be attuned to the incentives class counsel have under the percentage method of premature settlement. If it appears that class counsel has settled too quickly for an amount grossly lower than what one might consider to be the value of the claims of the class members, then the lodestar method might be more appropriately used than the percentage method (assuming the percentage method is provided for in the retainer agreement)[54].

127. Class Counsel is seeking a contingency payment of 33.33% of the actual cash recovery. This request is in accordance with the terms of the Class Proceeding Contingency Fee Retainer Agreement entered into; and the fees awarded by courts in other class proceeding cases[55].

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[54] *Stone Paradise Inc. v. Bayer Inc. et al*., (19 April 2006), London 45604CP (S.C.J.) at para. 21; *CCWIPP v. Royal Group et al.*, (11 January 2008), London 965/06 (S.C.J.) at para. 13

[55] *799376 Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc.*, [2008] O.J. No. 5280 (S.C.J.); *Toevs v. Yorkton*, [2006] O.J. No. 538 (S.C.J.) at para. 6; *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.*, [2004] O.J. No. 908 (S.C.J.) at paras. 40-42.

128. In *Roveredo v. Bard Canada,* this Court approved a 30% contingency fee, in respect of a settlement of modest value, in the range of the settlement negotiated here. The requested contingency fee percentage here is less than the 30% approved in *Roveredo.*[56]

129. Regarding the "Information for the Profession" published by the Costs Sub-Committee of the Civil Rules Committees, those rates were published in 2005. They were to have been reviewed. That still has not occurred more than eight years later. The hourly rate suggestions are guidelines only. They ought not be blindly followed or applied, particularly given that they are eight years old and have not been renewed.[57]

130. It is submitted that the guidelines are disconnected from reality, particularly when this Court has recognized that some counsel in Toronto are billing at $1,000.00 an hour.[58]

131. Furthermore, the guidelines regarding maximum rates may properly not recognize the specialized and demanding nature of class proceeding cases.[59]

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[56] *Roveredo v. Bard Canada,* 2013 ONSC 6979
[57] *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc., supra* at para. 17
[58] *Sankar v. Bell Mobility,* 2013 ONSC 6886
[59] *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc., supra* at para. 17

PART V - ORDER REQUESTED

132. The Plaintiffs request an order declaring the Settlement Agreement and Distribution Plan to be fair, reasonable and in the best interests of the Class. An Order is also sought approving Representative Plaintiff Compensation, and approving payment of Class Counsel Fees, disbursements and taxes, as well as other incidental relief requested in the Notice of Motion.

RESPECTFULLY SUBMITTED December 3, 2013.

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SCHEDULE A
LIST OF AUTHORITIES

TAB	DESCRIPTION
1.	*Nunes v. Air Transat A.T. Inc*., 2005 CarswellOnt 2503 (S.C.J.)
2.	*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.)
3.	*Dabbs v. Sun Life, Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); aff'd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to S.C.C. denied [1998] S.C.C.A. No. 372
4.	*Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.)
5.	*Newberg on Class Actions*, 3rd ed. (Shepard's/McGraw-Hill, 1992)
6.	*Manual of Complex Litigation*, 3rd ed. (Federal Judicial Centre: West Publishing, 1995)
7.	*Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (S. C.J.)
8.	*Stewart v. General Motors of Canada Ltd.*, 2008 CarswellOnt 6590 (S.C.J.)
9.	*Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 (Gen.Div.)
10.	*McCarthy v. Canadian Red Cross Society* [2007] O.J. No. 2314 (S.C.J.)
11.	*Sutterland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (S.C.J.)
12.	*Belaire v. Daya* [2007] O.J. No. 4819 (S.C.J.)
13.	*McCutcheon v. Cash Store Inc.*, [2008] O.J. No. 5241 (S.C.J.)
14.	*Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.)
15.	*Fakhri v. Alfalfa's Canada Inc.* [2005] B.C.J. No. 1723 (S.C.J.)
16.	*Parsons v. Coast Capital Savings Credit Union*, 2010 BCCA 311, [2010] B.C.J. No. 1184
17.	*Smith Estate v. National Money Mart*, 2011 ONCA 233 (C.A.)
18.	*Robinson v. Rochester Financial Limited*, 2012 ONSC 911
19.	*Kranjcec v. Ontario* 2006 CarswellOnt 5535 (S.C.J.)

20. *Abdul Rahim v. Air France,* [2011] O.J. No. 326

21. *Ainslie v. Afexa Life Sciences Inc.*, [2010] O.J. No. 3302

22. *Robertson v. ProQuest LLC,* [2011] O.J. No. 2013

23. *Osmun v. Cadbury Adams Canada Inc.*, [2010] O.J. No. 2093

24. *Pichette v. Toronto Hydro*, [2010] O.J. No. 315

25. *Robertson v. Thompson Canada Ltd.*, [2009] O.J. No. 2650

26. *Cassano v. Toronto Dominion Bank*, [2009], 98 O.R. (3d) 542

27. *Martin v. Barrett,* [2009] O.J. No. 2015

28. *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105

29. *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc.,* 2010 ONSC 5673

30. *Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) (417) (C.A.)

31. *Endean v. Canadian Red Cross Society*, [2000] BCJ No. 1254 (S.C.);

32. *Wamboldt v. Northstar Aerospace (Canada)* [2009] O.J. No. 2583 (S.C.J.)

33. *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998),* 40 O.R. (3d) 83 (Gen. Div.)

34. *Serwaczek v. Medical Engineering Corp.* (1996), 3 C.P.C. (4th) 386 at 393 (Gen. Div.)

35. *Stone Paradise Inc. v. Bayer Inc. et al.,* (19 April 2006), London 45604CP (S.C.J.)

36. *CCWIPP v. Royal Group et al.,* (11 January 2008), London 965/06 (S.C.J.)

37. *799376 Ontario Inc. (c.o.b. Lonsdale Printing Services) (Trustee of) v. Cascades Fine Papers Group Inc.*, [2008] O.J. No. 5280 (S.C.J.)

38. *Toevs v. Yorkton*, [2006] O.J. No. 538 (S.C.J.)

39. *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.*, [2004] O.J. No. 908 (S.C.J.)

40. *Roveredo v. Bard Canada*, 2013 ONSC 6979

41. *Sankar v. Bell Mobility*, 2013 ONSC 6886

Schedule B
Text of Relevant Statutes, Regulations and By-laws

1. *Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 12*
2. *Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 14*
3. *Class Proceedings Act, 1992, S.O. 1992, c.6., s.32(1)*
4. *Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 33*

CLASS PROCEEDINGS ACT, 1992, S.O. 1992, C.6., S.12

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.

CLASS PROCEEDINGS ACT, 1992, S.O. 1992, C.6., S.14

Participation of class members

14.1 In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding. 1992, c. 6, s. 14 (1).

Idem

2.Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate. 1992, c. 6, s. 14 (2).

*CLASS PROCEEDINGS ACT, 1992, S.O. 1992, C.6., S.32***(1)**

Fees and disbursements

32.1 An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,

(a) state the terms under which fees and disbursements shall be paid;

(b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

(c) state the method by which payment is to be made, whether by lump sum, salary or otherwise. 1992, c. 6, s. 32 (1).

CLASS PROCEEDINGS ACT, 1992, S.O. 1992, C.6., S.33

Agreements for payment only in the event of success

33.1 Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

Interpretation: success in a proceeding

2.For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

Definitions

3.For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

4.An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

Motion to increase fee by a multiplier

5. A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

6.Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

7.On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

8.In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

Idem

9.In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

578115 ONTARIO INC. O/A MCKEE'S CARPET ZONE, et al. Plaintiffs	-and-	SEARS CANADA INC., et al. Defendants
SEARS CANADA INC. Plaintiff by Counterclaim	-and-	578115 ONTARIO INC. O/A MCKEE'S CARPET ZONE Defendant to the Counterclaim

Court File No. CV-09-378780-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE PLAINTIFFS
RE: SETTLEMENT AND FEE APPROVAL
(MOTION RETURNABLE DECEMBER 6, 2013)

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