**CITATION:** Drynan v. Bausch Health Companies Inc., 2021 ONSC 7423
**COURT FILE NO.:** CV-19-00632601-00CP
**DATE:** 20211110

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ROBERT DRYNAN, Plaintiff

**AND:**

BAUSCH HEALTH COMPANIES INC., BAUSCH HEALTH CANADA INC., VALEANT CANADA GP LIMITED, VALEANT CANADA LIMITED, VALEANT CANADA LP, Defendants

**BEFORE:** Justice Glustein

**COUNSEL:** *James Bunting, Sean R. Campbell, Carlos Sayao and Judith Manger*, for the plaintiff

*Randy Sutton, Kate Findlay, and Justine Smith*, for the defendants

**HEARD:** October 6, 7, and 8, 2021

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## REASONS FOR DECISION

## OVERVIEW

[1] The plaintiff, Robert Drynan (Drynan), brings a motion for an order certifying this action as a class proceeding pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*Act*").[1]

[2] COLD-FX® is a "natural health product" (NHP) sold, marketed, and distributed in Canada by the defendants Bausch Health Canada Inc. (Bausch Canada) and Valeant Canada LP.[2] All COLD-FX® products contain CVT-E002®, a proprietary extract derived from the roots of North American ginseng.

[3] In the years 2017 to 2019, sales of COLD-FX® products at national points of sale were almost $68 million, with more than 2.3 million units sold.

[4] COLD-FX® is sold in in two formats. COLD-FX® "Daily Support" is marketed as an NHP which "helps reduce the chance of catching cold and flu" and "helps reduce the Frequency, Severity and Duration of cold and flu Symptoms by Boosting the Immune System".[3]

[5] COLD-FX® "First Signs"® is marketed as an NHP which provides both an immune boosting effect and helps to relieve existing cold and flu symptoms if taken at the "first signs" of a cold or flu.

[6] The present case addresses representations made by the defendants that COLD-FX® products are "proven by science", "clinically proven", or contain "clinically proven ingredients" or have a "clinically proven formula", to help (i) reduce the frequency, duration, and severity of cold and flu symptoms and (ii) increase the proportion of natural killer cells and T-helper cells to boost the immune system (the Claimed Effects).

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[1] Given the numerous references in these reasons to both the *Class Proceedings Act, 1992* and the *Consumer Protection Act, 2002*, I use the defined terms of the "*Act*" for the *Class Proceedings Act, 1992* and use "*CPA*" as the defined term for the *Consumer Protection Act, 2002*.

[2] As I set out at paras. 19-22 below, I refer to Bausch Canada and Valeant Canada LP as the defendants, as there is no basis in fact, on the evidence for this motion, to establish that a common issue exists against the remaining defendants. The uncontested evidence on this motion is that the remaining defendants were not involved in the sale, marketing, or distribution of COLD-FX® products in Canada.

[3] In these reasons, all quotations with references in capitalized or block letters are as set out in the original text, unless otherwise noted.

[7] Drynan relies on expert evidence from Dr. Gordon Guyatt, who concluded that the Claimed Effects "fall far short of being scientifically proven" by the scientific data and studies. Dr. Guyatt concluded that:

(i) "scientifically proven" effects "would require high quality evidence in support" and;

(ii) the quality of the scientific evidence relied upon by the defendants to support that COLD-FX® provided the Claimed Effects was either "low" (for the claim that COLD-FX® reduces the frequency of cold and flu symptoms) or "very low" (for the claims that COLD-FX® reduces the duration or severity of cold and flu symptoms or increases the proportion of natural killer cells and T-helper cells), and as such did not meet the "scientifically proven" standard.

[8] Consequently, Drynan submits that the defendants have (i) made a false, misleading, deceptive or unconscionable representation and as such engaged in "unfair practices" under the *CPA* and equivalent provisions in other provincial consumer protection legislation (Equivalent Consumer Protection Legislation),[4] (ii) knowingly or recklessly made a false or misleading representation contrary to the *Competition Act*, R.S.C. 1985, c. C-34, and (iii) been unjustly enriched by their conduct.

[9] Drynan submits that all of the requirements under s. 5 of the *Act* have been met. In brief, he submits:

(i) The statement of claim discloses a cause of action for each of the claims under s. 5(1)(a);

(ii) There is an identifiable class under s. 5(1)(b). Drynan submits that the proposed class of all consumers in Canada who purchased COLD-FX® products between January 1, 2017 and the date the notice of certification is published is objectively defined, bounded, and rationally connected to the common issues;

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[4] Drynan pleads that Equivalent Consumer Protection Legislation is (i) *Consumer Protection Act*, R.S.A. 2000, c. C-26.3, (ii) *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2, (iii) *The Business Practices Act*, C.C.S.M., c. B120, (iv) *Consumer Protection Act*, C.Q.L.R. c. P-40.1, (v) *Business Practices Act*, R.S.P.E.I. 1988, c. B-7, (vi) *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1, (vii) *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, (viii) *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1, (ix) *Consumer Protection Act*, R.S.N.S. 1989, c. 92, (x) *Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17, (xi) *Consumer Protection Act*, R.S.N.W.T. 1988 (Nu) 1988, c. C-17, and (xii) *Consumer Protection Act*, R.S.Y. 2002, c. 40.

(iii) The claims raise common issues under s. 5(1)(c). Drynan submits that the issue of whether the defendants made a false or misleading representation by stating that COLD-FX® is "proven by science", "clinically proven", or has "clinically proven" ingredients or a "clinically proven formula" to help produce the Claimed Effects, is a significant issue that is common across the class and can be resolved on an objective class-wide basis;

(iv) A class proceeding is the preferable procedure under s. 5(1)(d). Drynan submits that the goals of access to justice, judicial economy, and behaviour modification are all promoted by a class action; and

(v) Drynan is an adequate representative plaintiff under s. 5(1)(e) because he (a) has a claim since he purchased COLD-FX® Daily Support after the defendants made the impugned misrepresentations, (b) understands and will execute his responsibilities in advancing the action in the best interests of the class, and (c) has put forward a workable litigation plan.

[10] The defendants oppose each requirement for certification. They raise 20 objections and submit that "[t]he proposed class proceeding is a monster of complexity" which "promises multifaceted and protracted litigation based on the varying forms of proposed misrepresentations; changes in advertising and packaging over the class period; multiple products with different ingredients; varying provincial legislative requirements; and unsupported assertions that there is a 'general impression' gleaned from labelling and advertising, irrespective of approval and oversight by Health Canada".

[11] In brief, the defendants submit that "the evidence before this Court demonstrates that this case is unsuitable and unworkable as a class action: it is too big to certify".

[12] In my reasons below, I address each of the defendants' objections. However, at its core, the defendants' submissions that a class action cannot be certified are based on (i) a factual premise that the representations are numerous and varied and (ii) a legal premise that reliance by each consumer is required to establish a cause of action. I reject both premises.

[13] First, the core representation is whether COLD-FX® was "proven" (i.e., scientifically and/or clinically) to help produce the Claimed Effects. That representation was made in numerous formats, but it is the core representation which gives rise to a cause of action.

[14] Second, reliance is not required to establish an unfair practice, false or misleading advertising, or unjust enrichment.

[15] Consequently, I accept Drynan's submissions as summarized at para. 9 above and find that he has met the requirements for certification under s. 5 of the *Act*.

**FACTS**

*The parties*

[16] Drynan lives in Toronto. On March 15, 2019, he purchased a package of COLD-FX® Daily Support (containing sixty 200 mg capsules) from a Shoppers Drug Mart in Toronto. He paid $29.99 plus HST.

[17] Drynan alleges that "[t]he Defendants function (or functioned) as a joint enterprise to manufacture, promote, market, and sell the COLD-FX[5] line of products in Ontario and throughout Canada. The specific nature and details of the legal, business, and financial relationships between the Defendants is known to the Defendants".

[18] However, Drynan led no evidence as to the "joint enterprise" alleged between the defendants.

[19] The defendants led uncontested evidence that:

(i) "During the class period, COLD-FX® products were initially owned by Valeant Canada LP"; and

(ii) "In December 2018, ownership of COLD-FX® products was wholly transferred from Valeant Canada LP to Bausch Canada".

[20] Consequently, the defendants' evidence is uncontested that "only Bausch Canada and Valeant Canada LP have been engaged in the sale, marketing or distribution of COLD-FX® to consumers in Canada during the class period".

[21] There is no basis in fact to support the existence of a common issue with respect to any of the defendants other than Valeant Canada LP or Bausch Canada. While Drynan may be able to amend his claim if he later becomes aware that any of the other defendants were involved in the sale, marketing or distribution of COLD-FX® during the class period, a mere allegation without evidence is not sufficient to meet the requirement in *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128, 149 O.R. (3d) 521 (Div. Ct.), at para. 33, for some evidentiary basis that the common issue exists.

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[5] In my reasons, I refer to COLD-FX® products with the "registered" trademark included, as was the format used by the defendants. References to COLD-FX® without the registered trademark or in lower case letters are cited in that format if they so appear on the particular documents or are cited from other sources, including the submissions of the parties or expert reports.

[22] Consequently, for the purposes of these reasons, any reference to the "defendants" includes only Valeant Canada LP and Bausch Canada. I do not certify the action against the remaining defendants.

*The COLD-FX® products*

[23] The COLD-FX® Daily Support product line is marketed to help reduce the chance of catching cold and flu throughout the cold and flu season and to decrease the frequency, severity, and duration of cold and flu symptoms, by boosting the immune system. Its only active ingredient is CVT-E002®.

[24] The COLD-FX® First Signs® product line is marketed to help alleviate symptoms of the cold and flu and to boost the immune system. It is intended to be used at the "first signs" of cold or flu to provide treatment for those symptoms. Its active ingredients vary depending on the product type, but always include CVT-E002® and andrographis. Other active ingredients include echinacea, zinc, vitamin C, valerian, ginger, and melatonin, depending on the Daytime or Nighttime variation.

*The representations*

The website representations

[25] Ms. Laura Shepherd (Shepherd), the Marketing Director, Consumer Health Products at Bausch Canada, agreed in her cross-examination that the COLD-FX® website[6] is a "key vehicle for communicating with consumers about COLD-FX products". In 2019, over 742,000 consumers landed on the COLD-FX® webpage, and that number has been increasing every year.

[26] When a consumer arrives at the "landing" (i.e., first) website page, the first statement is that COLD-FX® is "A NATURAL HEALTH PRODUCT, PROVEN BY SCIENCE".

[27] On the "FAQs" (frequently asked questions) page of the website, COLD-FX® answers the question "How is Cold-FX® Different From Other Ginseng Products That Are on the Market?" by stating that unlike "other ginseng products, which are mostly comprised of Asian ginseng, the active ingredient in COLD-FX®, CVT-E002®, is uniquely derived from the roots of North American ginseng … and it has been shown in laboratory and clinical studies to have the immune modulation effect".

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[6] In these reasons, I refer to the website in its current form, as accessed at https://cold-fx.ca. While the active website was not included in the motion records, Drynan relied on it at the hearing, and the defendants did not oppose its introduction into the record, provided that the court review all of the statements made on the website. I have done so and set out the relevant representations.

[28] A similar answer is provided to the FAQ "How Does Cold-FX® Work?", by stating that "A number of studies, including both laboratory experiments and clinical trials, have shown that COLD-FX® has an immune modulating effect which helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system".

[29] In response to the FAQ "Have clinical trials been conducted to support its efficacy and safety?", consumers are advised that "over six clinical trials have been carried out on COLD-FX®" and "COLD-FX® has been found to be effective in reducing the frequency, severity, and duration of cold and flu symptoms by boosting the immune system".

[30] In response to the FAQ "Is There Research to Support the Effectiveness of COLD-FX®?", consumers are advised that "[t]he science of COLD-FX® is backed by" (i) "10+ years of clinical research", (ii) "6 published randomized controlled trials", (iii) "18+ published articles studying the effects of CTV-E002®", and (iv) "1,600+ subjects enrolled in clinical studies with CVT-E002®".

[31] In response to the FAQ "Is COLD-FX a placebo?", consumers are advised that "No, COLD-FX is not a placebo. COLD-FX contains the active ingredient CVT-E002® … It's [*sic*] indication, to help reduce the Frequency, Severity and Duration of cold and flu symptoms by Boosting the Immune System is backed by 6 published clinical trials, 10+ years of clinical research, and 18+ published articles studying the active ingredient in COLD-FX".

[32] In explaining "HOW COLD-FX® WORKS", consumers are advised that "CVT-E002®, the active ingredient in COLD-FX®, has been demonstrated in clinical studies to increase the proportion of natural killer cells and T-helper cells. These cells play an important role in both the innate and adaptive immune response". COLD-FX® provides a footnote citation to one such study. In earlier versions of this website page, CVT-E002® was described as "the clinically proven medicinal ingredient in COLD-FX®".

[33] Consequently, the website includes at least seven examples of the core representation that it is "proven" ("by science", in "clinical trials", in "clinical studies", or by "research") that COLD-FX® products help to provide the Claimed Effects.

<u>Packaging representations</u>

[34] On its packaging, the COLD-FX® Daily Support products are described as having a "CLINICALLY PROVEN FORMULA" that (i) "helps reduce the chance of catching cold and flu" and (ii) "helps reduce the Frequency, Severity and Duration of cold and flu Symptoms by Boosting the Immune System". The only active ingredient in the COLD-FX® Daily Support products is CVT-E002®.

[35] On its packaging for the COLD-FX® First Signs® products, COLD-FX® has made representations including that the product (i) is "CLINICALLY PROVEN TO BOOST THE IMMUNE SYSTEM", (ii) contains "CLINICALLY PROVEN, NATURALLY SOURCED CVT-E002®", and (iii) has "CLINICALLY PROVEN INGREDIENTS".

Representations in other formats

[36] Similar representations are made in social media advertising, point-of-sale displays, and through on-line retailers.

[37] The representation that COLD-FX® was "A Natural Health Product, Proven by Science" was made on point-of-sale displays for the product at Costco locations.

[38] London Drugs repeated the "Proven by Science" and "CLINICALLY PROVEN FORMULA" representations in clinic or pharmacy magazines that serve as marketing vehicles to increase sales of COLD-FX®.

[39] The defendants also sell products online through Amazon.ca and Well.ca, which repeat and expand on the representations provided by the defendants despite being described, in the case of the Amazon.ca product page, as an Amazon "Editorial Review".

*The core representation applies to the Claimed Effects*

[40] Shepherd's evidence was that the representation "Proven by Science" was intended to refer to the defendants' claims that COLD-FX® would "help reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune systems".

[41] With respect to the "clinically proven" representation or the representation that COLD-FX® products either had a "CLINICALLY PROVEN FORMULA", "CLINICALLY PROVEN INGREDIENTS" or had been established as effective at "clinical trials", "clinical studies" or "random trials", Shepherd similarly acknowledged that the defendants intended the consumer to link that core representation to the Claimed Effects.

[42] Consequently, the core representation is that COLD-FX® products were "proven", by "science" or "clinically" to help provide the Claimed Effects.

*The Insight marketing study and changes to advertising*

[43] In early 2017, the defendants commissioned a "COLD FX USER DRIVERS AND BARRIERS REPORT" prepared for Shepherd by Insight and Innovation CMI (Insight),

[44] The "Background" section set out the defendants' concerns that revenues for COLD-FX® products were declining. Insight stated: "The COLD FX team is looking to reverse declines and grow the COLD FX / cough cold flu portfolio. Sales for the current cough cold season have

been disappointing, with declining year on year sales, particularly in the fall period, prior to the court decision on the efficacy class action suit".[7]

[45] The defendants asked Insight to conduct "a deep dive on brand user sentiment and barriers and drivers for both current and lapsed users" and identify "key barriers and drivers to COLD FX usage" … "to help reverse declines and grow the brand in the future".

[46] Insight conducted its study and concluded "THE NET IMPACT OF VARIOUS EFFICACY CONCERN STATEMENTS IS JUST AS IMPORTANT AS PRICE CONCERNS IN TERMS OF KEY BARRIERS TO USE".

[47] For lapsed users, Insight advised that "EVIDENCE THAT IT WORKS, HAS THE HIGHEST INFLUENCE ON PURCHASE".

[48] In her cross-examination, Shepherd acknowledged that the slogan "proven by science" was introduced in late 2017 "in part to address the concern that [the defendants] had identified among consumers regarding the efficacy of Cold-FX".

[49] Shepherd acknowledged that "proven by science" and "clinically proven formula" were "key messages used" in the period from 2017 to 2020.

*Health Canada approval and regulation of NHPs*

[50] NHPs cannot be sold in Canada without a product licence and assigned natural product number, provided by Health Canada only if the products are assessed and found to be safe, effective and of high quality under their recommended conditions of use.

[51] To obtain a product licence, applicants must submit a licensing application that includes specified information about medicinal ingredients, recommended use(s) and health claims, along with supporting evidence on the product's safety and efficacy for those recommended uses, which can include clinical studies, animal studies, and peer-reviewed published articles.

[52] In addition to its review of relevant clinical data, Health Canada also maintains product monographs for certain pre-cleared NHPs, upon which it relies when approving NHPs. Manufacturers that include these pre-cleared ingredients in their products can use the monographs to support health claims that correspond to the information in the monographs.

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[7] The reference is to the British Columbia decision in *Harrison v. Afexa Life Sciences Inc.*, 2016 BCSC 2123 (*Harrison* SC), aff'd on appeal 2018 BCCA 165, 9 B.C.L.R. (6th) 271 (*Harrison* CA), leave to appeal dismissed [2018] S.C.C.A. No. 264. The defendants frequently rely on the *Harrison* SC and *Harrison* CA decisions to oppose certification. I do not agree with those submissions, for the reasons I discuss below.

These monographs exist for certain ingredients contained in COLD-FX® products, including melatonin and zinc.

[53] Health Canada also regulates advertising and labelling of NHPs such as COLD-FX®. The Marketed Health Products Directorate reviews packaging and labelling, while advertising must be pre-cleared by a Health Canada approved agency before distribution.

[54] Ultimately, manufacturers of an NHP deemed effective for its approved claim(s) under its recommended terms of use are authorized to advertise the product under its recommended terms of use.

*Health Canada approval of certain claims made by the defendants*

[55] Health Canada approved the claims that COLD-FX® "helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system" and that COLD-FX® "is safe and effective for reducing symptoms associated with acute respiratory tract infections".

[56] Health Canada did not approve claims that COLD-FX® is "proven by science", is "clinically proven" to help provide the Claimed Effects for all ages, or that it has a "clinically proven formula" or contains "clinically proven ingredients".

[57] There is no reference to "proven by science" in the COLD-FX® product licence.

[58] The only reference in the product licence that COLD-FX® was "clinically proven" related to "individuals over 65", to "reduce the frequency, severity and duration of cold and flu symptoms … by boosting the immune system", and as being "efficacious against cold and flu symptoms".

[59] In her cross-examination, Dr. Heather Boon, an expert retained by the defendants on the Health Canada regulatory process, acknowledged that Health Canada could approve the claims it did without any evidence designed to test the efficacy of the COLD-FX® claims.

[60] Dr. Boon did not review the applications made to Health Canada in respect of the COLD-FX® products and did not know what evidence was submitted or not submitted by the defendants to Health Canada.

*CVT-E002® and other ingredients in COLD-FX® products*

[61] CVT-E002® is a proprietary extract derived from the roots of North American ginseng. It is the only active ingredient in COLD-FX® Daily Support.

[62] COLD-FX® First Signs® also contains CVT-E002®. However, no clinical trials have been conducted on the First Signs® line of products.

[63] COLD-FX First Signs® contains other natural ingredients such as zinc and echinacea but none of the Health Canada monographs for these ingredients authorize the claims "proven by science" or "clinically proven". There is no evidence before the court of any clinical studies for an ingredient other than CVT-E002®.

*Expert evidence of Dr. Guyatt on the quality of the clinical trials on the efficacy of COLD-FX®*

[64] Dr. Guyatt provided the only expert evidence on the quality of the clinical trials addressing the efficacy of COLD-FX® products to "reduce the frequency, severity and duration of cold and flu symptoms" or "increase the proportion of natural killer cells and T-helper cells".

[65] Dr. Guyatt is a medical doctor and Distinguished Professor in the Department of Medicine and the Department of Health Research Methods, Evidence and Impact at McMaster University. Dr. Guyatt has authored or co-authored ten textbooks and more than 1200 peer-reviewed academic articles.

[66] Dr. Guyatt is one of the founders of the field of evidence-based medicine, which involves assessing the quality of clinical trials and other scientific evidence to inform clinical decision-making. He has been closely involved in the development and evolution of the GRADE approach (Grading of Recommendations, Assessment, Development and Evaluation), recognized internationally as the leading method to assess the quality of scientific evidence.

[67] In forming his opinion, Dr. Guyatt reviewed the clinical studies on the efficacy of COLD-FX® products and identified a number of significant concerns, including risk of bias, inconsistent results of trials, insufficient participants, and the existence of unpublished trials with negative results.

[68] Dr. Guyatt also identified several additional flaws in the clinical studies. In particular, he found that:

(i) the studies were funded by the manufacturers of COLD-FX®; and

(ii) there was deceptive reporting of the results of certain studies (e.g., not reporting on the primary, but unfavourable, outcome of the study and instead reporting on a secondary outcome) and "cherry-picking" of data to support a favourable hypothesis.

[69] On cross examination, Dr. Guyatt testified that the authors of several of the clinical studies had presented their findings in a manner "bordering on professional misconduct".

[70] In summary, Dr. Guyatt came to the following conclusions regarding the evidence that COLD-FX® was scientifically proven to produce the Claimed Effects:

| COLD-FX Claimed Effect Assessed Using GRADE | Number of RCTs | Certainty/Quality of Evidence | Plain Language Summary |
|---|---|---|---|
| Reduces the frequency of cold and flu symptoms | 5 | LOW | COLD-FX may result in a decrease in the frequency of URTIs |
| Reduces the duration of cold and flu symptoms | 6 | VERY LOW | We are very uncertain regarding the effect of COLD-FX on duration of URTIs |
| Reduces the severity of cold and flu symptoms | 3 | VERY LOW | We are very uncertain regarding the effect of COLD-FX on the severity of URTIs |
| Increases the proportion of natural killer cells and T-helper cells | 1 | VERY LOW | We are very uncertain about the effects of COLD-FX in increasing the proportion of NK and T-helper cells |

[71] The defendants called no expert evidence to respond to any of the criticisms addressed in Dr. Guyatt's report. The defendants' expert on Health Canada approval, Dr. Boon, reviewed Dr. Guyatt's affidavit but acknowledged on cross-examination that, although she has expertise in assessing scientific evidence and clinical trials, she was not asked to respond to Dr. Guyatt's opinion.

[72] On cross examination, Shepherd acknowledged that she was not qualified to address Dr. Guyatt's criticisms, and despite attaching to her affidavit many of the clinical studies reviewed by Dr. Guyatt, was prevented by her counsel from answering questions regarding the reliability of those studies.

*Expert evidence of Peter Steger on methodologies for determining damages of the class on a common and/or aggregate basis*

[73] Mr. Steger is a Chartered Accountant/Chartered Professional Accountant, a Chartered Business Valuator and a Certified Fraud Examiner. He is a founding principal of a firm specializing in damages quantification, business valuation and forensic accounting and has practiced exclusively in those fields for 29 years. He has been retained as an expert witness in numerous court actions (including class actions) and domestic and international arbitrations involving the quantification of damages, in matters including pharmaceuticals, nutrition products, and other retail products.

[74] Mr. Steger was asked to provide an opinion "that identifies and describes a methodology or methodologies for determining damages during the Class Period on a common and/or aggregate basis", assuming that class members can recover damages assessed on:

(i) "the revenues received by the Defendants for the sale of Cold-FX products in the aggregate or on a product-by-product basis",

(ii) "the profit earned by the Defendants for the sale of Cold-FX products in the aggregate or on a product-by-product basis",

(iii) "the amount paid by consumers to purchase Cold-FX products in the aggregate or on a product-by-product basis", or

(iv) "the difference between the amount paid by consumers for Cold-FX products in the aggregate or on a product-by-product basis and the natural health product American Ginseng".

[75] Mr. Steger concluded that he would be able to calculate damages on an aggregate basis, without the need for individual evidence for each class member. The information he would require is either within the knowledge of the defendants or publicly available.

[76] His approach can be scaled or adjusted to accommodate additional considerations (such as any residual efficacy benefit achieved by the different COLD-FX® products).

[77] The defendants did not file any expert evidence disputing Mr. Steger's proposed methodology.

*Expert evidence relied upon by the defendants*

[78] Dr. Michael Mulvey, an expert in consumer behaviour, branding and retail marketing strategy, provided evidence that potential class members do not follow a single common path to purchase, do not rely on or form a general impression of labels, packaging or advertising to a common degree, and exhibit a wide variety of reasons for purchase that do not invoke the alleged misrepresentations, including for reasons unrelated to efficacy claims. Dr. Mulvey concluded that "a homogeneous class of COLD-FX® buyers does not exist".

[79] Dr. Boon provided expert evidence on Health Canada's approval and regulation of NHPs.

**ANALYSIS**

[80] The defendants submit that none of the certification requirements under the *Act* have been met. They raise 20 separate objections to certification. I first review the general principles governing certification. I then review each of the objections, grouped according to the certification requirements under s. 5 of the *Act*.

*General principles governing certification*

[81] In *Gilani v. BMO Investments Inc.*, 2021 ONSC 3589, leave to appeal refused 2021 ONSC 5906 (Div. Ct.), I summarized the general principles governing certification. I rely on the following analysis, at paras. 60-63:

> Section 5(1) of the *CPA*[8] provides that the court "shall" certify a class proceeding if the requirements under that section are met. The "legislative history of the [CPA] makes clear that the Act should be construed generously" and it is particularly important to keep that in mind at certification: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 14.
>
> At certification, the court should not consider whether a plaintiff's claims are likely to succeed, but rather whether the action meets the low threshold to proceed as a class proceeding. As McLachlin C.J. held in *Hollick*: "the certification stage is decidedly not meant to be a test of the merits of the action": at para. 16.
>
> The plaintiff only needs to establish that there is "some basis in fact" to show that the certification criteria (except for the cause of action requirement) are satisfied: *Hollick*, at para. 25.
>
> The governing principles were set out by Strathy J. (as he then was) in *578115 Ontario Inc. v. Sears Canada Inc.*, 2010 ONSC 4571, at para. 30:
>
> > (a) The *C.P.A.* is remedial and is to be given a generous, broad, liberal and purposive interpretation. The three goals of a class action regime, as recognized by the Ontario Law Reform Commission, *Report on Class Actions*, 3 vols. (Toronto: Ministry of the Attorney General, 1982) and by the Supreme Court of Canada are: judicial efficiency; improved access to the courts; and, behaviour modification, or the generation of "a sharper sense of obligation to the public by those whose actions affect large numbers of people": *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67 (S.C.C.) at para. 15; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report* (Toronto: The Committee, 1990) at 16-18 and 20; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at paras. 27-29.

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[8] References to the *CPA* in *Gilani* are to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

(b) The *C.P.A.* is entirely procedural. The certification stage is not meant to be a test of whether the plaintiff's claim will succeed. In the event that subsections (a) through (e) of s. 5(1) of the *C.P.A.* are satisfied, certification of the action by the court is mandatory: *C.P.A.* s. 5(1), *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948 at para. 39 (Gen. Div.).

(c) The *C.P.A.* provides the courts with a procedural tool to deal efficiently with cases involving large numbers of interested parties, as well as complex and often-intertwined legal issues, some of which are common and some of which are not: *Hollick v. Toronto (City)*, above, at paras. 14 and 15; *Bendall v. McGhan Medical Corp.*, above, at para. 40.

(d) Certification is a fluid, flexible procedural process. It is conditional, always subject to decertification. Certification is not a ruling on the merits. A certification order is not final. It is an interlocutory order, and it may be amended, varied or set aside at any time: *C.P.A.* ss. 5(5), 10(1) and 10(2); *Bendall v. McGhan Medical Corp.*, above, at para. 42; *Hollick v. Toronto (City)*, above, at para. 16; Ontario Attorney General's Advisory Committee on Class Action Reform, *Report*, above, at 30-33.

(e) The court has no discretion to refuse to certify a proceeding as a class proceeding solely on the ground that one or more of the following are present: (i) the relief claimed would require individual damage assessments; (ii) the relief claimed relates to separate contracts; (iii) there are different remedies sought for different class members; (iv) the number or identity of class members is not known; (v) the identified class includes a sub-class whose members have claims or defences that raise common issues not shared by all class members: *C.P.A.* s. 6; *Anderson v. Wilson* (1997), 32 O.R. (3d) 400, [1997] O.J. No. 548 at para. 18 (Gen. Div.); varied (1998), 37 O.R. (3d) 235, [1998] O.J. No. 671 (Div. Ct.); rev'd, certification order varied (1999), 44 O.R. (3d) 673, [1999] O.J. No. 2494, (C.A.), leave to appeal to S.C.C. dismissed, [1999] S.C.C.A. No. 476, 185 D.L.R. (4th) vii.

(f) The Ontario class proceeding regime does not require common questions of fact and law applicable to members of the class to predominate over any questions affecting only individual members. It furthermore does not require that the representative plaintiff be typical: *Hollick v. Toronto (City)*, above, at paras. 29 and 30; *Bendall v. McGhan Medical Corp.*, above, at para. 48;

> *Andersen v. St. Jude Medical Inc.* (2003), 67 O.R. (3d) 136, [2003] O.J. No. 3556 at para. 48 (S.C.J.).
>
> (g) In order to succeed on a certification motion, the plaintiff requires only a "minimum evidentiary basis for a certification order". It is necessary that the plaintiff "show some basis in fact" for each of the certification requirements, other than the requirement in s. 5(1)(a) that the claim discloses a cause of action: *Hollick v. Toronto (City)*, above, at paras. 22 and 25.
>
> (h) "*Some basis in fact*" is an elastic concept and its application is difficult. It is not a requirement to show that the action will probably or possibly succeed. It is not a requirement to show that a *prima facie* case has been made out. It is not a requirement to show that there is a genuine issue for trial: *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303, [2009] O.J. No. 1523 at para. 15 (S.C.J.). [Emphasis in original.]

*Section 5(1)(a) objections*

[82] The defendants submit that none of the claims discloses a cause of action. I first review the general principles applicable to s. 5(1)(a) objections and then consider the objections to each of the three causes of action relied upon by Drynan.

General principles governing the cause of action requirement under s. 5(1)(a)

[83] In *Gilani*, I also set out the applicable test under s. 5(1)(a) to determine whether the pleadings disclose a cause of action. I rely on my analysis at paras. 66-72:

> The test under s. 5(1)(a) is the same as on a motion to strike: the "plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed": *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 63.
>
> A claim should not be dismissed unless the court is satisfied "beyond reasonable doubt" that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at 980.
>
> The inquiry is into the legal adequacy of the causes of action pled, not the evidence for or against those causes of action: *Brozmanova v. Tarshis*, 2018 ONCA 523, at para. 25.
>
> "All allegations of fact pleaded are assumed to be true unless they are patently ridiculous, manifestly incapable of proof, or amount to bald conclusory statements

> unsupported by material facts": *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337, at para. 58(b).
>
> "The pleading must be read generously to allow for drafting deficiencies and the plaintiff's lack of access to key documents and discovery information. The court should err on the side of permitting an arguable claim to proceed to trial": *Wright*, at para. 58(d).
>
> No evidence is admissible: *Wright*, at para. 58(a). However, the court can assess documents incorporated by reference into the pleading in evaluating the legal tenability of the claim: *Das v. George Weston Limited*, 2018 ONCA 1053, at para. 74, leave to appeal ref'd [2019] S.C.C.A. No. 69.
>
> Consequently, the threshold for satisfying the cause of action requirement is "very low": *McLaren v. Stratford (City)*, [2005] O.J. No. 2288 (S.C.), at para. 21.

[84] In *Gilani*, I also reviewed the effect of the recent decision in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 on the test under s. 5(1)(a). I rely on my analysis at paras. 73-80:

> BMO Investments submits that the recent decision of the Supreme Court of Canada in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, constitutes a "culture shift" to the law on a pleadings motion. I do not agree.
>
> In *Atlantic Lottery*, the Court struck the waiver of tort claim brought by the respondent as an independent cause of action for disgorgement. The claim was novel, and the court reviewed the pleadings and law thoroughly to conclude that it was plain and obvious that such a claim could not succeed.
>
> BMO Investments relies on paras. 18 and 19 from the reasons of Brown J.:
>
> > [S]ince Microsoft was decided, this Court has recognized in *Hryniak v. Mauldin*, 014 SCC 7, [2014] 1 S.C.R. 87 the need for a culture shift to promote "timely and affordable access to the civil justice system" (para. 2). **Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial (paras. 24-25 and 32). This includes resolving questions of law by striking claims that have no reasonable chance of success** (S.G.A. Pitel and M.B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 Adv. Q. 344, at pp. 351-52). Indeed, **the power to strike hopeless claims is "a valuable housekeeping measure essential to effective and fair litigation**" (*Imperial Tobacco*, at para. 19).

> **Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial** (*Imperial Tobacco*, at para. 21; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 73; see also *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670). **That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial**" (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). **If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy** (see e.g. *Imperial Tobacco*; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps*; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261). [Emphasis added.]

I do not agree that the above paragraphs constitute a culture shift on motions to strike pleadings.

The court in *Atlantic Lottery* affirms the principles established throughout its jurisprudence (as the Court discusses at para. 19) that (i) a claim cannot be permitted to proceed merely because it is novel; (ii) a court may be able to resolve "complex issues of law and policy" based on the pleadings; and (iii) the court must review the existing law and the pleadings to determine whether a novel claim can proceed.

However, the "plain and obvious" test remains the same. In *Atlantic Lottery*, Brown J. stated that a court should not permit a claim to proceed "simply because it is novel" (at para. 19). Nevertheless, Brown J. maintained the test that a claim (novel or not) should not be struck unless it is "hopeless" (at para. 18), consistent with the settled test in *Hunt* and recently affirmed in *Wright*.

The court on a certification motion is not asked to determine whether the plaintiff will succeed on any particular claim. Instead, the court must only determine whether it is "plain and obvious", on the pleaded facts and applicable law, that the claim cannot succeed. Unless the court finds that the defendant meets that high

threshold, the merits of the pleaded cause of action are to be addressed at trial or, if applicable, on summary judgment.

Objections to the claim for damages under s. 18 of the *CPA* (Objections 1 to 4) [9]

[85] The defendants raise the following four objections, each of which they submit establishes that Drynan's claim under the *CPA* fails to disclose a cause of action:

(i) "The meaning" of the "actual advertising, marketing, and packaging of the COLD-FX® products… will vary in each consumer's mind: it is not a representation that can be answered on a common basis as true or false in the binary, as this is a matter of individual interpretation" (Objection 1);

(ii) In any event, the impugned representation that COLD-FX® products are proven by science or clinically proven to help provide the Claimed Effects is an "advertising pitch" that cannot support a claim under s. 18 (Objection 2);

(iii) Since consumers purchase COLD-FX® products from third parties, there is no privity of contract which is required to bring a s. 18 claim (Objection 3); and

(iv) There is no valid cause of action because Drynan did not give notice under s. 18(3) (Objection 4).

[86] In this section:

(i) I first review Drynan's *CPA* claim;

(ii) I then review the principle that reliance on a misrepresentation is not required for a consumer to have a cause of action under s. 18; and

(iii) I then review the four objections raised by the defendants with respect to the *CPA* claim.

(i) The *CPA* claim

[87] Drynan submits that the alleged core misrepresentation constituted an "unfair practice" under the *CPA* as a "false, misleading or deceptive representation" (under s. 14(1)), and as an "unconscionable representation" (under s. 15(1)).

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[9] All statutory references in this section are to the *CPA* unless otherwise stated.

[88] An unconscionable representation under the *CPA* includes a "statement of opinion" that the person making the representation knows or ought to know "is misleading and the consumer is likely to rely on it to his or her detriment" (s. 15(2)(g)).

[89] Unfair practices are prohibited under s. 17.

[90] Drynan seeks damages under s. 18, which provides:

> **Rescinding agreement**
>
> 18 (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.
>
> **Remedy if rescission not possible**
>
> (2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible,
>
> (a) because the return or restitution of the goods or services is no longer possible; or
>
> (b) because rescission would deprive a third party of a right in the subject-matter of the agreement that the third party has acquired in good faith and for value.

[91] Drynan submits that the court has a broad discretion to order "all common law damages" under s. 18(2): *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490, at para. 94.[10]

[92] Drynan seeks damages measured by either (i) the revenues received by the defendants for the sale of COLD-FX® products in the aggregate or on a product-by-product basis, (ii) the profit earned by the defendants for the sale of COLD-FX® products in the aggregate or on a product-by-product basis, (iii) the amount paid by consumers to purchase COLD-FX® products in the aggregate or on a product-by-product basis, or (iv) the difference between the amount paid by

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[10] There were two appellate decisions in *Ramdath*, the first cited at 2013 ONCA 468 (which I refer to as *Ramdath 1* in these reasons) and the second cited at 2015 ONCA 921 (which I refer to as *Ramdath 2* in these reasons).

consumers for COLD-FX® products in the aggregate or on a product-by-product basis and North American ginseng.

(ii) Reliance is not required to claim for damages under s. 18.

[93] In *Ramdath 1*, the court held, at para. 15:

> As to the reliance issue, we do not view the *CPA* as requiring proof of reliance in order to establish that there has been an unfair practice and that there is entitlement to a remedy under the Act. **Section 18(1) of the *CPA* clearly provides that a consumer who enters into an agreement "after or while a person has engaged in an unfair practice" is entitled to any remedy that is available in law, including damages. Proof of reliance is not a prerequisite.** [Emphasis added.]

[94] The court reaffirmed the above principle in *Ramdath 2*, emphasizing the importance of removing the reliance requirement so that liability for an unfair practice under the *CPA* can be certified as a class action. The court held, at paras. 86-90:

> The *Consumer Protection Act* came into force in 2005. It replaced the *Business Practices Act*, R.S.O. 1990, c. B.18, which was enacted in 1974. The latter Act also contained a remedy of rescission and damages for an unfair practice where a consumer entered into an agreement following a false, misleading or deceptive representation: ss. 2 and 4(1). Unlike under the *Consumer Protection Act*, the *Business Practices Act* remedy was only available where the consumer was induced to enter into the agreement by the misrepresentation.
>
> **That inducement requirement was removed from the new Act. A consumer who enters into an agreement following a misrepresentation is entitled to rescind the agreement and to claim damages with no inquiry into whether the consumer relied on the misrepresentation or was induced by it into entering into the agreement.**
>
> Reliance on a misrepresentation will not normally be a common issue in a class action, as it will depend on the individual history of each consumer …. **By removing any requirement for reliance or inducement, common issues that are determinative of whether there is liability for a *Consumer Protection Act* claim can be certified, as they were in this case.**
>
> The removal of the need for inducement or reliance is consistent with and facilitates the use of the *Consumer Protection Act* as a basis for class actions. Section 8 of the *Consumer Protection Act* specifically contemplates class proceedings in respect of a consumer agreement and proscribes the ability to opt out of that right. The Supreme Court of Canada has recently endorsed the use of class actions to achieve the goals of similar legislation in Quebec: see generally

> *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265 and *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 S.C.R. 725.
>
> … **[T]he necessary causal link is the link between the damages and the agreement, i.e. that the consumer suffered damages that flowed from entering into an agreement after or while an unfair practice was occurring. What is not required is a causal link between the actual unfair practice and the damages. That is because damages are payable regardless of reliance. To require the causal link suggested by GBC would reintroduce the need for reliance or inducement into the remedy for an unfair practice. It would therefore be wrong in law.** [Emphasis added.]

[95] The defendants do not submit any authority to challenge the settled proposition in the *Ramdath* cases.

(iii) Objection 1: The meaning of the alleged misrepresentations will "vary in each consumer's mind"

[96] The defendants submit that no claim can be brought under the *CPA* because "[t]he meaning" of the "actual advertising, marketing, and packaging of the COLD-FX® products… will vary in each consumer's mind: it is not a representation that can be answered on a common basis as true or false in the binary, as this is a matter of individual interpretation".

[97] I do not agree.

[98] It is settled law that the test for whether a representation is an unfair practice is based on an objective consumer, not on the interpretation that each individual consumer might apply. While Drynan and the defendants disagree on the specific objective test to apply, the law is settled that the test is, at a minimum, objective and based on the reasonable person.

[99] Drynan relies on the test as set out in *Richard v. Time Inc.*, 2012 SCC 8, [2012] 1 S.C.R. 265, at para. 72, in which the court applied the objective standard of the "credulous and inexperienced consumer" to determine whether an advertising claim was misleading.

[100] Drynan submits that a similar test was applied in *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2013 ONSC 5315, at paras. 123-31, and *Bell Canada v. Cogeco Cable Canada GP Inc.*, 2016 ONSC 6044, at para. 25, in which the courts held that an advertisement must be considered from the perspective of a credulous and technologically inexperienced consumer for the purposes of a claim under ss. 36 and 52 of the *Competition Act*.

[101] In *Matoni v. C.B.S. Interactive Multimedia Inc. (c.o.b. Canadian Business College*), [2008] O.J. No. 197 (S.C.), Hoy J. (as she then was) certified the proposed common issue (PCI) as to whether the representations constituted a false, misleading, or deceptive representation under the *CPA*. Hoy J. applied a "reasonable person" test, at para. 149:

> Whether the defendants have breached these provisions turns on whether they have made, "a false, misleading or deceptive representation". A failure, "to state a material fact if such failure deceives or tends to deceive" constitutes a false, misleading or deceptive representation. I believe that whether the failure to state a material fact tends to deceive can be determined objectively, by reference to what would be conveyed to a reasonable person.

[102] In *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (*Ramdath* SC), Strathy J. (as he then was) relied on the decision in *Matoni* and held that "the determination of whether a representation is false, misleading or deceptive can be made on an objective basis": at para. 108.

[103] The defendants did not agree that the test in *Richard* should be, or has been, accepted into Ontario law, submitting that it "is specific to the language in Québec consumer protection legislation".

[104] It is not necessary for the court on this certification motion to decide which objective standard would be used at a common issues trial to determine whether a representation was false and misleading. Regardless of whether the "reasonable person" or *Richard* test is used, there is no dispute that an objective standard is required. Consequently, the pleadings disclose a cause of action under s. 18.

[105] For the above reasons, I reject Objection 1.

(iv) Objection 2: The impugned representations are an "advertising pitch"

[106] The defendants submit that the impugned representation that COLD-FX® products are proven by science or clinically proven to help provide the Claimed Effects is an "advertising pitch" that cannot support a claim under s. 18.

[107] I do not agree.

[108] Drynan pleads that "Bausch [represents] to consumers that the efficacy of COLD-FX Products is both 'clinically proven' and 'Proven by Science'" but that "[t]he available scientific evidence does not, however, support Bausch's claims that COLD FX Products are 'Proven by Science' to prevent or cure colds and flu or provide the myriad other benefits identified by the Defendants in the Representations": at paras. 21 and 22 of the statement of claim.

[109] Drynan then pleads the alleged faults with the trials and pleads that those trials "fall well short of any meaningful, reliable or reproducible assurance that … the efficacy of COLD-FX Products is 'Proven by Science'": at paras. 24-26 of the statement of claim.

[110] Drynan pleads the particular representations at issue at paras. 34-46 of the statement of claim.

[111] Consequently, on the face of the pleading and accepting the allegations as true, I do not accept the defendants' submission that it is beyond doubt that Drynan has "created" representations "largely of the Plaintiff's own making [which] disregard the actual advertising, marketing, and packaging of the COLD-FX® products".

[112] In particular, based on the pleadings, I find that it is not settled law that the core representation, i.e., that COLD-FX® was scientifically "proven" to help consumers obtain the Claimed Effects, is an "advertising pitch", unlike the case in *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3692 (Div. Ct.) relied upon by the defendants.

[113] In *Williams*, the impugned statement was that the defendant's camera would allow the consumer to "always get your shot". In that case, the court held that the impugned slogan was an advertising pitch and not a representation: at paras. 209 and 211.

[114] In the present case, the pleaded misrepresentation that COLD-FX® products were "proven by science" or "clinically proven" to help produce the Claimed Effects is a statement which if proven to be false, can constitute an unfair practice.

[115] Drynan's claim under the *CPA* is similar to causes of action certified under the *CPA* for (i) misrepresented fuel consumption: *Rebuck v. Ford Motor Co.*, 2018 ONSC 7405, at para. 14, or (ii) misrepresented low fuel consumption and low emissions of a diesel engine: *Kalra v. Mercedes Benz Canada Inc.*, 2017 ONSC 3795, 15 C.E.L.R. (4th) 145, at para. 6.

[116] In both of those cases, the court certified the issue of unfair practices under the *CPA*: *Kalra*, at paras. 31-33; *Rebuck*, at paras. 29-37.

[117] For the above reasons, it is not settled law that the alleged misrepresentations are an advertising pitch. I reject Objection 2.

(v) Objection 3: Privity of contract is required for a claim under s. 18

(a) Positions of the parties and overview

[118] Drynan submits that it is not settled law that contractual privity is required for a consumer to seek damages under the *CPA* for an unfair or unconscionable practice arising out of false or misleading advertising. Drynan relies on:

(i) a statutory and purposive interpretation of the *CPA*, which Drynan submits supports a conclusion that contractual privity is not required;

(ii) the decision of the Court of Appeal in *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 113, which stated that such relief could be available; and

(ii) the decisions of the lower courts in *Kalra* and in *Rebuck*, in which similar claims for unfair practices under the *CPA* were certified against manufacturers who had no contractual privity with the consumer.

[119] The defendants rely on the decisions of Strathy J. in *Williams* (in which he affirmed his earlier conclusion in *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, at para. 85), as later adopted and as affirmed by the courts in *Richardson v. Samsung*, 2018 ONSC 6130 (*Richardson* SC), aff'd 2019 ONSC 6845 (*Richardson* Div. Ct.). On this basis, the defendants ask the court to find the law is settled that consumers who do not have a contractual relationship with the supplier cannot bring a claim for unfair practices under the *CPA*, and as such, there is no cause of action for the class because the defendants submit that they did not sell directly to consumers.

[120] For the reasons that follow, I do not agree that the law is settled. I first address the line of cases supporting the defendants' position and then consider the cases and principles supporting the plaintiff's position.

(b) The cases supporting the defendants' position

[121] In *Williams*, Strathy J. held that a claim for damages under s. 18 could be brought only by consumers who had entered a "consumer agreement", defined in the *CPA* as an agreement between a "supplier and a consumer" in which "the supplier agrees to supply goods or services for payment": at para. 206.

[122] Consequently, since consumers in *Williams* did not buy cameras directly from the defendant Canon Canada, Strathy J. held that there was no cause of action under s. 18: at para. 210.

[123] The approach taken by Strathy J. was consistent with his earlier analysis in *Singer*, at para. 85.

[124] The approach in *Singer* and *Williams* was followed in *Richardson* SC, at paras. 34-36, aff'd *Richardson* Div. Ct., at para. 11, in which the courts adopted the reasons of Justice Strathy.

[125] The courts in *Richardson* did not review the principles of statutory interpretation, the analysis in *Arora*, or the decisions in *Kalra* or *Rebuck*, all of which I discuss below.

(c) The cases and analysis supporting Drynan's position

[126] Drynan submits that the approach in *Williams*, requiring a consumer agreement before a consumer can seek damages or rescission under s. 18 for an unfair practice, is not settled law. Drynan relies on applicable principles of statutory interpretation (including interpretation of consumer protection legislation), the comments of the court in *Arora*, and the decisions in *Rebuck* and *Karla*. I address each of these submissions below.

1. Statutory interpretation principles

[127] Section 18 permits a consumer to rescind "any agreement" and seek a remedy against "a person" who has committed an unfair practice. It does not restrict the agreement to a "consumer agreement", nor restrict the person against whom a remedy is sought to a contracting party under a consumer agreement.

[128] I restate ss. 18(1) and (2) below, with emphasis on the statutory language relied upon by Drynan:

> **Rescinding agreement**
>
> 18 (1) **Any agreement**, whether written, oral or implied, entered into by a consumer after or while **a person** has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages.
>
> **Remedy if rescission not possible**
>
> (2) A consumer is entitled to recover the amount by which the consumer's payment under **the agreement** exceeds the value that the goods or services have to the consumer or to recover damages… [Emphasis added.]

[129] Drynan submits that under the ordinary and grammatical reading, s. 18(1) applies to "any agreement" entered into by a consumer, not just a "consumer agreement". Moreover, the *CPA* states at s. 19 that Part III (which contains the "unfair practices" provisions) "applies to consumer transactions", broadly defined to mean "any act or instance of conducting business or other dealings with a consumer".

[130] In contrast, "consumer agreement", a defined term in the *CPA*, is used elsewhere in the *CPA* to refer specifically to an agreement between a consumer and a supplier of a good or service. Drynan relies on the settled principle that when the legislature uses different words in a statute, a different meaning must have been intended: *Godbout v. Pagé*, 2017 SCC 18, [2017] 1 S.C.R. 283, at para. 115.

[131] Drynan further submits that the use of "person" in s. 18 imposes no requirement for contractual privity between a consumer and the party that engaged in the unfair practice. Section 18(1) states, "[a]ny agreement… entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded…".

[132] Drynan submits that had the legislature intended "person" to be limited to a party to a consumer agreement, it could have made this clear in the language of s. 18(1).

[133] In *Kalra*, Belobaba J. adopted a similar interpretation and held that representations by the manufacturer that the vehicles provided a "clean and green" diesel option that has low fuel consumption and low emissions could be addressed by a claim under s. 18. Belobaba J. noted the

distinction in s. 18(1), commenting: "Note the word 'person' is used rather than 'contracting party'": at para. 31.

[134] Further, s. 64(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, provides that legislation should be interpreted broadly and in a manner that furthers its objectives.

[135] It is settled law that consumer protection laws are to be interpreted generously in favour of consumers: *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867, at paras. 132-36.

[136] Drynan submits that a broad and remedial interpretation supports the conclusion that s. 18 captures misleading representations made to consumers in circumstances where there is no direct contractual privity. Drynan submits that finding otherwise would:

(i) permit a manufacturer (as a "supplier" who sells goods to retailers) to make misrepresentations directly to consumers, including gross misrepresentations about a product's attributes, without liability under consumer protection legislation, while

(ii) at the same time, a retailer who made the same misrepresentations in selling those goods directly to consumers would be liable under consumer protection legislation (under s. 18).

[137] Drynan submits that such a result would be antithetical to the legislative purposes of the *CPA*.

2. The decision in *Arora*

[138] Drynan submits that the comments of the court in *Arora* support a conclusion that the law is not settled on the issue of whether privity of contract is required to bring a claim for damages under the *CPA*.

[139] In *Arora*, the plaintiffs brought a proposed class action against the defendant washing machine manufacturer alleging that its front loading washing machines were poorly designed and prone to developing an unpleasant smell. The court upheld the decision of the motions judge and struck out claims for breach of express and implied warranty (due to lack of privity of contract), false and misleading representations under the *Competition Act* (since the failure to disclose a defect was not a representation), and the negligence claim for pure economic loss (since policy reasons militated against allowing a claim for diminution in value for a defective, non-dangerous product).

[140] However, the court concluded that an "unfair practice" claim could have been brought against the manufacturer, which is the nature of the claim in the present case.

[141] The court first reviewed the availability of remedies under the *CPA* for consumers. The court made no reference to a requirement of contractual privity. Hoy A.C.J.O. held, at para. 109:

> **Both the *BPA* [*Business Practices Act*] and the *CPA* permit a consumer to claim against a manufacturer who engages in an "unfair practice", which is defined to include false, misleading, deceptive and unconscionable representations. Under the *BPA* and the *CPA*, damages are an available remedy.** In certain cases where rescission is not available, remedies for an unfair practice include recovery of an amount by which payment under the consumer agreement exceeds the value that the goods have to the consumer. This is essentially the remedy that the appellants seek in this litigation without pleading an unfair practice. [Emphasis added.]

[142] The court then stated that, for unknown reasons, a claim under the *CPA* was not before it. Hoy A.C.J.O. stated, at para. 111:

> I note that the appellants abandoned their claim under the *CPA* prior to the certification motion. While I cannot speculate as to their reasons for doing so, there was no argument before the court that these statutory provisions were difficult, expensive, inconvenient or otherwise inadequate.

[143] The court then noted that although privity of contract is required between a consumer and seller for a *CPA* claim for breach of implied warranty or fitness for purpose, a consumer would still have the remedy of a claim under the *CPA* against a manufacturer for unfair practices: at paras. 112 and 115:

> **[T]he *CPA* does not provide an exception to privity of contract so as to allow consumers to recover against manufacturers for breach of implied warranties of quality or fitness for purpose.** Other jurisdictions have done so in their equivalent legislation…
>
> …
>
> **[I]t must be remembered that this is not a case where the appellants were without a remedy.** The [Ontario *Sale of Goods Act*] and *CPA* provided a statutory remedy against the seller of the machines for breach of implied warranties of quality and fitness for purpose, and the *BPA* and **the *CPA* provided remedies against Whirlpool for unfair practices.** [Emphasis added.]

[144] Consequently, the court held, in *obiter*, that remedies would have been available to class members against the manufacturer for unfair practices under the *CPA*.

3. The decisions in *Kalra* and *Rebuck*

[145] In addition to the comments in *Arora*, Drynan relies on both *Kalra* and *Rebuck*, in which comparable *CPA* claims were certified.

[146] The defendants seek to distinguish *Rebuck* on the basis that the representative plaintiff named both the manufacturer *and* vehicle lessor as defendants. However, nowhere in *Rebuck* does the court suggest that the *CPA* claim could not be certified against the manufacturer and could only proceed against the contracting parties.

[147] To the contrary, Morgan J. referred to the misrepresentations of the plural "[d]efendants" regarding the understated fuel consumption of the vehicles: at para. 29. He held that "[t]he record before me shows that the representations that form the heart of the Plaintiff's claim were made in Ford's [the manufacturer] nationally disseminated promotional materials, NRC guides, and EnerGuide labels": at para. 49.

[148] Consequently, Morgan J. certified the *CPA* claim against all defendants, with the common issue of "Did the Defendants, or any one of them, contravene sections 14 and 17 of the *Consumer Protection Act*, and parallel provisions of the provincial Consumer Protection Legislation by making any false, misleading or deceptive representations?": at para. 41.

[149] Similarly, in *Kalra*, Belobaba J. certified the *CPA* claim against both the manufacturer Mercedes-Benz Canada Inc., and Mercedes Benz Financial Services Canada Corporation (the importer, distributor and warrantor of Mercedes-Benz vehicles in Canada). Belobaba J. certified the PCIs relating to the manufacturer's liability to consumers for unfair practices, including the issues (set out at *Kalra* at Appendix, PCI (xiii)):

> Did the Defendants, or any of them, make any false, misleading or deceptive representations within the meaning of the [*CPA* and "Equivalent Consumer Protection Statutes"]? If so:
>
> (1) Were any such representations unfair practices?
>
> (2) Are the Class Members, or any of them, entitled to damages?

[150] As I note at para. 133 above, Belobaba J. also relied on the definition of "person" in the *CPA* as being distinct from a contracting party, as a basis to find that claims against the manufacturer disclosed a cause of action under the *CPA* and the Equivalent Consumer Protection Statutes.

(d) Conclusion on the contractual privity issue

[151] In light of the court's comments in *Arora*, the decisions in *Rebuck* and *Kalra*, and the applicable principles of statutory interpretation, I do not find that it is settled law that a consumer agreement is required in order to bring a claim for unfair practices under the *CPA*. I cannot find that it is beyond doubt that the approach followed in *Williams*, *Singer*, and *Richardson* would succeed.

[152] Consequently, I reject Objection 3.

(vi) Objection 4: The failure to provide notice is fatal to the claim

[153] The defendants submit that there can be no cause of action because no notice has been provided by Drynan of any intention to seek damages under s. 18(3). I do not agree that the law is settled that there is no cause of action under s. 18 if the class member seeks a waiver of the notice.

[154] Drynan pleads that it is in the interests of justice that the class members obtain, if necessary, a waiver of any notice requirements under the *CPA* and Equivalent Consumer Protection Legislation.

[155] In *Bernstein*, Perell J. rejected a similar argument by the defendants. On a motion for summary judgment, the court held that having found that the defendant engaged in unfair practices, it was in the interests of justice to waive the notice requirement, at para. 291:

> In any event, as already noted, under s. 101 of the *Consumer Protection Act, 2001* [*sic*], the court has discretion to "disregard" any notice requirements "if it is in the interests of justice to do so". **Ms. Bernstein submits that it is in the interests of justice to waive the notice requirement for the unfair practices claims. Apart from the fact that waiver is superfluous, if it was not, it is not in the interests of justice to impose the notice requirement. To allow Peoples Trust to use the s. 18 notice requirement as a shield would defeat all three purposes of class proceedings, but particularly access to justice. Once the Class Members have demonstrated that they have viable claims, it would not be in the interests of justice to strictly apply the notice requirements of the *Consumer Protections Act, 2002*.** [Emphasis added.]

[156] Consequently, it is not beyond doubt that the court could waive notice if the *CPA* claim were successful, as pleaded by Drynan. Otherwise, class members could potentially be without a remedy only because of the notice requirement, a position which the court in *Bernstein* held was not consistent with the interests of justice.

[157] For the above reasons, the notice requirement is not a bar to the cause of action under s. 18. I reject Objection 4.

(vii) Conclusion on *CPA* objections

[158] For the above reasons, the *CPA* claim discloses a cause of action. Consequently, I find that the requirements under s. 5(1)(a) of the *Act* are met for this claim.

Objections to the claim under the Equivalent Consumer Protection Legislation (Objection 5)

[159] The defendants submit that even if the *CPA* claim under s. 18 discloses a cause of action, the claims arising out of the Equivalent Consumer Protection Legislation disclose no cause of action because Drynan has (i) failed to identify the particular provisions upon which he relies,

(ii) failed to "provide the required particulars or supporting material facts" and (iii) not pleaded "any distinctions between provincial consumer legislation, such as available remedies and the varying requirements of privity of contract".

[160] I first review the claim under the Equivalent Consumer Protection Legislation and then consider whether it is settled law that the pleading as drafted discloses no cause of action.

(i) The claim under the Equivalent Consumer Protection Legislation

[161] Drynan pleads all of the particular statutes which he claims apply to members of the proposed national class.

[162] Drynan pleads that under all of those statutes, (i) class members are a consumer; (ii) the defendants are a "supplier"; (iii) the representations are false, misleading, or deceptive and constitute unfair practices; (iv) the defendants acted unconscionably; (v) the class members are entitled to damages because the return or restitution of COLD-FX® products purchased is no longer possible; and (vi) it is in the interests of justice that the class members obtain, if necessary, a waiver of notice requirements.

(ii) Analysis of the objection

[163] I find that the unfair practices claim related to the Equivalent Consumer Protection Legislation discloses a cause of action.

[164] Drynan seeks to certify unfair practices claims under the Equivalent Consumer Protection Legislation, on the basis of the same material facts pleaded for the *CPA* claim.

[165] Given my conclusion above that the claim under the *CPA* discloses a cause of action, Drynan has pleaded the material facts required for the claim.

[166] Consequently, the present case is distinguishable from *Magill v. Expedia Canada Corporation*, 2010 ONSC 5247, relied upon by the defendants. In *Magill*, the plaintiff did not identify any statutory provision (in that case, of the *CPA*) upon which he relied: at paras. 2, 30 and 31. In the present claim, the particular *CPA* provisions are set out in detail, and Drynan has alleged that the Equivalent Consumer Protection Legislation is equivalent.

[167] The defendants do not submit that there are any distinctions in the Equivalent Consumer Protection Legislation which would result in no cause of action under those statutes. While the defendants may raise any such argument in defence of the action, the pleadings disclose a cause of action under the Equivalent Consumer Protection Legislation. Drynan is not required to plead all of the applicable legislative provisions from each of the other legislation when he pleaded the relevant *CPA* provisions and pleads that there are equivalent provisions in each of the legislation.

[168] Further, the courts in both *Kalra* and *Rebuck* certified similar claims under equivalent consumer protection legislation: *Kalra*, at paras. 31-33; *Rebuck*, at para. 30.

[169] For the above reasons, I adopt the approach of Belobaba J. in *Kalra*. Under the heading "provincial consumer protection legislation", Belobaba J. held that there was a cause of action for an unfair practice against all defendants and held, at para. 33:

> The availability of remedies under the pleaded consumer protection statutes will obviously depend on who bought or leased what from whom in which particular province. Sub-classes will no doubt be needed as this litigation proceeds. But at this stage, I cannot conclude that the consumer protection cause of action for eligible class members has no reasonable prospect of success.

[170] In the present case, the pleadings of material facts are sufficient to establish a cause of action under provincial consumer protection legislation. As Belobaba J. held in *Kalra*, I cannot conclude, at this stage, that the consumer protection claims under the Equivalent Consumer Protection Legislation have no chance of success. If separate classes are subsequently required to address any differences, they can be addressed either before trial or by the common issues judge.

[171] In any event, even if Drynan was required to plead all of the specific statutory provisions from each of the Equivalent Consumer Protection Legislation, he could do so by amending his claim: *Magill*, at para. 114, and I would permit Drynan to do so if required.

[172] Consequently, I reject Objection 5.

Objection to the *Competition Act* claims (Objection 6)

[173] The defendants rely on the decision of Strathy J. in *Singer* in which he held that "the 'value' of a particular product *to the consumer* will depend not only on the nature of the product, but also on the consumer's needs in relation to the information that he or she has received about the product", and, as such, "[t]he same product may have a different 'value' to a consumer, depending on what he or she is looking for and what information he or she has received about the product through labeling, advertising or other sources": at para. 177 (italics in original).

[174] Consequently, the defendants submit that (i) neither a causal connection between breach and damages, nor (ii) value of those damages, has been pleaded in a manner that discloses a cause of action.

[175] I first review the *Competition Act* claim by Drynan and then consider whether it is settled law that the pleading as drafted discloses no cause of action.

(i) The Competition Act claim

[176] Drynan pleads that:

> (i) The defendants breached s. 52 of the *Competition Act* by making representations that were (a) false and misleading in a material respect, (b) made knowingly or recklessly, and (c) made for the purpose of promoting, directly or indirectly, the

supply or use of the COLD-FX® products and the business interests of the defendants;

(ii) The class members paid for goods which had the advertised characteristics but the class members received products which did not have those characteristics; and

(iii) The defendants' representations caused the class members to purchase COLD-FX® products based on an expected value (i.e., a product "Proven by Science" to be effective) that was above the value that they actually acquired from the COLD-FX® products (based on a generic version of North American ginseng not subject to the representations).

[177] Drynan pleads and relies on ss. 36 and 52 of the *Competition Act*, which permit recovery of damages (under s. 36(1)(a)) to "any person who has suffered loss or damage as a result" of a "representation to the public that is false or misleading in a material respect" (under s. 52(1)).

(ii) Analysis

[178] The defendants rely on *Singer* to submit that "[p]roof of detrimental reliance is required under section 36(1)". In *Singer*, Strathy J. held, at paras. 107-08:

> As I have noted, s. 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert, that the plaintiff must show both a breach of s. 52 and loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.
>
> Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the *Competition Act*, contains its own requirement that the plaintiff must have suffered loss or damage "as a result" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something - i.e., that he relied on it to his detriment.

[179] However, the decision in *Singer* does not require a plaintiff to establish individual reliance on (or even awareness of) a representation, but rather that the plaintiff suffered damages by obtaining less value than expected based on the representation and, as such, suffered damage causally connected to the misrepresentation.

[180] In *Rebuck*, at para. 32, Morgan J. relied on Strathy J.'s comments in *Singer* cited above, and in particular Strathy J.'s conclusion at para. 107 in which he held that a "causal connection" between the representation and loss is required. Morgan J. set out the distinction between "causal connection" and reliance. Morgan J. held, at paras. 33 and 35:

> **Although causation has not been dispensed with, reliance in the usual sense of a common law negligent misrepresentation claim is not a necessary ingredient to establish a civil cause of action under s. 36 of the *Competition Act* for breach of s. 52**: *Magill v Expedia Canada Corp*, 2010 ONSC 5247, at para 107. For example, in *Pro-Sys*, at paras 71, 113, a claim under s. 36 was permitted to proceed and for damages to be calculated on an aggregate rather than an individualized basis. This could not happen under a common law tort claim of negligent misrepresentation with its strict reliance-as-inducement rule: *Hedley Byrne & Co Ltd v Heller & Partners Ltd.* [1964] AC 465, 502-4.
>
> …
>
> **The Plaintiff need not plead that the misrepresentations induced him to buy his car; that type of detrimental reliance would be a necessary ingredient for a claim based on the common law of negligent misrepresentation. Rather, under s. 36 of the *Competition Act* what the Plaintiff must plead is that the misrepresentations caused him to acquire less value than he expected to acquire** -- i.e. to spend more on gas than he thought he would spend when he purchased the Vehicle. [Emphasis added.]

[181] On the alleged facts, Drynan paid for a product which was represented to have been "proven" (scientifically or clinically) to help produce the Claimed Effects, when the product ought not to have been valued on that basis. Consequently, the pleadings support a claim that the amount paid was based on a value that exceeded the actual value of a product not "proven by science".

[182] Under *Rebuck*, there is no requirement to plead the magnitude of the value differential.

[183] Similarly, the court in *Kalra* certified *Competition Act* claims based on the representations about the diesel engine. The defendants in that case did not submit that the *Competition Act* claims failed to disclose a cause of action: at paras. 14 and 15.

[184] For the above reasons, I find that the pleading of breach of the *Competition Act* discloses a cause of action. I reject Objection 6.

<u>Objections to the unjust enrichment claim (Objections 7 to 11)</u>

[185] The defendants raise five objections to the unjust enrichment claim. They submit that there is no cause of action because:

(i) "Unjust enrichment should not permit recovery for an indirect and incidental benefit" (relying on *Peel (Regional Municipality) v. Canada*, [1992] 3 SCR 762, at p. 797) (Objection 7);

(ii) In any event, "many class members would have received some value" which "depends on each individual, such as whether the individual experienced a difference in the severity, frequency and duration of symptoms between prior cold and flus" (Objection 8);

(iii) The contracts entered into by the consumers are a juristic reason to deny recovery (Objection 9);

(iv) Drynan's pleading of unjust enrichment is inconsistent with a contract claim and violates the prohibition against inconsistent pleadings (relying on *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38, at paras. 47-50) (Objection 10); and

(v) Since "the Defendants [met] their statutory obligations under the *Food and Drugs Act*", "[s]tatutory obligations are well-established juristic reasons to deny recovery" (relying on *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 44) (Objection 11).

[186] I first review the unjust enrichment claim and then consider each of the objections.

(i) The unjust enrichment claim

[187] Drynan submits that he has pleaded the three required elements of a claim for unjust enrichment, which are (i) an enrichment of the defendant, (ii) a corresponding deprivation of the plaintiff, and (iii) an absence of juristic reason for the enrichment: *Garland*, at para. 30.

[188] Drynan has pleaded that:

(i) The defendants have been unjustly enriched from sales they would not have received but for their unlawful conduct in breach of the *CPA*, the *Competition Act*, and s. 9(1) of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (*FDA*), as well as breaching multiple provisions of Health Canada's Guidelines for Consumer Advertising of Health Products for Nonprescription Drugs, Natural Health Products, Vaccines and Medical Devices (the Health Canada Guidelines);

(ii) Class members suffered a corresponding deprivation to the defendants' enrichment; and

(iii) There is no juristic reason for the defendants' enrichment and corresponding deprivation. Drynan pleads that the defendants' conduct is contrary to the *CPA*, the *Competition Act*, and the *FDA* and, as such, negates any such juristic reason.

(ii) Objection 7: A direct relationship is required for an unjust enrichment claim

[189] The defendants rely on *Peel* to submit that an unjust enrichment claim requires a direct relationship between the parties. However, more recently, the Supreme Court held that it was not settled law that a direct relationship was required.

[190] In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477, the defendant relied on *Peel* to submit that a claim against it in unjust enrichment could not be certified since Microsoft had no direct relationship with the consumer. The court rejected that argument and held, at para. 87:

> In support of its first argument, Microsoft cites *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762. In *Peel*, McLachlin J. (as she then was) held, at p. 797, that "[t]he cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant". A claim in unjust enrichment must be based on "more than an incidental blow-by. A secondary collateral benefit will not suffice. To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice - once from the person who is the immediate beneficiary of the payment or benefit ... , and again from the person who reaped an incidental benefit" (*Peel*, at p. 797). **The words of *Peel* themselves would appear to foreclose the possibility of an indirect relationship between plaintiff and defendant. However, this does not resolve the issue. First, it is not apparent that the benefit to Microsoft is an "incidental blow-by" or "collateral benefit". Second, Pro-Sys relies on *Alberta Elders*, which it says stands for the proposition that an unjust enrichment may be possible where the benefit was indirect and was passed on by a third party. At this stage, I cannot conclude that it is plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and the defendant is direct.** [Emphasis added.]

[191] In *Kalra*, Belobaba J. relied on *Pro-Sys* and held that it was not plain and obvious that a claim in unjust enrichment could only be made where the relationship between the plaintiff and the defendant was direct: at paras. 21-22.

[192] Consequently, it is not settled law that a direct relationship is required to establish unjust enrichment.

(iii) Objection 8: Individual value arising from efficacy precludes an unjust enrichment claim

[193] As with the pleading under the *CPA*, the unjust enrichment claim does not depend on any reliance by the class members, or benefits that they may have received from using COLD-FX® products.

[194] Rather, the unjust enrichment claim is based on the claim that the defendants were unjustly enriched from sales arising out of their alleged unlawful conduct in breach of the *CPA*, the *Competition Act*, s. 9(1) of the *FDA*, as well as breaching multiple provisions of the Health Canada Guidelines.

[195] Consequently, it is irrelevant to the unjust enrichment claim whether any class member (i) experienced any benefit from the products, (ii) was a loyal or repeat customer, or (iii) experienced no benefit from the products. The deprivation and corresponding enrichment arose by paying more than the actual value, which is the basis for the unjust enrichment claim, regardless of the efficacy of the COLD-FX® products.

(iv) Objection 9: Contracts are a juristic reason to deny recovery

[196] A contract can constitute a juristic reason to deny recovery: *Garland*, at para. 44. However, a contract is not a juristic cause unless it permits the receipt of funds for the alleged deprivation and such contractual provision is valid and enforceable: *Microcell Communications Inc. v. Frey*, 2011 SKCA 136, 342 D.L.R. (4th) 513, at para. 27. The contract must provide for the benefit.

[197] In the present case, there is no pleading or any basis in fact to suggest that there is a contractual term which permits the defendants to benefit from false representations that COLD-FX® products are "proven by science" or "clinically proven".

[198] Not only is there no claim of breach of contract in the present case, but even if such a claim was made, the contract could not be a juristic cause if entered into on the basis of an unfair practice.

[199] Consequently, the *Garland* principle does not apply on the facts as pleaded in this case, and I reject Objection 9.

(v) Objection 10: The unjust enrichment claim violates the prohibition against inconsistent pleadings

[200] The defendants rely on *Organigram* to submit that Drynan has pleaded in an inconsistent manner. I do not agree.

[201] In *Organigram*, the plaintiff pleaded common law breach of contract as well as unjust enrichment. The "wrongdoing" alleged to be the source of the unjust enrichment was that "[t]he Plaintiff and Class Members did not receive a product of the quality, nature or fitness that had been represented by OrganiGram or that the Plaintiff and Class Members, as reasonable consumers and patients, expected": at para. 43. The court noted that "[t]he argument depends upon a breach of contract to sustain the claim of unjust enrichment" and held that "one cannot plead inconsistent causes of action from common facts. One needs to plead the facts material to the causes of action claimed": at paras. 47-48.

[202] Consequently, the court in *Organigram* held, at paras. 49-50:

> Here Ms. Downton has pleaded facts material to a breach of contract. Those facts cannot simultaneously sustain an unjust enrichment claim. Where Ms. Downton explicitly refers to unjust enrichment, she fails to plead facts material to that claim.
>
> The pleaded facts support a claim in contract, not unjust enrichment. The claim for unjust enrichment should be struck.

[203] However, in the present case, Drynan does not plead a breach of contract as a basis for the claim. Instead, Drynan pleads that there is no basis for the defendants to benefit from their alleged misrepresentations, and as such, the alleged breach of the *CPA*, the *Competition Act*, the *FDA*, and the Health Canada Guidelines has enabled the defendants to benefit from sales they would not have made without the alleged unfair practices, which deprived the class members who paid for the products, and with no juristic reason for the benefit. Consequently, there is no conflict in Drynan's claims.

[204] In any event, it is not settled law in Ontario that an unjust enrichment claim cannot be asserted as an alternate cause of action to a breach of contract claim: *Wellman v. TELUS Communications Co.*, 2014 ONSC 3318, at para. 36, aff'd 2017 ONCA 433, rev'd on other grounds 2019 SCC 19, [2019] 2 S.C.R. 144.

[205] The above analysis is consistent with the approach of courts which have certified unjust enrichment claims as alternate causes of action with claims for breach of the *CPA*: see *Kalra*, at para. 23, and *Wellman*, at para. 36. I reject Objection 10.

(vi) Objection 11: The defendants have met their statutory obligations under the *FDA*

[206] The defendants submit that the juristic cause for enrichment is that they met their statutory obligations under the *FDA*.

[207] However, Drynan pleads that the defendants breached the *FDA*. Those pleadings are to be taken as true under the s. 5(1)(a) analysis.

[208] Consequently, while statutory obligations can be a juristic reason for recovery: *Garland*, at para. 44, compliance with the *FDA* is an issue for trial and, as such, the unjust enrichment claim discloses a cause of action based on the breach of the *FDA*. I therefore reject Objection 11.

*Section 5(1)(b) objections*

[209] The defendants raise two objections to certification of the proposed class. They submit that there is no identifiable class because:

(i) Drynan is required, and has failed, to establish "some basis in fact that two or more persons have complaints about the COLD-FX® products connected to the causes of action pleaded and the common issues proposed" (Objection 12); and

(ii) The proposed class is "overbroad", "overinclusive", and "subjective" because it includes "those without a claim or interest in the resolution of the common issues" such as "repeat" COLD-FX® customers who have "strong loyalty" and those consumers who purchase COLD-FX® "as part of their lifestyle". Consequently, there is "no commonality across the claimed Representations", and "a homogeneous class of COLD-FX® buyers does not exist". The defendants rely on the *Harrison* decisions and the decision in *Clark v. Energy Brands Inc.*, 2014 BCSC 1891, 72 B.C.L.R. (5th) 383 (Objection 13).

[210] Drynan submits that:

(i) The evidence establishes some basis in fact that two or more persons are class members: over 2.3 million units of COLD-FX Products were sold to consumers in Canada in the three-year period starting January 1, 2017;

(ii) The class is defined by objective criteria such that a person can be identified as a class member without reference to the merits of the action; and

(iii) The definition is properly bounded and rationally connected to the common issues by extending from the date on which the representations were first made until the date notice of certification is published.

[211] I first review the applicable law and the proposed class. I then consider each of the defendants' objections.

The applicable law

[212] The settled law on the test to determine if there is an identifiable class was discussed by the Supreme Court in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38:

> Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria ...

[213] Consequently, while it is not necessary that everyone in the class shares the same interest, a class cannot be overly broad. It must be defined as narrowly as possible without excluding some people who share the same interest in the resolution of the common issues: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 21.

The proposed class

[214] In his factum, Drynan defines the proposed class as:

> [A]ll persons in Canada who purchased one or more COLD-FX Products between January 1, 2017 and the date the notice of certification is published.

Objection 12: The proposed class fails to establish two or more persons with a complaint

[215] The defendants rely on *Harrison* CA to submit that "the Plaintiff is required to provide evidence of class members with a complaint based upon the alleged misrepresentations". However, the court in *Harrison* CA distinguished between (i) the "necessity of a relationship between the defined class and the common issues", which was required to establish an identifiable class: at para. 43, and (ii) demonstrating that "more than one individual is motivated to pursue a claim", which was not required to establish an identifiable class: at para. 42.

[216] It is settled law that a representative plaintiff is only required to show that there exist two or more persons who have the same claim against the defendants. The plaintiff is not required to show that there are other class members who desire to pursue claims as a class action based on a complaint from such class members: *Keatley Surveying Ltd v. Teranet Inc.*, 2015 ONCA 248, 125 O.R. (3d) 447, at paras. 70 and 72.

[217] In *Keatley*, Sharpe J.A. held, at para. 72:

> I agree with the Divisional Court that **a distinction must be drawn between the existence of multiple claims and the subjective wishes or intentions of individual class members to assert a claim**. It is in the very nature of class actions that many, if not most, individual class members lack the motivation or the will to commence proceedings. The access to justice and behaviour modification goals of class proceedings will often depend upon a representative plaintiff taking the initiative in circumstances where other members of the class would be ignorant of their loss or acquiesce because of disinterest, lack of resources or fear of an adverse costs award. If multiple claims exist, the representative plaintiff does not have to conduct a referendum to determine how many class members want to sue. Ontario's class action regime features an opt-out procedure which affords class members who do not wish to have their claims advanced the right to disassociate themselves from the action. **There is no corresponding requirement to establish a willing class.** [Emphasis added.]

[218] The court in *Harrison* CA followed *Keatley* and held, at para. 32:

> **It is necessary that an individual seeking certification of a claim as a class proceeding show that there is a class of persons who have similar claims**, that there are common issues that apply to that class, and that the class can be defined by objective criteria. **It is not necessary to show that more than one person within the class is motivated to bring a class proceeding.** [Emphasis added.]

[219] The claim in the present case is based on the core misrepresentation that the COLD-FX® products were "proven by science" or "clinically proven" to help produce the Claimed Effects. There is no need to establish reliance by class members. Consequently, Drynan is only required to show some basis in fact that two or more persons purchased one or more of the COLD-FX® products between January 1, 2017 and the date notice of certification is published, i.e., after or while the alleged unfair practice took place.

[220] Given Bausch's evidence that more than 2.3 million units of COLD-FX® products were sold to consumers between 2017 and 2019, there is some basis in fact that there is (i) "a relationship between the defined class and the common issues" (as stated by the court in *Harrison* CA) or (ii) the "existence of multiple claims" without concern for the "subjective wishes or intentions of individual class members to assert a claim" (as stated by the court in *Keatley*).

[221] For the same reasons, I do not accept the defendants' submission that it is necessary to have separate evidence from "any class member who took COLD-FX® First Signs®", in order to establish an identifiable class. All purchasers of COLD-FX® products were subject to the same core representation, and are identifiable under the case law discussed above.

[222] Consequently, I reject Objection 12.

Objection 13: The class is overbroad

[223] The defendants submit that the proposed class is "overbroad", "overinclusive", and "subjective" because it includes "those without a claim or interest in the resolution of the common issues" such as "repeat" COLD-FX® customers who have "strong loyalty" and those consumers who purchase COLD-FX® "as part of their lifestyle".

[224] The defendants submit that, as such, there is "no commonality across the claimed Representations", and "a homogeneous class of COLD-FX® buyers does not exist". The defendants rely on the *Harrison* decisions and the decision in *Clark*.

[225] I do not agree.

[226] The defendants ask the court to rely on the decisions in *Harrison*, in which the courts refused to certify claims related to representations about COLD-FX®. However, while *Harrison* arose from representations made by the defendants about COLD-FX® products, there are fundamental differences in fact and law between *Harrison* and the present case.

[227] In contrast to *Harrison*, the present case does not advance any common law misrepresentation claims and, as set out above, Drynan's statutory and unjust enrichment claims do not require proof of reliance to establish liability or an entitlement to damages.

[228] In *Harrison*, the court was asked to consider whether 27 alleged misrepresentations were false or misleading: *Harrison* SC, at para. 15. Those representations were much broader than the core representation in the present case, and encompassed claims that related to the efficacy of the products, including representations that (i) COLD-FX® provided "immediate relief": *Harrison* SC, at paras. 17 and 18; and (ii) was "effective in treating the cold or flu": *Harrison* SC, at para. 20.

[229] However, in the present case, the core representation is whether it was "proven" by science or clinically that COLD-FX® helped produce the Claimed Effects, which does not require reliance and, as such, does not result in an overbroad class.

[230] The representations in *Harrison* were linked to consumers' personal experiences with the product, and as such, the proposed class was overbroad because "[i]t includes persons with no claims because some of the Cold-Fx products sold during the relevant time did not contain any of the misrepresentations, not all of the purchasers would have purchased the product for short term relief, not all of the persons would have purchased the product because of the representations, and not all of the purchasers were dissatisfied with the product": *Harrison* SC, at para. 57.

[231] On appeal in *Harrison*, the plaintiff sought to narrow the class definition to those who had purchased the product during the period of the alleged misrepresentations. The court did not permit the modification: *Harrison* CA, at para. 50, and further noted that the proposed class definition would still not set out an identifiable class because, at para. 49:

> [I]t does not include a requirement that the purchaser have read the misrepresentations, or have relied on them. More importantly, it does not contain any requirement that the person purchased or used the product for the purpose of immediate relief of cold or flu symptoms.

[232] The *Harrison* decisions turned on the issue of individual reliance, which does not arise in the present case. The claim in *Harrison* was essentially a common law claim for misrepresentation: the Court of Appeal identified the claim's "central thrust" as the allegation that consumers had relied on misrepresentations in purchasing COLD-FX® products: *Harrison* CA, at para. 38. The reliance allegation in *Harrison* was necessary to support the plaintiff's common law claim in deceit and fraudulent misrepresentation, since the plaintiff was required to establish detrimental reliance to prove liability and damages.

[233] *Harrison* did not involve claims under the *CPA*, and the plaintiff's claims under the British Columbia *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, had been struck or abandoned prior to certification (along with many other claims): *Harrison* SC, at para. 4.

[234] Because of the negligent misrepresentation claim in *Harrison*, which required individual reliance, there was no identifiable class. The motions judge held: *Harrison* SC, at paras. 57-58:

> The class definition is overly broad. It includes persons with no claims because some of the Cold-Fx products sold during the relevant time did not contain any of the misrepresentations, not all of the purchasers would have purchased the product for short term relief, not all of the persons would have purchased the product because of the representations, and not all of the purchasers were dissatisfied with the product.
>
> The plaintiff has also failed to provide a means other than subjective examination to determine whether an individual purchaser falls within the class. The evidence shows that there are many reasons for a person to purchase this product. There does not appear to be an objective process to identify persons who purchased the product because of the representations. Nobody has come forward in the four years that this action has been progressing to say that the representations induced them to purchase the product, despite plaintiff counsel's publication of the action.

[235] The impact that proof of individual reliance had on the motion to certify the *Harrison* case is reflected in the court's findings that:

(i) The class definition was overbroad because the plaintiff had failed to "include a requirement that the purchaser have read the misrepresentations, or have relied on them," combined with the large number of representations and products at issue over the ten-year class period: *Harrison* CA, at paras. 34 and 49;

(ii) The representative plaintiff failed to establish that he had relied on the alleged misrepresentations: *Harrison* CA, at para. 37; and

(iii) In the context of commenting on the preferable procedure analysis, "[i]ssues of causation and reliance would almost certainly have to be proven on an individual basis": *Harrison* CA, at para. 63.

[236] Similarly, in *Clark*, the plaintiff alleged a breach of the false and misleading advertising provisions of the British Columbia *Business Practices and Consumer Protection Act*, which the court determined in that case required individual reliance as a precondition for liability: at para. 126. The court held that the class definition was overinclusive and would include persons who have no claim against the defendants because "the proposed class would include individuals who did not rely on any of the representations set out in the plaintiff's claims": at para. 145.

[237] However, in the present case, there is no requirement to establish reliance. It is settled law under *Ramdath 1* and *Ramdath 2* that a claim under the *CPA* does not require reliance on the unfair practice. The claim under the *Competition Act* also does not require reliance on an unfair practice to enter into the agreement; it requires a causal connection to damages by acquiring a product which has less value than advertised: *Rebuck*, at para. 35.

[238] Without a reliance requirement, the proposed class in the present case is not overbroad. All individuals who purchased COLD-FX® products during the class period have a cause of action for the unfair practices or false advertising alleged, whether under the *CPA, Competition Act*, or unjust enrichment. There is "a class of persons who have similar claims, … there are common issues that apply to that class, and … the class can be defined by objective criteria": *Harrison* CA, at para. 32.

[239] For the same reasons, Dr. Mulvey's conclusion (relied upon by the defendants) that "a homogenous class of COLD-FX® buyers does not exist" is irrelevant to whether there is an identifiable class. Whatever the reason for a consumer's purchase of COLD-FX® products, the claims of all class members are rationally connected to the pleaded causes of action, because each class member purchased the COLD-FX® products while those unfair practices were allegedly taking place.

[240] Consequently, the reasons why a "loyal" or "repeat" customer purchased a COLD-FX® product, or the efficacy from the product, is irrelevant to the class definition. Similarly, even if "repeat" customers were not "induced by any unfair practice or representation" or "have no efficacy concerns" (as submitted by the defendants), they are part of the class because they purchased COLD-FX® products while the alleged unfair practices were taking place.

Conclusion on the identifiable class criteria

[241] For the above reasons, I conclude that the requirement for an identifiable class under s. 5(1)(b) is satisfied. I reject Objections 12 and 13.

*Section 5(1)(c) objections*

[242] I first review the applicable law and then consider each of the defendants' five objections to certification of particular PCIs.

The applicable law

[243] In determining whether the claims of the class members raise common issues, I rely on the following legal principles:

(i) The "common issues" requirement is a "low bar" and the court must take a purposive approach to s. 5(1)(c) in order to further the objectives of the *Act*: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at paras. 51-53;

(ii) A common issue must be necessary to the resolution of a class member's claim. It need only advance the litigation by avoiding duplication of fact-finding or legal analysis: *Hollick*, at para. 18;

(iii) A common issue need not resolve the litigation entirely: *Cloud*, at para. 53;

(iv) There must be a rational connection between the common issues and the class definition, but not all class members need to have suffered harm: *Tiboni v. Merck Frosst Canada Ltd.* (2008), 295 D.L.R. (4th) 32 (Ont. S.C.), at para. 78; and

(v) A common issue must be capable of being answered once for all class members – it is not common if it can only be resolved by inquiry into the circumstances of each individual's claim: *Kaplan v. Casino Rama*, 2019 ONSC 2025, 145 O.R. (3d) 736, at para. 55.

[244] I apply the above principles to the PCIs[11] in the present case. I address each of the defendants' objections below.

The defendants' objections to PCIs 4 and 8 (whether the defendants breached the *CPA*, the Equivalent Consumer Protection Legislation or the *Competition Act*) (Objection 14)

[245] These PCIs ask the court to determine whether "the defendants, or any of them" engaged in (i) "unfair practices within the meaning of the *CPA* or the Equivalent Consumer Protection Legislation" (PCI 4) or (ii) "conduct contrary to section 52 of the *Competition Act*" (PCI 8).

[246] The defendants rely on three submissions for this objection.

[247] First, the defendants rely on the *Clark* and *Harrison* decisions to submit that "whether the labelling and marketing of COLD-FX® actually misled a consumer 'is an inherently individualistic and fact-based question'", which cannot be determined on an objective basis.

[248] Second, the defendants rely on *Harrison* to submit that the issue of whether the alleged misrepresentations are false and misleading cannot be determined on a common basis since "there are multiple different products with different ingredients", and the representations are "sourced from different product materials and are not all contained in the products' packaging".

[249] For this submission, the defendants also rely on the decisions in *Singer* and *Clark*, which they submit "concern representations similar to those put in issue by the Plaintiffs [*sic*], and are therefore more applicable than the cases relied upon by the Plaintiff, such as *Ramdath* and *Matoni*, which consider representations that can be objectively determined as true or false".

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[11] I refer to the numbering of PCIs based on the "Proposed Common Issues" attached as the Appendix to these reasons. The defendants' submissions in their factum were based on the numbering as set out in the list of "Amended Proposed Common Issues" in the motion record, but that version referred to PCI 14 based on a waiver of tort claim which is no longer pursued. Consequently, where necessary, I have adjusted the numbering of the PCIs to be consistent with the numbering of PCIs listed in the Appendix to these reasons.

[250] Third, the defendants submit that the expert evidence of Dr. Guyatt does not support the falsity of the core representation. The defendants submit that Dr. Guyatt's report is of no value since he only considered whether it was scientifically proven that COLD-FX® products (i) reduce the frequency, duration, and severity of cold and flu symptoms or (ii) increase the proportion of natural killer cells and T-helper cells to boost the immune system, and not whether COLD-FX® "helps to" provide those Claimed Effects.

[251] The defendants further assert that Dr. Guyatt (i) acknowledged that COLD-FX® products could be effective and (ii) failed to provide "expert evidence supporting the general impression that the Plaintiff asserts can be taken from the alleged Representations".

[252] Based on these submissions as to Dr. Guyatt's report, the defendants submit that there is no basis in fact for PCIs 4 and 8.

[253] I address each of these submissions below.

(i) Submission 1: Whether a representation misled a consumer is an individualistic question

[254] The defendants make a similar argument to that raised with respect to the cause of action objection under the *CPA*, Equivalent Consumer Protection Legislation, and the *Competition Act*: the defendants submit that there can be no common issue to establish a breach of those statutes since the issue of whether a representation misled a consumer is an individualistic question.

[255] I do not agree.

[256] As I discuss above, under s. 18(1) of the *CPA*, the consumer does not have to establish that the unfair practice induced the person to enter into the contract. Class members only need to establish that they entered into agreements after or while the defendant engaged in the unfair practice: *Ramdath 1* and *Ramdath 2*.

[257] Under the *Competition Act*, individual reliance is not required. The class members must establish only that they purchased COLD-FX® products after or while the unfair practices took place and that as a result of the unfair practices, they acquired less value than they expected to acquire – by purchasing a product which was represented to be "proven" by science or in clinical trials to help provide the Claimed Effects, but which was not proven to do so: *Rebuck*.

[258] In both *Harrison* and *Clark*, relied upon by the defendants, individual reliance was a required element of the causes of action.

[259] However, in *Harrison* CA, the court held that the PCIs relating to (i) whether the representations were false and (ii) whether the defendants knew that the representations were false, were proper common issues, reversing the lower court judge's findings: at paras. 54 and 56.

[260] Further, the answer as to whether any of the alleged misrepresentations constitute an unfair practice under the *CPA* or Equivalent Consumer Protection Legislation, or are "false or misleading" contrary to s. 52 of the *Competition Act* is based on an objective standard – it does not depend on the individual perceptions of the class members as to the meaning of the statements.

[261] I have reviewed the law at paras. 98-104 above as to whether the objective test is based on (i) the "credulous and inexperienced consumer" standard as set out in *Richard*, and applied in a similar manner in *Chatr Wireless* and *Cogeco Cable*, or (ii) a "reasonable person" test as discussed in *Matoni* and in *Ramdath* SC.

[262] However, as I conclude above, regardless of whether the "reasonable person" or *Richard* test is used, there is no dispute that an objective standard is required.

[263] I adopt the conclusion of Hoy J. in *Matoni* that because of the objective basis of a false and misleading advertising claim, the common issues related to that representation should be certified. Hoy J. held, at paras. 149 and 155:

> **The determination of whether the defendants engaged in an unfair practice under these statutes involves common issues of fact and common issues of law.** The resolution of 6a[12] is necessary to the resolution of each class member's claim.
>
> …
>
> Under s. 18(1) of the *Consumer Protection Act*, the consumer does not have to establish that the unfair practice induced her to enter into the contract. In the case of the *Consumer Protection Act*, **6a is a significant common issue. While class members will still have to establish that they entered into agreements after or while the unfair practice is engaged in, as indicated above, that individual timing issue can be reasonably easily addressed**, by reference to the defendants' records, if necessary. [Emphasis added.]

[264] Consequently, I do not accept the submission of the defendants that PCIs 4 and 8 cannot be certified because they require individual determinations of reliance that cannot be assessed on a common basis. The common issues trial judge will be able to determine whether the core representation is false and misleading, without the need for individual trials. That issue would

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[12] PCI 6a in *Matoni* was "Did the defendants breach Part III of the *Consumer Protection Act* or section 3 or 4 of the *Business Practices Act* in relation to their promotion of the program before or during the Class period?", a question similar to PCIs 4 and 8: *Matoni*, at para. 148.

significantly advance the litigation, and would provide a common result binding all class members.

(ii) Submission 2: PCIs 4 and 8 do not raise a common issue due to the number of products and multiple forums of representations

[265] I do not agree with the defendants that because the same core representation appears in multiple forums or on multiple products, then a PCI for false and misleading representations or unfair practices cannot be certified. It would be an illogical result for a class action only to be certified if a defendant engages in an unfair practice in one forum or one product, but not if the same core representation is made in multiple forums or for multiple products.

[266] In *Harrison* SC, the motions judge did not certify numerous representations as a common issue. However, many of the 27 alleged misrepresentations were much broader than the core representation in the present case, and encompassed claims that related to the efficacy of the products.

[267] As I discuss at para. 259 above, the court in *Harrison* CA reversed the motion judge's decision to not certify all of the PCIs. The court held that there were "two substantial common issues: whether each of the specific representations made by the defendants were false, and, if so, whether they knew them to be false": at para. 56. Consequently, the defendants' reliance on *Harrison* CA does not support their submission, let alone take into account that the *Harrison* decisions were based on misrepresentations which required individual reliance.

[268] The facts of the present case are similar to those addressed by the courts in *Ramdath* SC and in *Matoni*.

[269] In *Ramdath* SC, the court certified a claim under the *CPA* for a false and misleading description in online and printed course calendars which allegedly misrepresented the benefits of a program by falsely stating that completion of the program would entitle the students to three industry designations: at para. 13.

[270] In *Matoni*, the court held that there was a common issue for a similar claim under the *CPA* and *Competition Act*: at paras. 144, 155. In that case, the alleged core misrepresentation was the failure of the defendants to advise of certain risks of enrolling in a program for dental hygienists that was not accredited by the applicable professional body: at para. 3.

[271] In the present case, there is a core representation of the alleged false and misleading representation that COLD-FX® products were "proven by science" or "clinically proven" to help produce the Claimed Effects. Such representation is common to all products, and to all forums of advertising.

[272] The above cases can be contrasted with the decisions in *Singer* and *Clar*k.

[273] In *Clark*, the court considered a different consumer protection statute which the court concluded requires proof of reliance. The PCIs related to false and misleading advertising could not be certified on that basis: at paras. 127-28.

[274] In *Singer*, the court held that the PCIs related to false and misleading advertising could not be certified because "there are numerous and different statements made, with no commonality across the range of products marketed by the defendants": at para. 155. In *Singer*, the court was asked to certify a vast number of different representations about numerous different sunscreen products, which were not consistent amongst the products. Strathy J. distinguished those facts from a situation where "there was a single uniform representation made to each and every plaintiff": at para. 155.

[275] The core representation in the present case, i.e., COLD-FX® was scientifically proven to help produce the Claimed Effects, is a uniform representation. It is stated at least seven times on the website (including on the landing page and in response to numerous FAQs, not even taking into account the numerous product photographs on the website in which the representation is prominently stated).

[276] The core representation is repeated throughout all of the defendants' packaging and marketing as well as in forums of third parties (such as pharmacy promotional materials or on-line vendors such as Amazon.ca).

[277] Consequently, the core representation in the present case is common to all COLD-FX® products and advertising, and its truth or falsity can be determined for all class members.

[278] For the above reasons, I reject this submission.

(iii) Submission 3: Dr. Guyatt's evidence does not disclose some basis in fact for PCIs 4 and 8

[279] The defendants submit that there is no basis in fact for the core misrepresentation claim because:

(i) "Dr. Guyatt's opinion evaluated claims distinct from the approved health claims that are not asserted anywhere in COLD-FX® packaging, labeling or advertising";

(ii) Dr. Guyatt "conceded that even evidence of efficacy assessed through GRADE as 'low quality' is still evidence of efficacy, and that low quality evidence can be relied upon when making treatment recommendations"; and

(iii) Dr. Guyatt failed to provide "expert evidence supporting the general impression that the Plaintiff asserts can be taken from the alleged Representations".

[280] I do not agree. I address each submission below.

(a) The defendants' submission that Dr. Guyatt's study did not address the COLD-FX® representations

[281] Dr. Guyatt was asked to consider whether it was "proven" scientifically that COLD-FX® provided the Claimed Effects. He concluded that, based on the scientific data and studies, the claims that COLD-FX® either (i) reduces the frequency, duration, and severity of cold and flu symptoms or (ii) increases the proportion of natural killer cells and T-helper cells to boost the immune system (i.e., the Claimed Effects), both "fall far short of being scientifically proven".

[282] Dr. Guyatt concluded that:

(i) "scientifically proven" effects "would require high quality evidence in support"; and

(ii) the quality of the scientific evidence relied upon by the defendants to support the impugned Claimed Effects did not meet that standard as the quality was either "low" (for the claim that COLD-FX® reduces the frequency of cold and flu symptoms) or "very low" (for the claims that COLD-FX® reduces the duration or severity of cold and flu symptoms or increases the proportion of natural killer cells and T-helper cells).

[283] The defendants ask the court to discard Dr. Guyatt's evidence, on the basis that he was not asked to consider whether the scientific evidence establishes that COLD-FX® "helps to produce" the Claimed Effects, but was instead asked to consider whether the scientific evidence supports a finding that COLD-FX® "produces" the Claimed Effects.

[284] I do not agree that the court should find no basis in fact for PCIs 4 and 8 based on this purported distinction.

[285] The defendants rely on the Health Canada approval of the statements that COLD-FX® "helps to" produce the Claimed Effects, to submit that Dr. Guyatt's report failed to consider the representations made by the defendants.

[286] However, it is uncontested that neither of the statements "proven by science" or "clinically proven" (except for those over 65 in certain circumstances) were approved in the Health Canada product license.

[287] Using the GRADE approach, the quality of the scientific evidence was assessed as to whether it was "proven by science" or "clinically proven" that COLD-FX® produced the Claimed Effects.

[288] Dr. Guyatt's evidence is unchallenged that the scientific studies "fall far below" the standard to make such a statement.

[289] There is no evidence before the court to support the semantic distinction between a review of the scientific evidence to determine whether it was scientifically proven that (i) COLD-FX® "helps to produce" the Claimed Effects or (ii) COLD-FX® "produces" the Claimed Effects.

[290] In particular, there is no evidence before the court that Dr. Guyatt's opinion that the studies did not establish that COLD-FX® "produced" the Claimed Effects would have been any different if he had considered whether the studies established that COLD-FX® "helps to" produce the Claimed Effects, let alone establish that his opinion would have been "fundamentally changed", as submitted by the defendants.

[291] The defendants asked Dr. Guyatt to confirm that he had considered the scientific evidence as to whether COLD-FX® produced the Claimed Effects, as requested by counsel. However, the defendants did not ask Dr. Guyatt whether his approach, analysis, or conclusion would have been any different if he considered the strength of the scientific evidence as to whether COLD-FX® "helps to produce" the Claimed Effects. The defendants also refused to allow any reply questions from Drynan's counsel on that topic.

[292] The defendants chose not to challenge Dr. Guyatt on the semantic difference they now assert undermines his entire report. The defendants filed no evidence to suggest that there is any difference. Consequently, there is some basis in fact to support a common issue as to whether the core representation, that COLD-FX® was scientifically proven to help produce the Claimed Effects, was false and misleading.

[293] If there is any basis to challenge the scope of Dr. Guyatt's report, it is a matter for a common issues trial. Drynan has met the low threshold to establish that based on the scientific evidence, the defendants engaged in false or misleading representations or unfair practices by representing that COLD-FX® was proven by science and clinically proven to "help" produce the Claimed Effects.

(b) The defendants' submission that Dr. Guyatt acknowledged that COLD-FX® could be effective and possibly recommended as a treatment even if scientific studies were of low quality

[294] In his cross-examination, Dr. Guyatt acknowledged that COLD-FX® could be effective and possibly recommended as a treatment even if scientific studies were of low quality.

[295] However, the fact that the GRADE approach is used for treatment decisions, and that some treatment may still be recommended even if a proposed approach has a "low quality" of scientific support, is irrelevant to the issue before the court. The issue is whether it was proven by science that COLD-FX® helps to produce the Claimed Effects.

[296] The defendants criticize Dr. Guyatt's report on the basis that "his analysis does not support the Plaintiff's allegations including those undermining the efficacy of the COLD-FX® products". However, as I discuss above, the issue before the court at the common issues trial is

not the efficacy of the products, but instead whether the "proven by science" and "clinically proven" representations were false or misleading. Dr. Guyatt was not asked to opine on the efficacy of the products, or on whether the representations as to efficacy were false, since these are not relevant issues in this action.

[297] Consequently, while the defendants submit that "Dr. Guyatt's opinion does not support the Plaintiff's over-arching argument that COLD-FX® does not provide a clinical benefit", Drynan does not make that allegation in the claim. Again, the core representation does not relate to the efficacy of COLD-FX®, but only to whether the efficacy claims are "proven by science" or "clinically proven".

[298] The defendants further submit that Dr. Guyatt was asked to consider whether COLD-FX® products "guarantee that they will reduce the frequency, severity and duration of cold and flu symptoms". However, he was not asked to consider whether the COLD-FX® products guarantee any results, and Drynan does not plead that there are any such representations.

(c) The defendants' submission that Dr. Guyatt gave no evidence on the general impression to be taken from the core representation

[299] I do not agree with the defendants' submission that there is no basis in fact for the PCIs relating to breach of the *CPA*, Equivalent Consumer Protection Legislation, or the *Competition Act*, because Dr. Guyatt gave no "expert evidence supporting the general impression that the Plaintiff asserts can be taken from the alleged Representations".

[300] It is not appropriate for any expert to provide an opinion on the "general impression" provided by a representation. Dr. Guyatt's role is to assist the court in determining whether the "proven by science" and "clinically proven" representations were consistent with the available scientific research. It is for the court to then consider the general impression an objective consumer would form in response to such statements.

(d) Conclusion on criticisms of Dr. Guyatt's report

[301] For the above reasons, I reject Objection 14 and find both on the basis of the law and Dr. Guyatt's evidence that PCIs 4 and 8 should be certified.

<u>The defendants' objections to PCIs 1, 2, 3, and 6 (whether there is some basis in fact for the PCIs against defendants other than Bausch Canada and Valeant Canada LP) (Objection 15)</u>

[302] The defendants do not object to these PCIs as proposed by Drynan, which are consistent with PCIs certified in other *CPA* class actions such as *Kalra* and *Rebuck*. Further, these PCIs would resolve a substantial ingredient of the litigation on a basis that would be common to all class members, as they address general issues related to liability which can be resolved in common.

[303] However, the defendants object to the certification of these PCIs against any defendants other than Bausch Canada and Valeant Canada LP, since only those defendants have been involved in the manufacture and sale of the COLD-FX® products.

[304] The defendants further submit that if the certification motion is not dismissed, then "In the alternative, the Defendants request that the action not be certified and be dismissed against the Defendants Bausch Health Companies Inc., Valeant Canada GP Limited, and Valeant Canada Limited".

[305] As I discuss at paras. 19-22 above, Drynan has led no evidence to establish the existence of any common issue with respect to the named defendants other than Bausch Canada and Valeant Canada LP.

[306] Consequently, I accept Objection 15 and find that all PCIs are to be limited to Bausch Canada and Valeant Canada LP, without prejudice to Drynan seeking to amend the pleadings if evidence were to establish any involvement of the other named defendants in the manufacture, sale, or distribution of the COLD-FX® products.

The defendants' objections to PCIs 5, 9, and 14 (whether aggregate compensatory damages are available for *CPA* and *Competition Act* claims) (Objection 16)

[307] The defendants submit that there is no basis in fact for Drynan to seek aggregate compensatory damages for breaches of the *CPA* or Equivalent Consumer Protection Legislation (PCI 5) or the *Competition Act* (PCI 9).

[308] I first review the applicable law on the availability of aggregate damages, and then consider the defendants' objections.

(i) The applicable law

[309] The circumstances in which aggregate assessment of monetary relief can be ordered are set out at s. 24(1) of the *Act*: (a) "monetary relief is claimed on behalf of some or all class members", (b) "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability", and (c) at least part of the defendant's liability to some or all class members "can reasonably be determined without proof by individual class members".

[310] The requirement in s. 24(1)(c) is directed to situations where monetary liability to some or all of the class is ascertainable on a global basis, and is not contingent on proof from individual class members as to the quantum of monetary relief owed to them. This requirement can be satisfied where information needed for assessing the quantum of monetary relief is available in the form of documentary evidence from a defendant's own transactional records: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 111 O.R. (3d) 346, at paras. 123-27.

[311] A plaintiff is not required to provide evidence of the actual value of each individual class member's claim on the certification motion. In *Ramdath 2*, the court held that leniency is permitted in the assessment of aggregate damages and that not all class members need to be accurately compensated, at para. 51:

> The same degree of accuracy as in an ordinary action is not required. Therefore, the aggregate damages methodology will be reasonable if some members of the class are over-compensated and some are under-compensated, as long as the defendant's total liability is not over-stated.

[312] Where questions relating to damages are proposed as common issues, the plaintiff must demonstrate (with supporting evidence) that there is a workable methodology for determining such issues on a class-wide basis: *Singer*, at para. 140.

[313] Common issues relating to damages can only be certified if there is a "reasonable likelihood" that damages can be assessed in the aggregate pursuant to s. 24 of the *Act*: *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at paras. 41-46, leave to appeal dismissed [2007] S.C.C.A. No. 346.

(ii) The defendants' objections

[314] The defendants make three submissions.

[315] First, the defendants rely on *Singer* and submit that there is no basis in fact for an aggregate compensatory damages claim since "the meaning of 'value' is informed by individual consumers, depending on the reason for purchasing the product and what they know about the product through various sources".

[316] The defendants submit that aggregate compensatory damages cannot be awarded because "the Plaintiff's damages expert has not ascribed any value to individual valuation", when "repeat customers from COLD-FX®'s loyal consumer base" ascribe value to the products.

[317] Second, the defendants submit that there is no basis in fact for Drynan's submission that one method of evaluating compensatory damages is to determine the difference in value between COLD-FX® and North American ginseng products.

[318] Third, the defendants submit that Dr. Mulvey's evidence that class size cannot be estimated demonstrates that there is no basis in fact for a claim for aggregate compensatory damages.

[319] I address each of these submissions below.

(a) The defendants' submission that Mr. Steger does not consider individual value in his methodology

[320] The defendants submit that there is no workable methodology for compensatory damages because the value of COLD-FX® would have to be based on the value each consumer ascribed to the products, which the defendants submit would depend on the reason for purchasing the product and what they know about the product through various sources.

[321] I do not agree.

[322] As I discuss above, reliance is not required under either the *CPA* or *Competition Act* claims. Consequently, there is no issue before the court that requires determination of any consumer's individual understanding as to the value of the product. The common issue for valuation is an assessment of the damages arising from purchasing a product which was sold at a higher price (or sold at all) based on a representation that is false and misleading.

[323] A similar PCI was certified by the court in *Matoni*, without any requirement for individual value to be considered. Hoy J. held, at paras. 154-55:

> While whether the unfair practice induced the consumer to enter into the contract is not a common issue, 6b,[13] **what remedy class members are entitled to under the *Business Practices Act,* assuming that the unfair practice induced the contract, may nonetheless be a common issue. The possibilities are rescission, recovery of an amount by which the amount paid under the agreement exceeds the fair value of the goods or services received and/or damages, and exemplary damages.** Whether rescission is possible may, for example, turn on whether the student commenced the course. Whether exemplary damages are appropriate presumably turns on the nature of the unfair practice.
>
> … **I am satisfied that in the case of the *Consumer Protection Act,* 6b involves common issues of law arising from common, but not necessarily identical, issues of fact and is also a common issue.** 6b overlaps with Common Issue 8: Punitive Damages, discussed below. [Emphasis added.]

[324] As pleaded in the statement of claim, the defendants have allegedly misled consumers into thinking they were purchasing products that were "Proven by Science" or "Clinically Proven" to help deliver the Claimed Effects. It is not a product liability case in which there may

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[13] In *Matoni*, PCI 6b was "If the answer to question 6a [whether there was a breach of the *CPA*] is yes, what remedy, if any, are the Class members entitled to under the Acts (including the statutory remedy of rescission)?": at para. 148.

be some residual and subjective benefit to the user if the product is shown to have some limited functionality. Rather, the case is based on damages for entering into the transaction at all, or at a higher price than the actual value, after or while the defendants engaged in the alleged unfair practice.

[325] Consequently, consumers' perceptions of the health benefits they derived from consuming the COLD-FX® products are not relevant to aggregate damages, and the need to determine individual value in *Singer* does not arise in the present case.

(b) The defendants' submission that there is no basis to use North American ginseng in an assessment of aggregate damages

[326] It is not the role of the court on a certification motion to determine the appropriate residual value which could be ascribed to COLD-FX® products. The only issue is whether the plaintiff has put forward a workable methodology to arrive at an aggregate damages award.

[327] Consequently, the defendants' submission that "[t]here is no evidence as to the actual retail prices paid for COLD-FX® products nor how pricing for COLD-FX® compares to any allegedly comparable product" raises an issue for trial as to the appropriate inputs into a damages calculation, but does not challenge the existence of a methodology to consider any relevant inputs.

[328] As I discuss at para. 74 above, Mr. Steger was asked to opine on whether he could calculate damages on a common or aggregate basis if asked to assess (i) "the revenues received by the Defendants for the sale of Cold-FX products in the aggregate or on a product-by-product basis"; (ii) "the profit earned by the Defendants for the sale of Cold-FX products in the aggregate or on a product-by-product basis", (iii) "the amount paid by consumers to purchase Cold-FX products in the aggregate or on a product-by-product basis", or (iv) "the difference between the amount paid by consumers for Cold-FX products in the aggregate or on a product-by-product basis and the natural health product American Ginseng".

[329] Each of the assumptions provided by counsel could be a basis for an aggregate award of damages, whether through restitution, disgorgement, or a value-based approach to damages, based on the difference between CVT-E002® and North American ginseng.

[330] Mr. Steger was not challenged on the methodology he used, and no contrary report was filed.

[331] Consequently, the evidence before the court is that Mr. Steger would be able to calculate an aggregate loss based on four possible damage orders made by the court, if provided with the required information.

[332] Mr. Steger stated on cross-examination that his valuation method could be scaled and adjusted to accommodate the various considerations put to him by the defendants' counsel. Mr. Steger set out the inputs upon which he could rely to arrive at a damages calculation based on a

difference in value between COLD-FX® products and North American ginseng, and the defendants filed no evidence to demonstrate that such a calculation was not possible.

[333] The defendants' criticisms of Mr. Steger's methodology do not relate to his ability to use a methodology, but rather to the factors he considered or failed to consider. That is a matter for the trial judge, and does not change the evidence of a workable methodology.

[334] By way of example, the defendants submit that a comparison of value between generic ginseng and COLD-FX® products cannot be used as a method of valuation of common damages because the defendants submit that CVT-E002® is "much more than – and not analogous to – ginseng in its natural form". However, there is no evidence to support that assertion.

[335] While the defendants led evidence that CVT-E002® is a proprietary extract of North American ginseng that makes it low in ginsenoside content (as compared to North American ginseng extraction processes), the core representation issue remains the same: was it proven by science or clinically proven that CVT-E002® helps to provide the Claimed Effects. If not, then a common issues court could determine that the common "value" of COLD-FX® be based on a North American ginseng product, since the false and misleading representation was that consumers were getting a proprietary ginseng product that was proven to help deliver the Claimed Effects.

[336] In the present case, the expert evidence of Mr. Steger demonstrates that information which may be required to calculate aggregate monetary relief, namely the defendants' revenues, profits, amounts paid by consumers to purchase the COLD-FX® products, and the price of American ginseng, is within the knowledge of the defendants or publicly available. Therefore, damages are ascertainable without the necessity of proof from individual class members: *Fulawka*, at para. 127.

[337] It is not necessary for Drynan to lead evidence as to any difference in value between COLD-FX® and North American ginseng at the certification stage, nor any evidence as to the actual retail prices paid for COLD-FX® products and how pricing for COLD-FX® compares to any allegedly comparable product. Drynan only has to establish some basis in fact that such damages could be determined without the need for individual assessment. He has met that low threshold on the evidence before the court.

(c) The defendants' submission that Dr. Mulvey's evidence precludes an aggregate compensatory damages assessment

[338] Dr. Mulvey's evidence was that "there is no reliable common methodology" to determine class size. The defendants submit that the "difficulties inherent with generating an estimate of class size" precludes any aggregate damage assessment.

[339] Dr. Mulvey acknowledged on his cross-examination that his conclusion was based on his "consumer behaviour spin", i.e., he took the view that class members would include only those who relied on the representations to purchase COLD-FX® products and who did not obtain the

value they anticipated. He stated on cross-examination that it "doesn't make sense" to compensate someone if they were not harmed.

[340] Drynan did not file a responding affidavit, but takes the position that the reasons why a consumer might purchase COLD-FX® products are irrelevant, since Drynan submits that reliance on any allegedly unfair or unconscionable practice or false representation is not required for any of the causes of action pleaded.

[341] I agree.

[342] As I have noted above, reliance is not required to obtain damages under the *CPA* or the *Competition Act*. Consequently, Dr. Mulvey's conclusion that estimated class size cannot be determined due to individual issues not only relies on incorrect assumptions but also falls outside his area of expertise because it relies on his interpretation of what is required under the *CPA* to establish liability and an entitlement to damages. These are matters of legal interpretation upon which Dr. Mulvey is not qualified to opine.

(iii) Conclusion on the objection to PCIs 5, 9, and 14

[343] For the above reasons, I dismiss the defendants' objections as to the availability of aggregate compensatory damages.

The defendants' objections to PCIs 10-13, and 15 (the availability of aggregate disgorgement and restitutionary damages) (Objection 17)

[344] The defendants submit that there is no basis in fact to certify any of the PCIs related to the unjust enrichment claim (PCIs 10-12), nor the PCIs related to whether the defendants are entitled to disgorgement or restitutionary relief to be determined on an aggregate basis (PCIs 13 and 15).

[345] I first consider the applicable law as set out in *Atlantic Lottery*. I then apply that law to each of the disgorgement and restitutionary relief claims in the present action.

(i) The applicable law

[346] In *Atlantic Lottery,* Brown J. set out the distinction between disgorgement and restitution, at paras. 23-24:

> Even the term "restitution" has been applied inconsistently, sometimes referring to the causative event of unjust enrichment and sometimes referring to a measure of relief. In my view, restitution properly describes the latter -- meaning, **restitution is the law's remedial answer to circumstances in which a benefit moves from the plaintiff to the defendant, and the defendant is compelled to restore that benefit. Further, restitution stands in contrast to another measure of relief, disgorgement, which refers to awards that are calculated exclusively by**

> **reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all**.
>
> …
>
> **In sum, then, restitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies**. **Each is distinct from the other: *disgorgement* requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff required), while *restitution* is awarded in response to the causative event of unjust enrichment** (most recently discussed by this Court in *Moore*), where there is correspondence between the defendant's gain and the plaintiff's deprivation. [Citations omitted; emphasis added; italics in original text.]

[347] Brown J. concluded that "disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct": at para. 27.

[348] The court in *Atlantic Lottery* did not limit the availability of disgorgement damages to breach of contract. The court held that a waiver of tort claim could not proceed, and that in the circumstances of the case, there was no cause of action for disgorgement for breach of contract.

[349] The court also set out factors that would be relevant to obtaining disgorgement: (i) other remedies are inadequate; and (ii) the plaintiff has a legitimate interest in preventing the defendant's profit-making activity: at para. 53.

[350] With respect to the first requirement, Brown J. held that "[c]ircumstances of inadequacy arise when the nature of the claimant's interest is such that it cannot be vindicated by other forms of relief. This may arise where, for example, the plaintiff's loss is 'impossible to calculate' or where the plaintiff's interest in performance is not reflected by a purely economic measure": at para. 59.

[351] The second element of the *Atlantic Lottery* test requires the establishment of a legitimate interest in preventing the defendant's profit-making activity. In *Atlantic Lottery*, the court held that disgorgement damages for breach of contract were not available since the court struck the allegations of criminal conduct. Consequently, the plaintiff in *Atlantic Lottery* had no special interest in disgorgement of the defendants' gains: at para. 61.

(ii) Is there some basis in fact for the court to order disgorgement?

[352] As I discuss above, it is not settled law that disgorgement is not available for other types of "unlawful conduct". Consequently, it is not beyond doubt that disgorgement could be available for "unlawful conduct" arising from a breach of the *CPA* or the *Competition Act*.

[353] The "inadequacy" requirement of the *Atlantic Lottery* test can be met if the plaintiff's loss is too difficult or impossible to quantify "or where the plaintiff's interest in performance is not reflected by a purely economic measure": at para. 59.

[354] In the present case, the defendants challenge the proposed assessment of compensatory damages on the basis that it cannot be determined without a method to calculate residual value. While Drynan opposes that position, it is open to the common issues trial judge to accept the defendants' position, and, as such, find that in the circumstances of the case, Drynan's loss is too difficult or impossible to quantify using a compensatory damage approach.

[355] Further, there is a basis in fact to quantify disgorgement damages on an aggregate basis. Mr. Steger's evidence as to methodology would permit him to determine aggregate damages based on revenues, profits, or the amounts paid by consumers, if disgorgement on any of those bases were ordered by the common issues judge.

[356] Given the strong consumer protection objective of the legislation relied upon by Drynan (both under the *CPA* and the *Competition Act*), there is some basis in fact upon which Drynan could establish that consumers have a legitimate interest in preventing the defendants' wrongful profit-making activity.

[357] Such an issue would be common to all class members, with the common issues judge determining whether the disgorgement remedy is available. I cannot find at this time that such a remedy is precluded.

[358] The availability of disgorgement damages for the defendants' wrongful gain is also consistent with the court's broad flexibility to fashion an appropriate remedy under the *CPA*. In *Ramdath 2*, the court held, at para. 94, that a court has "complete flexibility to award whatever damages would be appropriate at common law".

(iii) Is there some basis in fact to order restitutionary relief?

[359] As I discuss at para. 346 above, the court in *Atlantic Lottery* held that restitution can be ordered when "a benefit moves from the plaintiff to the defendant, and the defendant is compelled to restore that benefit". It is the remedy for an unjust enrichment claim.

[360] In the present case, I have found that the claim discloses a cause of action for unjust enrichment. Drynan submits that the defendants were enriched by sales made while the defendants were engaged in the alleged unfair practice; the class members were correspondingly deprived by making those purchases or paying a higher price based on the unfair practices; and there was no juristic cause for such benefit. On that basis, a claim for restitutionary relief can be ordered given the analysis in *Atlantic Lottery*.

(iv) Conclusion on the availability of aggregate disgorgement and restitutionary damages

[361] For the above reasons, I find that there is some basis in fact that could permit a common issues judge to award disgorgement or restitutionary damages. For those reasons, I reject this objection raised by the defendants.

The defendants' objection to certification of the punitive damages claim (PCI 16) (Objection 18)

[362] The defendants object to PCI 16: "Are the defendants, or any of them, liable to pay punitive damages to the Class members, having regard to the nature of their conduct and if so, what is the amount of punitive damages?".

[363] The appropriateness of such a common issue is well-accepted in the case law, and has been certified in other class actions under the *Competition Act*: see *Pro-Sys*, Appendix.

[364] However, the defendants submit that there is no basis in fact before the court to permit such a common issue to be certified.

[365] In the present case, there is some basis in fact for a punitive damages claim. There is evidence that the "proven by science" and "clinically proven" representations were made outside of the Health Canada licence and that those representations were introduced by the defendants to improve consumer perception of the efficacy of COLD-FX® products.

[366] Consequently, there is evidence (based on the low threshold for certification) upon which a court could accept Drynan's pleading that the defendants conduct was:

> [H]igh-handed, malicious and reprehensible, and it departs to a marked degree from the standards expected of Canadian manufacturers, marketers, sellers and distributors of pharmaceutical and natural health products [since the defendants] consistently and repeatedly made the false, misleading, deceptive, and unconscionable Representations as part of their aggressive COLD-FX marketing campaign … despite knowing that the clinical studies and trials that they commissioned or funded failed to provide adequate scientific and clinical support for the Representations.

[367] For the above reasons, I dismiss this objection.

*Section 5(1)(d) objection (Objection 19)*

[368] In this section, I first consider the applicable law. I then review the defendants' position. I then consider the objection given the pleadings and applicable law.

The applicable law

[369] The preferable procedure inquiry should be conducted through the lens of the three principal advantages of class proceedings: judicial economy, access to justice and behaviour modification. "Preferable" should be construed broadly to capture two ideas: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii) whether a class proceeding would be preferable to other procedures such as joinder, test cases and consolidation: *Hollick*, at paras. 27-28.

[370] A proceeding will only satisfy the preferable procedure requirement where the court finds that (i) the class proceeding would be a fair, efficient, and manageable method of advancing the claim; and (ii) it would be preferable to any other reasonably available means of resolving the class members' claims: *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 48.

[371] A class proceeding is not preferable if the common issues are "overwhelmed or subsumed by the individual issues such that the resolution of the common issues will not be the end of the liability inquiry but only the beginning": *Fresco v. Canadian Imperial Bank of Commerce*, 2009 CanLII 31177 (Ont. S.C.), at para. 94.

The defendants' position

[372] The defendants rely again on *Harrison* CA, in which the court held that "where different representations are made to different persons in different circumstances, a class proceeding will often not be appropriate because of the need for detailed individual assessments of circumstances": at para. 62.

[373] The defendants submit that:

(i) Access to justice is not promoted by certification since:

(a) "[a]ny individual who was not satisfied with their purchase of a COLD-FX® product could obtain a full refund for their purchase without proof of purchase; contact Health Canada to report 'misleading' advertising or labelling; and/or commence an individual claim, which, given the nominal purchase price of COLD-FX® products, would be appropriate for a small claims court action"; and

(b) there would be "expensive and complex class actions where there is an absence of evidence of persons seeking to advance the subject matter claim" (relying on *Harrison* CA, at para. 32, and *Norman v. Thunder Bay Regional Health Sciences Centre*, 2015 ONSC 3252, at paras. 117-19);

(ii) Judicial economy would not be promoted because of "the risk of the proceeding collapsing under its own weight" (citing *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879, at para. 196). The defendants submit that "[t]he meaning of COLD-FX® advertising, and therefore the alleged misrepresentations,

depends on the specific product; what label and or advertising was seen; the reason for purchasing the product; the purchase price; and the perceived value of the product [which] requires an individualized assessment for each class member", creating a "broadly framed class action which [considers] multiple products, multiple representations, over a number of years" (relying on the *Harrison* decisions); and

(iii) Behaviour modification is not promoted because there is "already a comprehensive regulatory scheme and enforcement to regulate and deter misconduct". The defendants submit that:

(a) "*FDA* and Health Canada regulate alleged unfair practices to ensure NHPs do not mislead consumers";

(b) "To the extent that the Plaintiff believes that COLD-FX® labels and advertising are inaccurate or misleading, he can direct his complaints to the appropriate regulators under the Regulations or the *Food and Drugs Act*"; and

(c) "Health Canada has the power to review the evidence submitted to it by the Defendants to consider whether there is sufficient evidence to support a NHP's approved claims".

[374] I address each of these submissions below.

Analysis

(i) Submission 1: Access to justice

[375] The defendants rely on (i) their refund process, (ii) regulation by Health Canada, (iii) claims before the Small Claims Court, and (iv) the alleged absence of evidence of persons seeking to advance the subject matter. I address these submissions below.

(a) The refund process

[376] There is no evidence that consumers have any knowledge of the refund process. It is not indicated on any packaging, which only provides a toll free number or website link for any "[q]uestions, concerns or to learn more". No website reference to a refund policy was led in evidence.

[377] In any event, a refund process would only address the claims of those class members who were aware of the misleading nature of the representations, even though all class members would be entitled to claim damages under the *CPA*, Equivalent Consumer Protection Legislation, and *Competition Act*, regardless of whether they knew about the unfair practice. Consequently, access to justice would not be provided to all class members.

(b) The Health Canada regime

[378] The defendants filed no evidence of the procedural and substantive elements of access to the Health Canada regime as an alternative to a class action. There is no evidence that Health Canada has a process to adjudicate claims on unfair practices or a process to enable class members to obtain a substantive, fair and just remedy.

[379] The cross-examination of Dr. Boon supports Drynan's submission that Health Canada is a regime with a different purpose and mandate from a consumer protection class action. Health Canada follows a risk-based process to protect the health of consumers by assessing safety and efficacy of products for a reasonable assurance that the benefits of the product outweigh any risks.

[380] There is no evidence of any adjudicative tribunal at Health Canada to address any unfair practice concerns. There is no evidence of any Health Canada process that can compensate class members. In any event, the core representation that COLD-FX® products were "proven by science" or "clinically proven" to help provide the Claimed Effects was not approved by Health Canada.[14]

[381] In *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396, Branch J. rejected the defendants' submission that a class action was not the preferable procedure. The defendants in *Krishnan*, as in the present case, submitted that a false and misleading advertising claim related to an NHP could be addressed by Health Canada. Branch J. held, at paras. 221-23:

> **In particular, the Defendant Manufacturers argue that a complaint to Health Canada would be preferable to a class proceeding, as Health Canada has the power to suspend product licenses to prevent further non-compliance, and to review approved testing methods for insufficiencies under the NHP Regulations.**
>
> **The problem with this suggestion is clear, Health Canada does not have the power to award damages or restitution. If the plaintiff's primary purpose is to get her money back, there is nothing Health Canada can do for her.** In *Reid*, the court rejected a suggestion that a Transport Canada complaint was the preferable procedure for a product defect complaint. The court stated:
>
> > [95] There is evidence that complaints have been made to Transport Canada regarding stalling problems in the proposed class vehicles and Ford Canada was made aware of these complaints, as

[14] (except for limited clinically proven benefits for those over the age of 65, as set out at para. 58 above)

> copies of the complaints are routinely sent to Ford Canada. The defendants' claim that they are not aware of such complaints is a clear indication that complaining to Transport Canada is not an effective means to resolve these types of claims. The evidence is that Transport Canada has not engaged in any prosecutions for the last ten years. A determination by Transport Canada is not binding or governing in any civil proceeding nor does it have the power to award damages. Hence, it is not an appropriate alternative to the proposed class proceedings.
>
> While it is true that there appears to have been no complaints to Health Canada here, the point still stands that a determination by Health Canada "is not binding in any civil proceeding nor does it have the power to award damages". [Emphasis added.]

[382] In *Wellman*, Conway J. rejected the defendants' submission that the Canadian Radio-television and Telecommunications Commission could address claims for compensatory damages arising from rounding up calculations: at para. 78.

[383] Consequently, I do not accept that a complaint to Health Canada would provide class members with an alternative mechanism to address procedural and substantive remedies sought in the class action.

(c) Small Claims Court

[384] There is no evidence to support the defendants' submission that consumers could "commence an individual claim, which given the nominal purchase price of COLD-FX® products, would be appropriate for a small claims court action".

[385] It is not practical to suggest that hundreds of thousands of class members should each advance individual small claims court actions, with expert evidence as to whether the impugned representations were "proven by science", all in order to seek limited damages arising out of their individual purchases. The cost of litigation would far exceed any individual recovery.

(d) The absence of a person seeking to advance the subject matter claim

[386] Finally, the defendants' submission that access to justice is not promoted because "there is an absence of evidence of persons seeking to advance the subject matter claim" is based on cases which do not apply to the present facts.

[387] In *Harrison*, "the judge did not find it necessary to undertake an inquiry into whether a class proceeding would be the preferable procedure," and the Court of Appeal's limited observations on preferability were informed by "issues of causation and reliance" that are not applicable in the present case: *Harrison* CA, at paras. 61-63.

[388] In *Norman*, the proposed class was comprised of 10 individuals who had significant medical malpractice claims of the type "that are usually prosecuted on a contingency fee basis": at paras. 115-18.

[389] The class size in the present case is much larger and the nature of the claims is fundamentally different. Drynan seeks to advance the claim for a class of consumers who purchased more than 2.3 million units of COLD-FX® products during the class period.

[390] For the above reasons, I find that access to justice would be promoted by a class action.

(ii) Submission 2: Judicial economy

[391] The defendants submit that the class action would "[collapse] under its own weight", since the court would have to address "a broadly framed class action which considered multiple products, multiple representations, over a number of years" which "requires an individualized assessment for each class member".

[392] I do not agree.

[393] As the Court of Appeal commented in *Ramdath 2*, "[b]y removing any requirement for reliance or inducement, common issues that are determinative of whether there is liability for a *Consumer Protection Act* claim can be certified": at para. 88.

[394] Nor is reliance a necessary element for the *Competition Act* claim, and damages can be calculated on an aggregate basis: *Rebuck*, at paras. 32-33. In the present case, the loss requirement under s. 36 of the *Competition Act* may be satisfied by the difference in price between the COLD-FX® products and a generic version of North American ginseng, which does not require evidence of individual loss.

[395] Consequently, there is judicial economy in having the common issues resolved for all class members in one proceeding. That determination can be made on the basis of the pleaded claim, without any risk of the proceeding "collapsing under its own weight" based on "what label or advertising was seen" or "the reason for purchasing the product".

[396] As I discuss above, the *Harrison* decisions relied upon by the defendants were based on a common law misrepresentation claim which required individualized assessments of reliance. Further, the decisions were based on a multitude of alleged misrepresentations, many of which addressed the efficacy of COLD-FX® products. In the present case, there is a core representation of whether it was proven by science or clinically proven that COLD-FX® helped to produce the Claimed Effects. No reliance is required to establish liability under the *CPA*, *Competition Act*, or unjust enrichment claims.

[397] Similarly, the present case is distinguishable from *Kett*, in which the court discussed the risk of the proceeding "collapsing under its own weight": at para. 196. At issue in that case were alleged overcharges by multiple defendant automobile parts manufacturers in respect of a

"staggering" number of products: at para. 7. Branch J. determined that "both liability and damages would require a 'shipment-by-shipment' analysis at best" and that the "required analysis would come very close to a vehicle-by-vehicle evaluation, in a case involving millions of vehicles — a daunting prospect to be sure": at paras. 172, 182.

[398] However, the present case is concerned with COLD-FX® products which are linked by the common representation that these products are "Proven by Science" and "Clinically Proven" to help produce the Claimed Effects. The concerns raised in *Kett* do not arise.

[399] Consequently, I find that judicial economy favours certification.

(iii) Submission 3: Behaviour modification

[400] The evidence does not support the defendants' submission that the *FDA* and Health Canada provide "a comprehensive regulatory scheme and enforcement to regulate and deter misconduct".

[401] Although the defendants adduced evidence as to Health Canada's regulatory regime for approving COLD-FX® product licences, there is almost no evidence on Health Canada's enforcement of breaches of false and misleading advertising provisions subsequent to the issuance of product licences.

[402] The limited evidence on Health Canada's enforcement mandate consists of:

(i) one sentence in Dr. Boon's affidavit: "The Office of Policy, Risk Advisory, and Advertising (of the Marketed Health Products Directorate) oversees 'the Department's health product regulatory advertising activities, to ensure that health product advertisements are not false, misleading or deceptive'"; and

(ii) a brief discussion on Health Canada's "monitoring" role in connection with extensions or amendments to the COLD-FX® product licences in Shepherd's affidavit.

[403] There is no evidence that Heath Canada (or another government body) has the authority to impose, or has imposed, significant fines or other penalties on non-compliant NHP manufacturers in a manner that would promote behaviour modification. Nor is there any evidence that Health Canada has the authority to award consumers damages or other forms of compensation.

[404] Even if Health Canada could take steps to change messaging or prevent the core representation, there is no evidence that it has taken any steps to do so. In any event, the deterrent effect of seeking damages on a class wide basis (including punitive damages) promotes behaviour modification in a much more effective manner than requiring an NHP manufacturer to change advertising after selling millions of units of its product through allegedly unfair practices.

[405] For the above reasons, I reject the s. 5(1)(d) objection.

*Section 5(1)(e) objection (Objection 20)*

[406] In this section, I first consider the applicable law. I then review the defendants' position. Finally, I consider the objection given the pleadings and applicable law.

The applicable law

[407] Under s. 5(1)(e) of the *Act*, there must be a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan to advance the proceedings and notify the class, and (iii) does not have an interest that conflicts with the interests of the other class members.

[408] A representative plaintiff must be a genuine representative of the class and be willing and able to vigorously prosecute the claims of the class: *Western Canadian Shopping Centres Inc.*, at para. 41.

[409] At the certification stage, the plaintiff's litigation plan is necessarily tentative and not all procedural details need to be provided. Its purpose is to assist the court to determine whether the goals of the *Act* will be served by certification, not to provide a finalized plan with all procedural elements spelled out in detail: *Andersen v. St. Jude Medical Inc.*, [2004] O.J. No. 132 (S.C.), at para 14. The litigation plan can be modified as necessary as the litigation progresses: *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.), at para 70.

The defendants' objection

[410] The defendants submit that Drynan is not an adequate representative plaintiff because:

(i) He 'took the wrong COLD-FX® product for his symptoms", and "therefore has no entitlement to damages and does not possess a compensable claim" (relying on *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, in which the court held that a representative plaintiff's claim must be "anchored in the class action": at para. 365);

(ii) He is "good friends with counsel for almost twenty years" which "may interfere with [Drynan's] ability to act as an independent and neutral representative of the class" (relying on *Kett*, at paras. 201-04). The defendants suggest that Drynan is "a string-puppet of entrepreneurial champertous class counsel" (as the concern was raised in *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271, 45 C.C.E.L. (4th) 217, at para. 44) and has no real interest in the outcome of the litigation (as that concern was expressed in *Harrison* SC, at para. 73; and *Singer*, at para. 222); and

(iii) "The generic and skeletal litigation plan tendered by the Plaintiff does not address the inherent complexities of this proposed class action" since it "fails to consider individual issues that may be left for after the determination of common issues" because "there is no plan for assessing damages after deciding the common issues; and there is no breakdown or consideration of what will be a large and multi-faceted class".

[411] I address each of these submissions below.

Analysis

(i) Drynan's use of COLD-FX® Daily Support

[412] The defendants submit that Drynan cannot be a representative plaintiff because he purchased the "wrong product", i.e., he purchased COLD-FX® Daily Support when he already had cold and flu symptoms. I do not agree that this is a valid objection.

[413] The class action does not depend on which COLD-FX® product was purchased, or the reason for it. Each member of the class purchased COLD-FX® products after or while the defendants represented that COLD-FX® products were "proven by science" or "clinically proven" to help provide the Claimed Effects. The core representation is the basis of the cause of action. Consequently, Drynan's claim is anchored to the PCIs in the class action, regardless of which COLD-FX® product he purchased.

[414] The present case can be distinguished from *Martin*, which is relied upon by the defendants. In *Martin*, the representative plaintiffs' claims were not "anchored in the class action" because (i) there was no medical evidence that the impugned drug caused the weight gain complained of by the plaintiffs, which evidence was required to sustain the various negligence-based claims pleaded and (ii) Martin alleged a duty to warn but there was no evidence that the weight gain warnings contained in the defendants' monographs were inadequate. In the present case negligence is not pleaded and reliance is not required under the *CPA* and *Competition Act* as discussed above. Drynan's claims are anchored in the class action.

(ii) Relationship between Drynan and class counsel

[415] The defendants' submission that Drynan and Mr. Bunting were "good friends" is not supported by the evidence. Drynan's evidence was that he:

(i) met Mr. Bunting in 2003, when they were volunteer counsellors at a summer camp,

(ii) became the Executive Director of the camp in 2004 and Mr. Bunting later joined the camp board, and

(iii) also knew defendants' counsel, Ms. Findlay as a volunteer counsellor at the camp.

[416] The above evidence does not support the submission that Drynan and Mr. Bunting were "good friends". In cross-examination, the defendants' counsel did not explore the nature of Drynan's alleged friendship with Mr. Bunting. There is no evidence that this relationship might interfere or conflict with Drynan's role as representative plaintiff.

[417] The evidence does not support the defendants' insinuation that Drynan is a "string-puppet of entrepreneurial champertous class counsel". There is evidence that Drynan is an engaged, genuine, and determined plaintiff who understands his duties to the class and his role in the action. There is no evidence that he has a conflict with class members or that he cannot fairly and adequately represent the interests of the class.

[418] There is some basis in fact (through Drynan's affidavit evidence and his cross-examination) that Drynan is a capable, informed and independent representative of the class (as the test is set out in *Singer*, at para. 217).

[419] Consequently, none of the cases relied upon by the defendants are applicable to the present case:

(i) In *Kett*, the court "accepted the plaintiff as a suitable representative" even though he had a family relationship with a lawyer at class counsel's firm (who resigned before the certification motion): at paras. 203-04;

(ii) In *Singer*, the proposed representative plaintiff had been a client of class counsel and "came to the law firm's office on a regular basis to participate in prayer meetings." Moreover, the plaintiff continued to purchase and use the impugned products despite having commenced the class action: at paras. 212, 214;

(iii) In *Harrison*, the court found that the representative plaintiff had not been involved in the litigation for four years prior to the certification hearing and thus was not sufficiently motivated to pursue the litigation: *Harrison* SC, at paras. 72-74; and

(iv) In *Chartrand v. General Motors Corp.*, 2008 BCSC 1781, the court was not satisfied that the proposed representative plaintiff was actively participating in the litigation or would do so in the future. Moreover, the court expressed concerns that American lawyers had some sort of "partnership" with class counsel and were "playing a significant role behind the scenes": at paras. 102-07.

[420] Further, the defendants have not provided any authority indicating that a prior acquaintance with class counsel, and nothing more, disqualifies a proposed representative plaintiff.

[421] Finally, even if there was any evidence that the present action is a counsel-driven proceeding (which I do not find), Ontario courts have held that entrepreneurial class counsel may be an effective vehicle to achieve the policy goals of the *Act* and that potential drawbacks of this

entrepreneurism are mitigated by the court's supervisory role throughout the life of a class action: *Fantl v. Transamerica Life Canada*, 2008 CarswellOnt 2249 (S.C.), at paras. 53, 55, and *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, at para. 94, aff'd 2018 ONSC 6352 (Div. Ct.).

(iii) Litigation plan

[422] Drynan has also proposed a satisfactory litigation plan that meets the requirements of s. 5(1)(e): *Bellaire v. Independent Order of Foresters*, 2004 CarswellOnt 5608 (S.C.), at para. 53.

[423] Drynan's plan provides a workable path through the common issues trial stage, including documentary and oral discovery, expert evidence, notification and reporting to class members, and determination of aggregate monetary relief. Given that proof of individual reliance is not required and aggregate damages may be available, it is reasonable for Drynan to not expect significant individual issues to remain if the common issues are resolved in favour of the class.

[424] The defendants submit that the litigation plan fails to (i) account for "the inherent complexities of this proposed class proceeding" and (ii) adequately consider individual issues that might remain after the common issues are determined. However, that submission is again based on the defendants' approach that individual assessments of "value", "reasons for purchase", and "reliance" will all have to be considered by the trial judge.

[425] Under Drynan's approach, it will not be necessary to consider any of those individual issues. Since reliance is not required under the causes of action pleaded, the litigation plan contemplates that the common issues trial judge will be able to determine liability and damages as common issues, with damages assessed in the aggregate. There is some basis in fact for such an approach, for all of the reasons discussed above.

[426] However, to the extent individual issue determinations are necessary following the common issues trial, Drynan will propose and seek approval of a process for resolving the individual issues using the procedures set out in s. 25 of the *Act*.

[427] Furthermore, Ontario courts have recognized that litigation plans may be amended during the course of proceedings, and that the procedure for resolving individual issues (if any) should be left to the common issues judge who may depart from the litigation plan as the litigation progresses: *Keatley Surveying Ltd. v. Teranet Inc.*, 2014 ONSC 1677, 371 D.L.R. (4th) 534 (Div. Ct.), at paras. 122-123, aff'd 2015 ONCA 248, 125 O.R. (3d) 447.

[428] For the above reasons, I find that Drynan has produced a workable litigation plan.

**ORDER AND COSTS**

[429] I certify the action against Bausch Canada and Valeant Canada LP.

[430] If the parties are unable to agree on costs, Drynan shall deliver a costs submission of no more than five pages (not including the costs outline) by December 3, 2021. The defendants shall

deliver responding costs submissions of no more than five pages (not including the costs outline) by December 17, 2021. Drynan may deliver a reply costs submission of no more than three pages by December 24, 2021.

GLUSTEIN J.

**Date:** 20211110

## APPENDIX

## Proposed Common Issues

Consumer Protection

1. Does the *Consumer Protection Act 2002*, SO 2002, c 30 ("*CPA*") or the Equivalent Consumer Protection Legislation (as defined in the Statement of Claim) apply to the Defendants? If so, to which Defendants?

2. Is contractual privity between the Defendants, or any of them, and the Class members required to ground a claim under Part III of the *CPA* or parallel provisions of the Equivalent Consumer Protection Legislation?

3. If so, has contractual privity been established, either directly as between the Defendants, or any of them, and Class members, or through the existence of an agency relationship between the Defendants and their online and/or bricks and mortar sales agents?

4. Did the Defendants, or any of them, engage in Unfair practices within the meaning of the *CPA* or the Equivalent Consumer Protection Legislation?

5. If so, are the Class members, or any of them, entitled to damages under the *CPA* or the Equivalent Consumer Protection Legislation?

6. Are the Defendants liable jointly and severally with any person who entered into an agreement with the consumer for any amount to which the Class Members may be entitled under the *CPA* or parallel provisions of the Equivalent Consumer Protection Legislation?

7. Is it in the interests of justice to disregard the requirement to give notice that a consumer seeks to recover damages under the *CPA* or the Equivalent Consumer Protection Legislation?

Competition Act

8. Did the Defendants, or any of them, engage in conduct contrary to section 52 of the *Competition Act*, RSC 1985, c C-34?

9. If so, are the Defendants, or any of them, liable to the Class members for loss or damage suffered, investigation costs, and/or costs of this proceeding under section 36(1) of the *Competition Act*?

Unjust Enrichment

10. Were the Defendants, or any of them, unjustly enriched from the sale of COLD-FX Products?

11. If so, did the Class members suffer a corresponding depravation?

12. If so, is there a juristic reason for the Defendants' enrichment?

13. If so, are the Class members entitled to restitution on the basis of unjust enrichment?

Aggregate Monetary Relief

14. If common issues 5 and/or 9 are answered in the affirmative, can the amount of loss or damages suffered by the Class members be determined on an aggregate basis, and if so, in what amount?

15. If common issue 13 is answered in the affirmative, can the amount of restitutionary relief or disgorgement to which the Class members are entitled be determined on an aggregate basis, and if so, in what amount?

16. Are the Defendants, or any of them, liable to pay punitive damages to the Class members, having regard to the nature of their conduct, and if so, what is the amount of punitive damages?

**CITATION:** Drynan v. Bausch Health Companies Inc., 2021 ONSC 7423
**COURT FILE NO.:** CV-19-00632601-00CP
**DATE:** 20211110

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

ROBERT DRYNAN

Plaintiff

**AND:**

BAUSCH HEALTH COMPANIES INC., BAUSCH HEALTH CANADA INC., VALEANT CANADA GP LIMITED, VALEANT CANADA LIMITED, VALEANT CANADA LP

Defendants

**REASONS FOR DECISION**

Glustein J.

**Released:** November 10, 2021