Exhibit 10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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UNITED STATES OF AMERICA,	Case No. 1:09-cr-149
Plaintiff,	***Motion Hearing via Telephone Conference Call***
- v -	
ARCTIC GLACIER INTERNATIONAL, INC.,	Tuesday, February 16, 2010 1:00 PM
Defendant.	Cincinnati, Ohio

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HERMAN J. WEBER, SENIOR JUDGE

APPEARANCES:

For the Plaintiff:
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Proceedings recorded in stenotype;
transcript prepared by computer.

APPEARANCES (Continued):

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Court Reporter:	Luke T. Lavin, RDR, CRR 838 Potter Stewart U.S. Courthouse 100 East Fifth Street Cincinnati, Ohio 45202

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P R O C E E D I N G S

(In chambers at 1:00 PM.)

COURTROOM DEPUTY: Judge Weber's chambers.

MR. AXELROD: Hi. This is David Axelrod.

COURTROOM DEPUTY: Who else do we have on the line?

MR. AXELROD: Well, I'm actually about to try to conference now.

COURTROOM DEPUTY: Okay. Wonderful.

MR. AXELROD: So cross your fingers.

COURTROOM DEPUTY: Thank you.

MR. AXELROD: Everyone here? Kevin?

MR. CULUM: Yes.

MR. AXELROD: All right. Do we have the whole party here?

MR. CULUM: I think so.

MR. WILD: We're here. Hang on a second.

UNIDENTIFIED SPEAKER: Hello?

COURTROOM DEPUTY: Okay. Do we have everyone?

MR. AXELROD: I think so. Why don't we take a roll call just to be sure.

THE COURT: Hi, everybody. Why don't you just enter your appearance for the record. And we'll start with -- well, Mr. Culum, I guess you're still in the plaintiff's seat or the --

MR. CULUM: I am. I am the plaintiff, and I'm here

with Don Lyon.

THE COURT: And defendant?

MR. MAJORAS: Yes. John Majoras from Arctic Glacier.

THE COURT: Then Mr. Axelrod?

MR. AXELROD: David Axelrod for the victim petitioners. Also on the phone is Matthew Wild of Levitt and Kaizer in New York.

THE COURT: And how are you, Mr. Wild?

MR. WILD: Very well, thank you. And yourself, Your Honor?

THE COURT: I'm snowed in, but outside of that, fine. Mr. Low?

MR. WILD: We're getting snow here now too.

THE COURT: Is it? Well, if it's heading your way, it's going to be a burden for the City of New York, that's for sure.

MR. WILD: Well, yeah, I can imagine.

THE COURT: Mr. Low, are you there?

MR. LOW: Yes, Your Honor. Daniel Low on behalf of Mr. McNulty and Mr. Mowery.

THE COURT: All right. Now, Mr. Low, you did actually, in my opinion, present a claim for restitution, and I just wanted to get the amounts on record. I think Mr. -- well, let me see. Mr. McNulty was requesting $6 million; is that right?

MR. LOW: Yes, Your Honor.

THE COURT: And Mr. --

Is it Maury?

MR. LOW: Mowery.

THE COURT: -- Mowery was requesting, I thought, 385,000, but I'm not sure about that number.

MR. LOW: Umm --

THE COURT: It was the difference between what he was offered originally, and I think it was by Home City, and what he was paid, what he was paid.

MR. LOW: Your Honor, I believe it was 388,000.

THE COURT: Okay. Well, in other words, I'm in the ballpark anyway.

MR. LOW: Yes, Your Honor.

THE COURT: All right. So those were the two restitution amounts that were before the Court, and, of course, I went ahead and proceeded as I did.

Now, Mr. Axelrod, you can bring me up to date on your request. And as far as I read your motion and as I understand it, you were objecting to two or three things: declining to recognize them as victims.

And those were the -- I'm not going to pronounce all their names. Are they the same ones that you have represented throughout, or have you added some names?

MR. AXELROD: Your Honor, I have the same group of

clients that I have represented throughout.

THE COURT: All right. And then accepting the plea despite the government's failure to offer the victims an opportunity to confer before its entry, and denying them access to the presentence investigative report.

And that, as I understand, is what we're going to be discussing now, and then the motion, of course, to stay and whether I will stay the proceedings. And you certainly have a right to file mandamus. That seems to be the hallmark of the statute and Congress' intent as it now exists. However, it's kind of a hybrid mandamus. It's more of an appeal than it is a mandamus. But be that as it may, that's something that the circuit will filter out for me.

So, Mr. Axelrod, if you want to go forward, you can incorporate what you've already said over the past, I think, three meetings we've had, or maybe four.

MR. AXELROD: Your Honor, I will be unusually brief. As I said at the conclusion of the sentencing hearing, we appreciate the Court's graciousness in hearing from us at great length throughout these proceedings.

Unfortunately, we believe that we were simply never able to overcome the fact that we were not invited to the party until too late, that the government, despite having been acquainted with Mr. Wild and knowing that he represented a class of indirect purchasers, did not contact him before the plea

agreement was entered. And once it was entered, it was a Sisyphian effort to try to get the plea agreement changed in a way that it would conform to what we believe the facts are and to what we believe the law requires.

And, obviously, we had a variety of substantive objections that we had hoped the Court would agree with, but -- and that the Court would rule based on substance, but we believe procedurally, nonetheless, we've been denied our rights. And it's important to us, and we -- we want to pursue them.

THE COURT: Mr. Culum, what kind of a record do you want to make in this case? And maybe you can agree to a brief stay.

MR. CULUM: Well, Your Honor, let me address that first. We do not believe that a stay is necessary in this case. We believe, as Mr. Axelrod conceded, or conceded at the hearing, all the rights of the Crime Victims' Rights Act have been conferred upon the victims and the petitioners in this proceeding. That being said, we certainly defer to the Court's discretion in terms of -- you know, if a stay is warranted in the Court's decision matrix, that's fine, but we don't believe that one is necessary here.

Let me address a couple of issues somewhat substantively. And I'm sure that counsel for Arctic -- Mr. Majoras -- will discuss more thoroughly how any additional delay could harm Arctic Glacier. And certainly I am not in a position to do so,

but certainly we are aware of the issues, as are the victims, in terms of the precarious financial condition of the company as they made at great length in the sentencing hearing.

In very short order we want to re-establish that the victims were accorded all the rights enumerated under 3771(a). That was clearly established in the record, and we rely on the record.

It seems to me that the opportunity to file this type of a motion or petition could have been done earlier. There's almost an estoppel issue. Thursday there was no mention at the end of the hearing that such a motion would be filed, no effort to alert us until 9:30 this morning that such a motion would be coming. We think that time to -- you know, that because time is of the essence, no further delay is required.

We also notice that in the objections to the plea agreement that were filed by Mr. Axelrod, there was no reasserting of the idea that we had not conferred with the petitioners in this case. I believe that the arraignment -- you know, we have conferred. Conferring does not mean agreement. We did confer, we did listen, we have considered what they had to say. We think that that is what the Crime Victims' Rights Act entitles a victim to do and requires us to do, and we certainly have done that, even notwithstanding the fact that we do not concede in any way that the petitioners in this case are victims of this crime.

So we were a little surprised to see in this paper that the -- to reassert the failure on our part to confer with the victims in this case. In some ways it is an inexorable opportunity for them to continue to argue, because we signed a plea agreement. We signed a plea agreement; we then conferred with them. Factually that will never change. We did listen to what they had to say. As a result of what they had to say, we ensured -- and we took great order of time, of the Court's time, and we apologize -- to ensure that probation was a portion of the plea agreement, which as Your Honor indicated at the time of the hearing, you did not believe was a part of it. That was a critical issue on the part of the petitioners in this case: to ensure that probation was established.

And great effort, myself and Mr. Majoras ensured that probation was available to Arctic Glacier in this case. So to say that we weren't conferring with them I think does not lend credence to the -- the facts do not lend credence to that.

The other issue is the declining of the -- declining to recognize them as victims. Your Honor chose not to define whether they were victims or not, and you were perfectly entitled to do so. And I thought that what your bigger point was, that you gave them the rights -- whether they're victims or whether they're not, they were given the opportunity under the Crime Victims' Rights Act to do the various things that were accorded them, and you made sure that it was on the record

that those rights were conferred regardless of whether they're a victim or not. To you it seemed like it was an irrelevant fact. You wanted to make sure that these petitioners were accorded what you believed were what the statute provides. So in some ways it's irrelevant whether you decline to recognize them or not.

And then the final issue, denying them access to the presentence investigative report, I am not an expert on the time, the various procedural time things on the Crime Victims' Rights Act, but as I read it, it says, "In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter" as it relates a particular proceeding.

You, Your Honor, denied turning over the PSR far more than five days ago. It was -- and I don't have the date in front of me, but I know that the Court will remember. It was, I believe, like February 2nd or so. And I think that there is no standing that -- to even seek review of that at this point, because certainly more than five days have transpired since you denied them the PSR.

If that was something that they felt they were entitled to under the Crime Victims' Rights Act, it seems to me that they should have acted at that time. They chose not to. I don't think that they should be allowed at this point to continue to reassert that issue. The water has passed under that bridge.

So the three issues that they sought, one is the declination, I think that Your Honor gave them all the rights regardless of whether they're victims or not, which we would argue -- and as I said in court, and you refused to -- that we specifically say they are not victims.

The second issue is they have not -- they seem to have waived or abandoned the argument about the conferring. And I would argue that, in point of fact, the probation, that we sought probation and suggest how strongly we did confer with them and how we did take their concerns into light.

And then the third thing is the denial of the PSR. I think that they've abandoned that and they've waived it. So for all those reasons I think that it is unnecessary to grant them a stay or additional time, but we certainly defer to your judgment, Your Honor.

THE COURT: Mr. Majoras?

MR. MAJORAS: Thank you, Your Honor.

Arctic opposes any delay in this case. We think that the arguments that the government just made are the appropriate responses to the substantive allegations they make. As we have made clear from the very time I appeared before you in chambers, certainty is a very important issue to our company. We have been trying to resolve this matter, working toward ultimately reaching a plea and then getting to the sentencing date.

Now, as I mentioned when I started, at least in our hearing the other day, the company has received refinancing. That was announced publicly that evening. So I'm not going to sit here and tell you that there is any particular thing that will happen if there is delay. A delay is a very important issue to the company as we seek certainty in moving forward trying to put this behind us.

And I think, in particular if you look at the arguments that Mr. Axelrod is making here, most of these arguments are the same ones that he has made since the first time he appeared before the Court. In addition to that, merely by fortuitous circumstances -- he had a federal holiday; the fact that the Court was unable to look at this matter again on Friday after entering the judgment -- he had a four-day window in which to make an argument on mandamus.

So if he wants to bring a mandamus motion, he should bring it in the time in which it's prescribed, but we think delay here is unnecessary and also would be harmful to the company.

THE COURT: Mr. Low?

MR. LOW: Your Honor, Mr. McNulty and Mr. Mowery are also considering filing a mandamus petition. Right now we're leaning in favor of it, not having made the final decision.

We read the statute to provide 14 days within which to file such a petition, although I do recognize that a stay can only be for five days. I don't necessarily see that as an obstacle,

as Mr. Axelrod noted in his filing.

One of the rights that he seeks to appeal on is the denial of access to a presentence investigation report. To the extent that that is a right that crime victims are entitled to --

THE COURT: When did you request that, Mr. Low?

MR. LOW: I have not.

THE COURT: Okay. I thought I might have missed it. Go ahead. I'm sorry. I didn't mean to interrupt.

MR. LOW: Sure. No problem.

You said that that's a right that crime victims are entitled to that we now move for that right under the Crime Victims' Rights Act, Your Honor.

THE COURT: Well, I don't think you've shown any compelling need at this point. Unless you want to start a new issue on that. I'll give you a chance to file your motion and demonstrate compelling need if that's what you wish to do.

MR. LOW: Your Honor, I think that would be something that would be helpful for seeking restitution in filing a mandamus petition. I was hoping that, given that it's already been briefed by Mr. Axelrod, that no formal filing would be necessary.

THE COURT: Well, you can join in with him if you wish. But as I say, I want to specifically note that you made no request for, have shown any compelling need for that presentence report, because you know what your claim is. Your

claim is before the Court. And Mr. Axelrod has never made a claim, at this point, of any specific restitution amount, that I know of, so there's a difference between the two approaches to the matter.

In fact, I think your one client -- Mr. Mowery -- even went into state court and then federal court and then even entered into a settlement agreement with the perpetrator of his wrong, from his point of view.

Now, I don't want to diverge our attention away from the important issue that Mr. Axelrod has presented me, but if you --

MR. LOW: Yes, Your Honor, and I take no position on whether a stay is necessary.

THE COURT: I'm sorry. I didn't hear the last. I'm sorry.

MR. LOW: I take no position on whether a stay is necessary.

THE COURT: There's something wrong. You're cracking up on the phone here.

MR. LOW: Let me try that one more time. I take no position on whether a stay is necessary pending the mandamus.

THE COURT: I heard it that time. Thank you.

MR. LOW: Thank you.

THE COURT: Let's see now. Mr. Axelrod, as I understand it, your concern is that there might be some

disadvantage to putting on the judgment entry before you file your mandamus petition because of some anticipated argument by the -- by the government, I guess, or someone.

I think the way you phrase it is, "A brief stay may be necessary, however, because the government and defendant may contend that entry of the judgment extinguishes petitioners' rights under the CVRA and otherwise (although the Victims argue that it would not do so)."

And I tend to agree with you, because the statute specifically gives you ten days to file your mandamus, if I recall, but that's neither here nor there.

MR. CULUM: Your Honor, the ten days -- just to clarify, because there are many different -- that's only under certain circumstances that I don't think in this case are appropriate. I think the governing law here is 3771(c) -- or (d), excuse me.

THE COURT: Who is speaking now?

MR. CULUM: That's Mr. Culum. I apologize, Your Honor.

THE COURT: Okay. Thank you. Go ahead.

MR. CULUM: The ten days I think is only in the situation where a victim has asserted the right to be heard before or during the proceeding at issue and such right was denied. I don't think anyone on the phone believes that Mr. Low or Mr. Axelrod was denied the opportunity to speak at the

sentencing hearing. So it's only in those situations is the 14 days available, as I read the statute.

THE COURT: Well, then, in other words, you're saying that if the judgment entry goes on, then that cuts off the victims', alleged victims' right to mandamus.

MR. CULUM: No. I believe -- I believe they have five days, as I read it. And it is not a model of clarity, but as I read it, they have five days to do something. And I believe that five days began on Thursday, but I'm not clear. It's not clear to me how long they have, and I defer to other people.

But when I saw the 14 days, I thought that it was in reference to the situation where someone was not allowed to speak, which clearly did not occur in this case.

MR. AXELROD: Your Honor, this is David Axelrod. I happen to be actually looking at the statute, and the five days to which Mr. Culum refers is simply that a stay can't last more than five days. But the statute is quite clear in 3771(c)(5)(B) that we have ten days to file for a petition, to file a petition for a writ of mandamus.

MR. CULUM: David, I'm looking at the statute too. That's (d). And just as an FYI, there is no (c)(5).

MR. AXELROD: You're right. You're absolutely right.

THE COURT: You gentlemen are starting to talk like patent attorneys.

MR. AXELROD: Well, we're not going to talk about

non-obviousness, Your Honor, nor synergistic effect.

There are a couple of other points that I think are important. First, I know that it was inadvertent, but Mr. Culum has missed that in our objections to the plea agreement we did, in fact, very specifically raise the government's failure to contact the victims and confer before the agreement was reached as an independent ground for rejecting the plea agreement. That's on page 2, and admittedly it's in Footnote 3. Because as I mentioned, we had hoped that the Court would see the merit in our substantive arguments and would have preferred to win based on substance, but nonetheless we did very specifically raise again the procedural point that the government didn't meet with us before entering the plea agreement. So we believe that it was more than adequately preserved.

Mr. Culum says that it wouldn't make any difference because they're going to do the same thing over again, and indeed that may occur, it may not occur. The same argument was made in the *Dean* case, which was cited in our papers, and it is at 527 F.3d 391, and the *Dean* court said that that's not the point. The point is that there are certain procedural rights and certain procedural niceties that have to be endured, and if it winds up not changing the outcome, then so be it, but victims under the CVRA are still entitled to those procedural rights.

Third, Your Honor, as you know, didn't formally decide our

status as victims, and this is an important matter to us because this is not the only case and this creates a precedent, and we think it's important that it be recognized that our rights as victims are measured not by the antitrust laws and not by *Illinois Brick* but by 18 U.S.C. 3771, and so that is an important point that we wish to pursue.

Finally, Mr. Culum raised the issue of access to the presentence investigation report. There is apparently some confusion about this, because for that we don't rely on the Crime Victims' Rights Act. We rely on the case law over which the issue was fought out on our papers and in our various conferences, and we had no right to appeal that until the proceeding was over. So this is our first opportunity to raise that issue in the court of appeals, and we hope to do so.

So for those reasons this is all brought timely, all properly preserved, and the Court has the authority to grant a stay for five days. We will file the petition within the time period provided in the statute. And for those reasons we ask that the Court stay the proceedings for a very brief time to let our petition be filed.

I might also add parenthetically that this isn't going to go on very long, because the court of appeals, as Your Honor knows, is directed to decide the matter within 72 hours. So this is not as if it's going to create a lengthy delay.

THE COURT: Well, as I pointed out, this isn't a usual

mandamus, that is, this specific provisions of the Crime Victim Recovery Act, and it's a unique procedure in law, and I agree with you that the procedure is important and that's what Congress was trying do.

I have before me the case *In Re W*, point -- *W. R. Huff Asset Management Company LLC*. It's *In Re*, and it's 409 F.3d 555, and it has some advice in there for me that answers one of our problems, but I wonder if anyone has any information about whether that case is still good law or not or whether that issue has been discussed. And the issue is this, and I'm quoting from page 564. The judge there says, "Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement. The CVRA requires only that the court provides victims with an opportunity to be heard concerning a proposed settlement agreement."

And the way the objection is referred to in the memoranda in support of the motion to stay is the -- let's see, let me read it -- "accepting the plea agreement despite the government's failure to offer the Victims an opportunity to confer before its entry."

And it seems that the Circuit -- and this, I think, was the Second Circuit; I didn't read the Ninth Circuit case. But the Second Circuit evidently said that that's within the prosecutorial discretion of the government. And I just point

that out, and that would -- therefore, I would try to follow that case, and that would not be my reason for granting a stay.

However, you are absolutely correct in that I held as definitely as I could that the victims in this case must be victims of the -- to gain restitution, must be victims of the crime of conviction. And as I understood, the Baron Ice House was in Texas, and that if any of these -- there may have been -- at one time there was one victim. There was another time I read that there were three victims alleged by Mr. Axelrod as buying ice in southern Michigan.

Is that right, Mr. Axelrod?

MR. AXELROD: That's correct, Your Honor.

THE COURT: And I don't know which victims they -- which alleged victims they were.

MR. AXELROD: Your Honor, I would have to go back to --

THE COURT: Well, I don't -- I'm sorry. But in other words, that's why I said customers are victims, in my opinion. Now, whether they're direct or indirect, that's for someone else to decide, but the others that were mentioned, and particularly the Baron Ice House, from my definition would not be considered a victim.

And if that is an error on my part, I accept the responsibility, but I am convinced that, to be a victim, you must -- and have the right to restitution, you must be a victim

of the crime of conviction.

MR. AXELROD: Your Honor, I understand the ruling with respect to the right to restitution. And I, frankly, am not certain that I agree with it, but I understand it and would need to research further to have a really informed opinion on it. But I don't think that limitation necessarily applies under the Crime Victims' Rights Act. The 3006 and 3771 are very different statutes, and I don't think it necessarily follows that one must have a right to restitution.

THE COURT: Well, you can argue that in the court of appeals.

MR. AXELROD: Yes, sir.

THE COURT: Now, the next point was access to the presentence investigation report, and I basically held that I would share at the time of sentencing any part of the report that I thought was material to the -- to my understanding of what the sentence ought to be in this case, that there was no compelling reason to submit the entire report to anyone. And the parties couldn't agree on a redaction, and so I redacted it myself to the point of stating that I would only -- that I would at the time of sentencing display on the record those parts that I thought were important.

And the important part was that this fine was not -- that $9 million fine was not within the Guideline fine range in this case, and I so held on the record. And, therefore, it is

suspect from the point of view of anyone that disagrees with the amount of the fine. I understand that.

And, therefore, for those two items I will give you an opportunity to consult with the court of appeals to see if you want to go further.

And that goes for you too, Mr. Low, I assume.

And now then the question is how long. I don't see any prejudice to anyone if I grant a -- well, let's see. The five days would end up on a -- well, let's see. When would it be? You don't count the first, I guess. Or do you count the first under this new setup? I know, when it's hours, you count all the hours. But when it's days, I don't know whether you count the first or not.

But anyway, for the sake of argument, let's say Wednesday, Thursday, Friday, Saturday, Sunday. It would fall on the fifth day, and that would be beyond my kin.

So I am going to, in my discretion, grant a stay until, let's see, Thursday at 3:00 o'clock, this Thursday at 3:00 o'clock.

And that is what date, Darlene?

COURTROOM DEPUTY: Thursday is the 18th.

THE COURT: The 18th. Now, does someone have something they wish to add to the record on that point?

Mr. Culum?

MR. CULUM: Your Honor, just for the record, I did

find the footnote that Mr. Axelrod referred to and, surprisingly, I had missed it before, and I apologize for that. It was inadvertent on my part.

The other issue is that we agree with your analysis on the *Huff* case. We've looked at it and we completely concur with your analysis.

And then the third issue is if Mr. Axelrod is correct in his analysis that access to the PSR is something that allows -- that he is not part of the Crime Victims' Rights Act, then I would suggest and submit that it is not subject to any writ of mandamus. Because if it's not within the Crime Victim Rights Act, any access to the PSR is independent of it and can be brought up independently and should not be part of the writ of mandamus.

THE COURT: Well, we are in a relatively new area here. I know that that is true from the various -- or the lack of any definitive case citings to me, at least from the Sixth Circuit.

I do have this question. I know "of counsel." Now, are all these lawyers that you listed, Mr. Axelrod, are they of your firm?

MR. AXELROD: No, Your Honor. Those are lawyers that also represent the individuals whom I do but in the class action in Detroit and are folks that have consulted with me and given me advice.

THE COURT: Well, how many clients do these one, two, three, four, and you, have, for goodness? Five, I guess.

MR. AXELROD: I think eight, Your Honor.

THE COURT: I see. And they all represent the same eight?

MR. AXELROD: No. There's overlap, Your Honor. There's one individual who represents the Baron's Ice group or Baron's Ice House. There are two lawyers who represent the remainder of the victims whom I also represent. There's a third lawyer who serves as local counsel for the group.

THE COURT: Oh, okay.

MR. AXELROD: So there are various combinations of lawyers who are involved in the class action. It's much more complicated than anything I'm able to figure out.

THE COURT: Well, I was just wondering the relationship there. I do see there is one lawyer from Michigan.

MR. AXELROD: Yes. That's -- that's the local counsel.

THE COURT: Okay.

MR. AXELROD: Your Honor, may I make a couple of additional points?

THE COURT: Sure.

MR. AXELROD: One --

THE COURT: Now, tell me who's speaking, please.

MR. AXELROD: I'm sorry. This is David Axelrod.

You know, I understand Mr. Culum's point about the -- about the right to the presentence investigation report arguably not being embraced by the petition for writ of mandamus, which, of course, we can fight about in the court of appeals, but the application was not, in our understanding, finally denied until we got to the sentencing hearing, and we intend to file a notice of appeal to cover that as well. So we will use multiple procedural devices to be sure we're properly before the court of appeals.

THE COURT: Well, you've got to have a judgment entry before you can go on an appeal, don't you?

MR. AXELROD: That's correct, Your Honor.

THE COURT: Okay.

MR. AXELROD: That's correct.

THE COURT: And I wish that's what you were doing, but we're not. We're understanding what the length and breadth of this statute that is so beautifully drawn by Congress is.

MR. AXELROD: It is an odd duck. The *Kenna* case specifically talks about this as in the nature of a direct appeal rather than a mandamus action.

THE COURT: Well, that's what it is, in my opinion, from just reading briefly and studying it over this past -- how long? -- six months. No, not quite six months.

MR. CULUM: David, does that mean that it's a clearly

erroneous statute?

MR. AXELROD: We can discuss that in the court of appeals.

The other point that I wanted to make was just with respect to the *Huff* case, and that is that it, in my understanding --

And, frankly, I haven't read the *Huff* case. I'm basing this just on hearing the Court.

-- but I think it directly conflicts with the *Dean* case. In *Dean* the Court said, quote, In passing the Act, Congress made the policy decision, which we are bound to enforce, that the victims have a right to inform the plea negotiation process by conferring with prosecutors before a plea agreement is reached, unquote.

THE COURT: Is it unusual in our business that circuits disagree?

MR. AXELROD: You know, Your Honor, it sometimes happens.

THE COURT: That does happen once in a while.

MR. AXELROD: But I think the Sixth Circuit is generally right.

THE COURT: Then the judge gets to pick and choose, unless you're citing a case from the Sixth Circuit.

MR. AXELROD: Your Honor, I can't argue with you.

THE COURT: Okay.

All right, gentlemen. Well, I appreciate your

professionalism, and that includes all of you. I do hope that the situation can be worked out so that it can be ultimately worked to the benefit of all the people that may or may not have been concerned with this rather interesting conspiracy in the Southeastern District of Michigan.

And with that brief statement, I heard no objections to the stay expiring at 3:00 o'clock Thursday.

MR. AXELROD: Well, Your Honor, I did want to address the timing, just --

THE COURT: Okay. All right.

MR. AXELROD: I mean, I understand the Court has discretion in this regard.

THE COURT: Now, who --

MR. AXELROD: This is David Axelrod again.

THE COURT: Okay.

MR. AXELROD: I understand the Court has discretion in this regard. The statute does not specifically identify the triggering act for when a stay begins. The Court announced at the sentencing that it was the Court's intention to enter the judgment today. Therefore, by my count, the -- or by my understanding of things, the stay or the five days would start today and would, therefore, run into the weekend, and the Court could stay the matter until Monday.

It has been our intention to file our petition on Friday, and we've been working on that schedule in the hope that we

could get the Court to stay it. But this is a very compressed time period, and so we would ask that the Court give us until the close of business Friday for the filing of our petition before the stay expires.

THE COURT: I'm sorry. I've set the time in stone. Your paralegals are just going to have to work overtime.

MR. AXELROD: I wish it were the paralegals and associates who worked overtime, but unfortunately it seems to me these days it's the partners.

THE COURT: I understand that; I understand that. But I think it's important that we get this moving on, and that gives you -- to me, that gives you time to get your materials to the court of appeals. And hopefully we will have some definitive answers to the procedure that victims, alleged victims, and district judges are entitled to follow in these sets of circumstances.

And I'm depending on your professionalism to give us the light at the end of the tunnel on how we should handle these types of cases.

MR. AXELROD: Understood, Your Honor. Thank you.

THE COURT: Mr. Culum, anything you want to add to the record to protect the interests of your client?

MR. CULUM: No, Your Honor. I believe I have.

THE COURT: Mr. Majoras, anything you wish to add to the record to protect the interests of your client?

MR. MAJORAS: Your Honor, the only thing I would add is that, with respect to their request of a finding that they're a victim or a finding that they're not a victim, I'm not sure exactly what they're asking for, our view of that is that is not part of the CVRA. There's no requirement that they be found or not to be found a victim. The requirement is that they be heard. And regardless of their status, they have adequately been heard, and we would certainly argue and will argue that that is not a subject for mandamus.

THE COURT: Well, I don't want to continue our argument, but I think -- my thought was the one thing they're entitled to is restitution to an amount claimed if it can be established in the evidence. But that's beside the point. We'll go on to the next.

Mr. Axelrod, anything you want -- I'll give you the last shot, Mr. Axelrod.

Mr. Low, anything you want to add to the record to protect your clients?

MR. LOW: No. Thank you, Your Honor.

THE COURT: Mr. Axelrod?

MR. AXELROD: Nothing further, Your Honor.

THE COURT: Now, I don't want you to lose any sleep over this. I mean, I might be able to extend it till 5:00 o'clock on Thursday if that would help.

MR. CULUM: Your Honor, we would say 3:00 o'clock is

good.

THE COURT: Okay.

MR. AXELROD: I mean, you know, obviously the problem is we have no transcript, so that is the biggest restraint.

THE COURT: Well, we wouldn't have a transcript in five days either.

MR. AXELROD: Well, we're attempting to get expedited transcript.

THE COURT: Well, I know the expedited transcripts, the arrangements are made before the hearing.

MR. AXELROD: Well, I'm --

MR. CULUM: Your Honor, this is Mr. Culum.

THE COURT: Yes.

MR. CULUM: And I'm sorry, but in many ways the transcript only helps us, because we were all there. We heard the concessions on the part of the victims. The reality is, is that if it is a winning argument that we did not confer before the plea agreement, it has nothing to do with the sentencing hearing.

In terms of the declining, you have just said again, and I'm sure you'll tell the court of appeals if they ask, you've declined to define them as a crime victim.

And the third thing is, there is no debate that they did not get a PSR. So there are three bases for their seeking of mandamus. None of them are required.

They're going to get the transcript quickly, but the transcript is not going to -- their arguments, in so many ways, are outside the transcripts. The transcripts are going to help the Court and help us.

THE COURT: Well, now my --

MR. CULUM: We would like this to move forward so we can move on to other things.

THE COURT: All right. Now, in your past experience, who writes the -- who answers the mandamus in the court of appeals? Because I really have no concern one way or the other as to what the result of the court of appeals decision is other than to follow it.

Who writes the brief up there? Who represents the trial judge up there?

MR. CULUM: I believe we do, Your Honor.

THE COURT: Well, then God bless you, but I have no --

MR. CULUM: Dog in that fight?

THE COURT: Well, all I want to know is to be sure that we're developing a procedure here that we can all live with in the future if it has any precedential value.

MR. CULUM: And we would as well, Your Honor.

THE COURT: And I hope that that's what we're all striving for.

Any -- I'm sorry, Mr. Axelrod. You still get the last bite at the apple.

MR. AXELROD: Your Honor, I have nothing further, other than to say thank you again for your graciousness in hearing us.

THE COURT: Take care, gentlemen. Thank you. And whatever other service we can be, why, let us know. You know how to get ahold of me.

MR. AXELROD: Thank you.

MR. CULUM: Thank you, Your Honor.

MR. AXELROD: Bye.

THE COURT: Bye.

(Proceedings concluded at 1:47 PM.)

- - -

C E R T I F I C A T E

I, Luke T. Lavin, RDR, CRR, the undersigned, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Luke T. Lavin
Luke T. Lavin
Official Court Reporter

- - -

Exhibit 11

Case Name:

Muscletech Research and Development Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended AND IN THE MATTER OF Muscletech Research and Development Inc. and those entities listed on Schedule "A" hereto

[2006] O.J. No. 3300

25 C.B.R. (5th) 218

33 C.P.C. (6th) 131

150 A.C.W.S. (3d) 534

2006 CarswellOnt 4929

Court File No. 06-CL-6241

Ontario Superior Court of Justice
Commercial List

R.E. Mesbur J.

Heard: July 31, 2006.
Judgment: August 16, 2006.

(45 paras.)

[Editor's note: Supplementary reasons for judgment were released September 13, 2006. See [2006] O.J. No. 5305.]

Counsel:

Fred Myers and David Bish for the applicants

Kevin P. McElcheran for the "Representative Plaintiffs"

James H. Grout and Kyla Mahar for Krys Osborne, on behalf of herself and all other similarly situated California consumers, (the "California Consumers")

Derrick Tay for Iovate Health & Sciences, the DIP Lender

Jeff Carhart for the Ad Hoc Tort Claimants Committee

Natasha MacParland for the Monitor, RSM Richter Inc.

[Editor's note: A corrected version was released by the Court September 13, 2006; the corrections have been made to the text and the corrigendum is appended to this document.]

ENDORSEMENT

R.E. MESBUR J.:--

Nature of the motions:

1 These motions raise the question of whether plaintiffs in uncertified class actions may file claims in the claims process in this CCAA proceeding on behalf of themselves and all other similarly situated plaintiffs. The applicant, the Monitor, the DIP lender and the Ad Hoc Tort Claimants Committee all take the position that claims filed in this manner are a nullity, and should be forever barred.

2 Mr. McElcheran, on behalf of four plaintiffs in four yet-uncertified US class actions, and Mr. Grout and Ms. Mahar for a plaintiff in a yet-uncertified class action in California all are of the view that there is jurisdiction under the CCAA to permit such representative claims, and either the claims should be permitted, or alternatively, the stay of proceedings imposed by the CCAA should be lifted to allow them to proceed to certification motions in the United States for their respective actions. I will refer to Mr. McElcheran's clients as the "Representative Plaintiffs", and Mr. Grout's clients as the "California Consumers".

Some history:

3 The applicants, whom I will refer to collectively as "Muscletech", are comprised of the applicant, Muscletech, and its various subsidiaries and related companies listed in Schedule "A". Muscletech is a Canadian company. Historically, it was in the business of the manufacture and sale of dietary supplements. Some of these supplements contained the chemical ephedra, while others contained what have been referred to as prohormones. Muscletech was not alone in selling supplements containing these compounds. A number of American companies did so as well. Because of problems surrounding the compounds, Muscletech's products have ceased to contain them since 2002. Nevertheless, there was significant litigation, particularly in various states in the United States, brought by the consumers of these products, against both Muscletech and other companies.

4 The litigation is essentially of two kinds. The ephedra litigation primarily concerns those consumers of products containing ephedra who allege they have suffered physical damages as a result of using these products. The parties here refer to that litigation as the Products Liability litigation. The prohormone litigation has been brought by consumers of products containing prohormone who allege either that the product failed to produce the promised increased muscle mass, or alternatively, produced the promised increased muscle mass, but in doing so, must have contained a controlled substance, namely anabolic steroids. In the first instance, the prohormone consumers complain of being the victims of false and misleading advertising. In the second, they complain of being illegally sold a controlled substance.

5 For the purposes of this motion, there are several of these lawsuits that are important. First, there is the group of four yet to be certified class actions relating to prohormone claims. These have been described as the Hannon Claim, the Hochberg Claim, the Rodriguez Claim and the Guzman Claim, or collectively, the Representative Plaintiffs' Claims.

6 The Hannon Claim was commenced in the State of Florida. The Hochberg and Rodriguez claims were commenced in New York State, and the Guzman claim was commenced in California. Using the multi-district litigation (MDL) provisions available in the United States, all four proceedings have been moved to the United States District Court for the Southern District of New York (the "U.S. District Court") in New York City, to be managed, along with all the other related ephedra litigation by Justice Rakoff of that court. As I have said, I will refer to these four claims as the "Representative Plaintiffs' Claims", and to the plaintiffs in them as the "Representative Plaintiffs".

7 In addition to the Representative Plaintiffs' Claims, there is a further yet-to-be-certified class action in the United States that is germane to this motion. It has been described as the California Consumers' Claim. Unlike the Representative Plaintiffs' Claims, the California Consumers' Claim is an ephedra claim, seeking damages for personal injuries. I refer to this action as the "California Consumers' Claim", and its plaintiffs as the "California Consumers". The California Consumers participated on the motion simply to support the Representative Plaintiffs' position; they seek no relief themselves.

8 In January 2006, Muscletech sought and was granted CCAA protection in this court. The initial stay has been ex-

tended throughout the proceedings to August 11, 2006.[1] As the applicants' factum puts it, seeking CCAA protection was done "principally as a means of achieving a global resolution of the large number of product liability and other lawsuits" against the applicants and others. These lawsuits relate to the products that Muscletech and others sold.

9 Once the initial order was granted, the Monitor commenced ancillary proceedings in the USA under Chapter 15 of the U.S. Bankruptcy Code. These proceedings are before the U.S. District Court as well. As a result of these ancillary proceedings, there is a similar stay in the U.S.

10 At the same time, the Monitor also applied for a Temporary Restraining Order and Preliminary Injunction (TRO/PI Application) in the U.S. District Court, to prohibit anyone commencing or continuing any products liability actions. The TRO/PI application was granted. That application is referred to as the "Adversary Proceeding" under Chapter 15 of the U.S. Bankruptcy Code.

11 On February 8, 2006, an Ad Hoc committee of products liability claimants sought and was granted representative status in this CCAA proceeding. On March 3, 2006, this court made a Call for Claims order. American counsel for both the Representative Plaintiffs and the California Consumers were served with the motion and draft order in relation to the Call for Claims order, just as they have been served throughout these CCAA proceedings. Although many interested parties made submissions concerning the terms of the order both before the hearing and at the hearing itself, counsel for the Representative Plaintiffs and California Consumers did not. They took no steps, as did the Ad Hoc Committee, to obtain representative status, or direction as to how they might put forward their claims.

12 As I have mentioned, Muscletech sought and obtained an order in the USA bankruptcy court, recognizing and enforcing the Ontario CCAA order, including its automatic stay. The Call for Claims order was similarly recognized and approved by Judge Rakoff in the U.S. District Court on March 22, 2006. Judge Rakoff is managing all the ephedra litigation, as well as the motions to recognize and enforce orders made here under these CCAA proceedings, and the Adversary Proceeding as well.

13 The Call for Claims order established a process for calling for what were defined as both "claims" and "product liability claims". The object of the order was to identify everyone with any kind of claim against Muscletech, its affiliates, and some defined Third Parties. The process envisions "a person" completing a proof of claim, with particulars of the claim, and sending it to the Monitor.[2] In this way, the Monitor could identify what Mr. Tay for the DIP lender has called the "total universe of potential claims". The Call for Claims order does not set the process for deciding on the validity of any of the claims. Its purpose is simply to identify them.

14 The Call for Claims order set out comprehensive definitions of what constitutes both types of claims, as well as an elaborate method of giving broad notice to anyone who might have a claim. In this case, the order required the Monitor to send a package containing a proof of claim and other necessary information to all known creditors of Muscletech. It also required that the Monitor file these documents and the Call for Claims order electronically on the U.S. District Court's website in all three pieces of litigation there. These are described in the Call for Claims order as the "U.S. Chapter 15 Proceedings", the "U.S. Chapter 15 Adversary Proceedings" and the "U.S. MDL Proceedings". The order required the Monitor to publish notices to creditors in the national edition of the *Globe and Mail* newspaper, the *Wall Street Journal,* and *USA Today.* The Monitor was also required to post copies of the documents and Call for Claims order on the Monitor's website. The Monitor did all these things.

15 All proofs of claim were to be filed by May 8, 2006. This date was defined in the order as the Claims Bar date. Any creditor who has not filed a proof of claim by that date is forever barred from making or enforcing any claim, and is not entitled to participate as a creditor in the CCAA proceedings, or to vote at any meeting of creditors. Prior to the Claims Bar date, the members of the Ad Hoc Tort Claimants Committee filed individual proofs of claim. The California Consumers also filed individual proofs of claim.

16 On May 8, the Representative Plaintiffs, (that is, Hannon, Hochberg, Rodriguez and Guzman), filed proofs of claim, claiming to do so on their own behalves, and "on behalf of all other similarly situated persons". Unlike the Representative Plaintiffs, the California Consumers filed individual proofs of claim. Even though they have done so, they support the Representative Plaintiffs' position on this motion.

17 The monitor received some 33 ephedra claims, both from the California Consumers individually, and from others, including the members of the Ad Hoc Tort Committee. The only prohormone claims the monitor has received are from the Representative Plaintiffs. No other individual claims relating to prohormones have been filed.

18 After the claims bar date, this court made a Claims Resolution order. That order, dated June 8, 2006, provided,

among other things, for a method for the monitor to review proofs of claim, accept or reject them, and for a claims resolution process for resolving disputed claims. The Claims Resolution order is subject to an earlier Mediation Order, which provided for mediation of ephedra claims. Of the 33 ephedra claims filed, 30 have already been settled through the mediation process. The mediation process is part of a larger mediation process in New York, in the context of the much broader ephedra litigation that Judge Rakoff is managing. This litigation is referred to as the MDL, or multi-district litigation, in the U.S.

19 No one has appealed the Call for Claims order. No one moved to vary its terms, prior to the claims bar date. No one has appealed the Claims Resolution order. None of the Representative Plaintiffs have taken any steps in the United States (where their class actions are pending), to lift the stay of proceedings there to permit their actions to proceed to certification.

The parties and their positions:

20 On these motions the applicants take the position that the proofs of claims by the Representative Plaintiffs are a nullity, since there is no provision in either the CCAA or any of the court orders that permit these claims to be made either as representative claims, or class action claims. They say that to allow these claims would unreasonably delay the CCAA process, and would undermine the process that has already been established, which all stakeholders rely on.

21 The DIP lender supports the applicants' position. The DIP lender takes the position that if the proposed claims were allowed, there is a potential for significant prejudice to the DIP lender who is funding the process, and will ultimately fund any plan of compromise. The DIP lender has already settled with a significant number of other tort claimants (albeit ephedra, as opposed to prohormone claimants). The DIP lender says it reached its settlement on the basis of a particular "known universe" of claims. It suggests that allowing these indeterminate claims, and claimants, at this late date, would prejudice its position.

22 The Ad Hoc Committee of Tort Claimants supports the applicants as well. The Committee takes the position that even before the Call for Claims order was made, it was able to obtain an order allowing it to participate as a Committee in the CCAA process and obtain what is called representative status in the proceedings. It says that if the Ad Hoc Committee was able to do so within the CCAA process, these other proposed claimants could, and should have done the same. Since the other proposed claimants did not, and took no steps to appeal the Call for Claims order, and indeed, declined to participate in the motion in which its terms were set, they should be barred from doing so at this late date.

23 The Monitor also supports the applicants' position, saying the CCAA process gave the Representative Plaintiffs adequate opportunity to file individual claims. The forms were readily accessible in plain English. The Products Liability claimants, that is, the members of the Ad Hoc Committee, were able to put individual claims forward in the CCAA process and the Representative Plaintiffs had the same opportunity to participate in exactly the same way. Lastly, the Monitor says that the CCAA process is far more economic than the lengthy process of certification of class actions, particularly in the USA, where certification would have to take place. To allow this new process to be overlaid on the existing CCAA process would be cumbersome, excessively expensive and time consuming.

24 All those opposing the Representative Plaintiffs' Claims and California Consumers suggests that the real motivation for putting these claims forward is to obtain and secure payment of significant legal fees for the lawyers involved, rather than to reap any meaningful benefits for any class participants. I need not comment on what is essentially a bald allegation. I mention it only to make the record of the parties' positions complete.

25 Both the Representative Plaintiffs and the California Consumers take a contrary view. They say their clients' claims should not be defeated on what they describe as essentially procedural grounds. They suggest that fairness requires that they be permitted to file in this way. They say the current CCAA process is not so far advanced that there would be undue prejudice to any of the other stakeholders, if their proofs of claims were allowed to be filed as representative claims.

The law and analysis:

26 The first question to consider is whether the CCAA permits representative claims, or class action claims. The next issue is whether this particular CCAA process adequately protected the interests of this potential group of claimants. Lastly, given the inherent jurisdiction of the court, I must also address whether this case might be an appropriate case to exercise my discretion and permit the Representative Plaintiffs' Claims to proceed in some fashion at this time.

Does the CCAA permit representative claims?

27 The CCAA neither expressly permits nor forbids representative claims. The CCAA defines "claim" in s. 12(1). It says that for the purposes of the CCAA, "claim" means "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act.*" Thus, to determine what a CCAA "claim" is, one must turn to the *Bankruptcy and Insolvency Act,* and the definition of debts "provable in bankruptcy".

28 Section 121(1) of the BIA deals with "claims provable", and says:

> 1. All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason on any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

29 The BIA has a mechanism to determine whether a contingent or unliquidated claim is a provable claim. The mechanism is found in section 135(1.1), which provides:

> 1. The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

30 A determination under s. 135(1.1) is "final and conclusive", unless within a thirty day period after the trustee serves a notice of disallowance, the person to whom the notice of disallowance was sent appeals the trustee's decision.

31 Section 124 of the BIA deals with the proof of claims. First, it provides in subsection (1) that creditors shall prove claims. It says: "Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made." The section goes on, in subsection (3) to deal with who may make proof of claims. The subsection says: "The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person authorized, it shall state his authority and means of knowledge."

32 The term "creditor" is not specifically defined in the CCAA. The applicants therefore point to the definition of "creditor" in the Call for Claims order itself. There, creditor is defined as "any *Person* having a Claim or a Product Liability Claim" [emphasis added]

33 From the interplay of the sections of the CCAA and the BIA, together with the definition in the Call for Claims order, the applicants infer that only individual creditors may make claims, unless they have authorized someone else to do so on their behalf. Since there is no question the Representative Plaintiffs' Claims have not been authorized by the group of people whom they purport to represent, they have no authority to do so, and the applicants say these claims must therefore be declared a nullity, at least to the extent that they purport to advance claims for other than Hannon, Hochberg, Rodriguez and Guzman personally.

34 While this interpretation may be technically correct, it is also clear that representative orders of some kind have been used in other CCAA proceedings[3], and even in this case.[4] In addition, there have been cases in which a stay has been lifted in order to permit a potential class proceeding to file certification materials,[5] while in other cases, a motion to lift the stay for that purpose and to file a class claim have been denied.[6] As yet, however, there are no examples in Canada where a class proof of claim has been specifically permitted.[7]

35 It is noteworthy here, that even though Farley J. made an order granting a "representation and ancillary order regarding funding" to the Ad Hoc Committee in this proceeding, there was no order permitting "representative" claims to be filed; each member of the committee filed an individual proof claim with the monitor.

36 From this I conclude that while it is possible at least to have a limited representation order in CCAA proceedings, it is by no means clear that representation orders have been extended to permit a "representative" proof of claim to be filed. Canadian courts have not yet permitted a filing of a proof of claim by a plaintiff in an uncertified class proceeding on behalf of itself and other members of the class. At best, our courts have at least once lifted a stay to permit the filing of certification materials. Any steps beyond that would be the subject of a further motion.[8] In the case of *Re Air Canada,* however, there was no suggestion that certification motions were going to be made in a foreign jurisdiction, as would be the case here.

37 While a representative claim may therefore be possible, the next question is whether this is a proper case to either permit this kind of "representative" claim, without the necessity of the individual members of the class filing claims, or

whether the stay should be lifted to permit certification motions to proceed in the United States. This involves a discussion first of whether the orders here gave adequate protection to this potential group or groups of creditors, and second, whether this might be an appropriate case for the court to exercise its discretion and grant the relief the Representative Plaintiffs seek.

Did the CCAA process adequately protect the interests of these potential claimants?

38 When I consider the CCAA process here, I am drawn inescapably to the conclusion that it adequately protected the interests of these potential claimants, had they availed themselves of the process as other claimants did.

39 The Ad Hoc committee obtained a representation order, and participates on that basis, although its members filed individual proofs of claim. Even the California Consumers filed individual claims. If the members of the Representative Plaintiff's proposed class had wished to file proofs of claim, they had as much notice and opportunity to do so as anyone else. This is particularly so since the required notices were published not only in two American nation-wide newspapers, but also in three locations on the U.S. District Court's website. Not a single "similarly situated" person, other than Hannon, Hochberg, Rodriguez and Guzman filed a proof of claim . They easily could have. They did not. I cannot conclude that the absence of additional claims implies the process was somehow unfair or flawed. To the contrary, the absence of even a single additional claim suggests there may be no other claimants at all. The process adequately protected the interests of these potential claimants. They simply chose not to utilize that process.

Should the court exercise its discretion?

40 While the court clearly has a broad discretion in CCAA matters[9], I am not persuaded that this is a proper case to exercise that discretion either to allow the representative claims as they are, or to lift the stay to permit certification motions to proceed.

41 First, representative claims *per se,* have not been recognized in Canadian jurisprudence in the context of CCAA proceedings. It is clear that rule 10 of the *Rules of Civil Procedure* permits the court to "appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served."

42 Rule 10, however, is generally used in estates and trusts cases, or as what has been described as the "simplified procedure" version of proceedings under the *Class Proceedings Act,* particularly in pension fund disputes.[10] I was referred to no case in which the rule was specifically used in CCAA proceedings to permit the filing of a representative or class claim. I do not see rule 10 as useful in these CCAA proceedings, which has created its own process and procedures. Here, a structure was established by court order, on notice to the very parties who now wish to alter the process fundamentally, after all stakeholders have relied on the structure that was established.

43 Changing and increasing the landscape of claimants after the settlement of 30 of the ephedra claims after the claims bar date could cause prejudice to the eventual success of the CCAA process. Simply put, all the arguments made by the Representative Plaintiffs and California Consumers should have been made before Farley J. when the Call for Claims order was made, or earlier motions should have been made to deal with these issues before the Call for Claims order was even made.

44 The process gave adequate opportunity for anyone with a claim to file a proof of claim. The forms were accessible, in plain English. The products liability claimants all managed to make individual claims, even though they might have been involved in class actions. No other prohormone claimants have filed a proof of claim. To allow representative or class claims at this date would be prejudicial to the entire claims process, and would impair the integrity of the CCAA process here. I decline to exercise my discretion in these circumstances.

Disposition:

45 The applicants' motion is therefore granted, and the representative plaintiffs' motion is dismissed. To be clear, the "representative" claims are to be considered as individual claims for each of Hannon, Hochberg, Rodriguez and Guzman. As the parties have agreed, there will be no order as to costs.

R.E. MESBUR J.

* * * * *

SCHEDULE "A"

HC Formulations Ltd.

CELL Formulations Ltd.

NITRO Formulations Ltd.

MESO Formulations Ltd.

ACE Formulations Ltd.

MISC Formulations Ltd.

GENERAL Formulations Ltd.

ACE US Formulations Ltd.

MT Canadian Supplement Trademark Ltd.

Mt Foreign Supplement Trademark Ltd.

MC Trademark Holdings Ltd.

HC US Trademark Ltd.

1619005 Ontario Ltd. (f/k/a NEW HC US Trademark Ltd.)

HC Canadian Trademark Ltd.

HC Foreign Trademark Ltd.

* * * * *

Corrigendum
Released: September 13, 2006

The Court has issued the following correction:

CORRECTION TO ENDORSEMENT

[1] Ms. MacParland and Ms. Mahar have brought to my attention two inaccuracies in my endorsement dated August 16, 2006. First, the reference in paragraph 13 of the endorsement to counsel for the DIP Lender should be to Mr. Tay, rather than Mr. Carhart.

[2] Second, apparently the California Consumers did not file individual proofs of claim. Their proofs of claim were similar to those filed by the Representative Plaintiffs. Ms. Mahar points out that the California Consumers' claim is a false advertising claim that seeks restitution, rather than damages for personal injury. Their claim is not the same nature as those filed by the Representative Plaintiffs. The statutory scheme in California (namely the Business & Professions Code Section 17203) apparently expressly authorizes Ms. Osborne to act as the representative of other parties, and thus she filed a proof of claim on behalf of herself and other simnilarly situated California consumers. The California Consumers did not file any affidavit material on the motion, and counsel did not make this clear at the hearing. However, these changes should be incorporated into my earlier endorsement.

cp/e/qw/qlhjk/qlbxs/qlrme

1 Since hearing this motion, I have granted an order extending the stay to November 10 of this year. Judge Rakoff has made a similar order in the corresponding US litigation.

2 See "Notice to Creditors Re: Notice of Call for Claims and Product Liability Claims", Schedule "E" to the call for claims order.

3 See, for example, *Canadian Red Cross Society/SociÈtÈ Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (S.C.J. Commercial List). See also the order of Blair J. in *Canadian Red Cross Society* dated July 29, 1998, in which he appointed representative counsel for various groups of claimants. It is noteworthy, however, that he did not provide for the filing of representative proofs of claim in the order.

4 see the reasons of Farley J. dated February 6, 2006, at paragraph 8, in which he says: "I understand that later this week the Ad Hoc Com-

mittee will be requesting a representation and ancillary order incorporating a joint funding agreement. [Note: as this is being typed up February 8th, I would note that I have just granted such an order.]" Again, nothing in the order permitted a representative *claim* to be filed.

5 *Re Air Canada,* Court File # 03-CL-4932. Endorsement of Farley J dated. September 24, 2003.

6 *Re Canadian Red Cross, supra*

7 *Re Canadian Red Cross,* note 2, above, at page 197

8 *Re Air Canada,* note 5, above at paragraph 18.

9 The *CCAA* has been described as having a "broad remedial purpose", and cases have stated the Act should be given a large and liberal interpretation. See Holden & Morawetz *The 2006 Annotated Bankruptcy and Insolvency Act,* [Carswell, 2006] pp 1163-64, and these cases referred to there.

10 see *Overview* to rule 10, Killeen, Morton and James, *Ontario Superior Court Practice*

Exhibit 12

Case Name:

Pro-Sys Consultants Ltd. v. Microsoft Corp.

Between
Pro-Sys Consultants Ltd. and Neil Godfrey, Respondents (Plaintiffs), and
Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE, Appellants (Defendants)

[2011] B.C.J. No. 688

2011 BCCA 186

304 B.C.A.C. 90

331 D.L.R. (4th) 671

201 A.C.W.S. (3d) 572

Dockets: CA034325 and CA037968

British Columbia Court of Appeal
Vancouver, British Columbia

I.T. Donald, P.D. Lowry and S.D. Frankel JJ.A.

Heard: November 29 and 30, 2010.
Judgment: April 15, 2011.

(78 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- Appeal by the defendant, Microsoft, from certification order and orders affirming validity of plaintiffs' pleadings and proposed amendments allowed -- Plaintiffs were indirect purchasers of computers containing Microsoft operating systems and software -- They contended Microsoft and manufacturers engaged in anti-competitive behaviour that allowed Microsoft to overcharge for its products -- Class proceeding certification order set aside and action dismissed -- Subsequent Supreme Court of Canada decision in Kingstreet conclusively removed passing-on defence -- It followed that no valid cause of action arose from unlawful charges passed on to indirect purchasers.

Commercial law -- Restrictive trade practices -- Abuse of dominant position -- Appeal by the defendant, Microsoft, from certification order and orders affirming validity of plaintiffs' pleadings and proposed amendments allowed -- Plaintiffs were indirect purchasers of computers containing Microsoft operating systems and software -- They contended Microsoft and manufacturers engaged in anti-competitive behaviour that allowed Microsoft to overcharge for its products -- Class proceeding certification order set aside and action dismissed -- Subsequent Supreme Court of Canada decision in Kingstreet conclusively removed passing-on defence -- It followed that no valid cause of action arose from

unlawful charges passed on to indirect purchasers -- Competition Act, ss. 36, 45.

Appeal by the defendant, Microsoft, from the rulings regarding the pleadings of the plaintiffs, Pro-Sys Consultants and Godfrey, and from an order certifying the plaintiffs' action as a class proceeding. The plaintiffs were retail purchasers of computers installed with the defendant's operating systems and applications software. The computer manufacturers who incorporated the defendant's products in their computers were "direct purchasers" and the plaintiffs were "indirect purchasers". The plaintiffs alleged that the defendant engaged in schemes with the manufacturers that constituted anti-competitive behaviour that allowed it to overcharge for its products. A motion by the defendant to strike the statement of claim was dismissed, with a portion of the claim related to abuse of market dominance struck for lack of jurisdiction. In a separate decision, the plaintiffs were permitted to amend the statement of claim to address the struck portion of the claim. The action was subsequently certified as a class proceeding on behalf of other similarly situated indirect purchasers. The defendant appealed on the basis that the pass-through of any overcharge to an indirect purchaser did not form the basis of a valid cause of action. The defendant submitted that its impugned market behaviour was not actionable by third parties and thus did not satisfy the unlawful act requirement for claims in tort or restitution. The defendant further argued that the claims of conspiracy, unjust enrichment and economic interference were plainly and obviously deficient due to the absence of intent to injure and any direct relationship between the plaintiffs and the defendant.

HELD: Appeal allowed. The plaintiffs' pleadings did not disclose a valid cause of action. The Supreme Court of Canada (SCC) released the Kingstreet decision subsequent to the rulings under appeal. In Kingstreet, the SCC conclusively determined that as a matter of law, a defendant was unable to reduce its liability to those who paid an unlawful charge by establishing that some or all of it was passed on to others. It followed that any passing on of the charge did not give rise to a cause of action for its recovery by those to whom the charge was in whole or in part said to have been passed on. To find otherwise would result in impermissible double recovery, as a defendant would be liable to both direct and indirect purchasers in respect of the same charge. Here, the core of the plaintiffs' allegations was that they, as indirect purchasers, bore the entire overcharge paid by manufacturers to the defendant, as passed on to them through the distribution channels. Given the consequences of the SCC's ruling on the passing-on defence, it was plain and obvious that the plaintiffs had no cause of action maintainable in law. The certification order was set aside and the plaintiffs' action was dismissed.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 19(24)

British Columbia Supreme Court Civil Rules, Rule 9-5(1)

Class Proceedings Act, RSBC 1996, CHAPTER 50, s. 4, s. 4(1)(a), s. 5, s. 5(1)

Competition Act, R.S.C. 1985, c. C-34, s. 36, s. 36(4), s. 45, s. 52

Appeal From:

On appeal from: Supreme Court of British Columbia, March 5, 2010, July 6, 2006, and November 24, 2006 (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2010 BCSC 285, 2006 BCSC 1047 and 2006 BCSC 1738)

Counsel:

Counsel for the Appellants: N. Finkelstein, J.M. Sullivan and S.L. Knowles.

Counsel for the Respondent: J.J. Camp, Q.C., R.M. Mogerman and M.L. Buckley.

Dissenting reasons were delivered by I.T. Donald J.A. Reasons for judgment were delivered by P.D. Lowry J.A., concurred in by S.D. Frankel J.A. (para. 72).

Reasons for Judgment

1 I.T. DONALD J.A. (dissenting):-- The Defendants appeal from decisions by Mr. Justice Tysoe, then in the Supreme

Court, on motions related to the pleadings: 2006 BCSC 1047 (the defendants' application to strike the statement of claim under Rule 19(24) (now Rule 9-5(1)) and 2006 BCSC 1738 (the plaintiffs' application to amend the statement of claim); and from the decision of Mr. Justice Myers certifying the action as a class proceeding: 2010 BCSC 285.

2 The appeal was heard consecutively with *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2011 BCCA 187, by the same division of this Court. Because of overlapping issues, there will be some cross-reference between the decisions, which are being released at the same time.

3 The action alleges that Microsoft engaged in various kinds of anti-competitive behaviour which allowed it to overcharge for its products. The plaintiffs are retail purchasers of computers installed with Microsoft operating systems and applications software. They are referred to herein as indirect purchasers (IPs). Direct purchasers (DPs) are those computer manufacturers who incorporated Microsoft products into their computers.

4 The plaintiffs allege that Microsoft combined with the manufacturers in schemes to exclude competition and keep the prices higher than they should be. They further allege that the overcharge at the direct purchaser level passed through to them and they claim redress in tort and restitution.

5 The action follows anti-competition litigation against Microsoft in the United States and the European Union.

6 In the appeal related to the pleadings, Microsoft submits that the action is really about allegations of "abuse of market dominance", a subject assigned exclusively to the Competition Tribunal in Part VII of the *Competition Act*, R.S.C. 1985, c. C-34. The claim should be struck for want of jurisdiction.

7 Second, Microsoft argues that the plaintiffs, as IPs, have no claim. The law in Canada is settled: there is no pass-through defence available to a vendor in resisting the claim of a DP on the ground that the DP passed on the overcharge and sustained no loss. It must follow, Microsoft says, that pass-through of the overcharge to IPs cannot form the basis of a cause of action because otherwise the vendor would be exposed to multiple claims.

8 As its third ground of appeal, Microsoft submits that a common essential ingredient of the plaintiffs' claims for interference with economic interests, conspiracy and unjust enrichment is plainly and obviously absent. The missing ingredient is an unlawful act. Microsoft argues that the market behaviour of which the plaintiffs complain is not actionable by third parties and therefore cannot satisfy the unlawful act requirement for the claims in tort or restitution. The only recourse is to the statutory scheme under Part VIII of the *Competition Act*.

9 In the fourth ground, Microsoft argues that the claims of conspiracy and economic interference are plainly and obviously deficient in advancing "preposterous" assertions of a predominant intention to cause injury to the plaintiffs and in failing to allege material facts concerning illegal arrangements with the manufacturers.

10 In the fifth ground, Microsoft says the unjust enrichment claim must be struck as it is bound to fail. On the pleadings, there is no direct relationship between the plaintiffs and Microsoft and the arrangements with manufacturers, the legality of which cannot be questioned by third parties, provide a juristic reason for the benefits said to be an overcharge.

11 Turning to the certification order by Myers J., Microsoft takes two points. First, the plaintiffs cannot rely on s. 36 of the *Competition Act* for a cause of action because it is not pleaded and, even if applicable, it sets up a two-year limitation period barring the claims. Second, Myers J. set too low a standard of proof for the alleged overcharge at certification, and had the evidence been given appropriate scrutiny, it would have been found lacking.

12 For the reasons that follow, I do not accept these contentions and I would dismiss the appeal.

CERTIFICATION ORDER

13 The order of Myers J. made March 5, 2010, certifying the action as a class proceeding, is as follows:

> 1. ON THE APPLICATION of the Plaintiffs coming on for hearing at the Courthouse, 800 Smithe Street, Vancouver, BC on January 12-23, 2009 and on hearing J.J. Camp, Q.C. and R. Mogerman, counsel for the Plaintiffs, and N. Finkelstein, J. Sullivan, C. Beagan Flood and S. Knowles, counsel for the Defendants and on Judgment being reserved to this date;
>
> 1. THIS COURT ORDERS that:

1. This action be certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50,
1. The Class be described as all persons resident in British Columbia who, on or after January 1, 1994, indirectly, and not for the purpose of further selling or leasing, purchased a genuine license for any full or upgrade version of:

    1. Microsoft's Word or Excel applications software or any full or upgrade version of Microsoft's Office, Works Suite, or Home Essentials applications suites, intended for use on Intel-compatible personal computers ("Microsoft Applications Software"); or
    1. Microsoft's MS-DOS or Windows operating systems software intended for use on Intel-compatible personal computers ("Microsoft Operating Systems") (collectively the "Class Members").

1. The Plaintiffs, Pro-Sys Consultants Ltd. and Neil Godfrey be appointed as the representative plaintiffs for the class.
1. The following questions be certified as common issues:

1. *Breach of Competition Act*, R.S.C. 1985, c. C-34

    1. Did the Defendants, or either of them, engage in conduct which is contrary to s. 45 and or s. 52 of the *Competition Act*?
    1. Are the Class Members entitled to losses or damages pursuant to section 36 of the *Competition Act*, and, if so, in what amount?
    1. Can the amount of damages be determined on an aggregate basis and if so, in what amount?

1. Conspiracy

    1. Did the Defendants, or either them, conspire to harm the Class Members?
    1. Did the Defendants, or either of them, act in furtherance of the conspiracy?
    1. Was the predominant purpose of the conspiracy to harm the Class Members?
    1. Did the conspiracy involve unlawful acts?
    1. Did the Defendants, or either of them, know that the conspiracy would likely cause injury to the Class Members?
    1. Did the Class Members suffer economic loss?
    1. What damages, if any, are payable by the Defendants, or either of them, to the Class Members?
    1. Can the amount of damages be determined on an aggregate basis and if so, in what amount?

1. Tortious Interference with Economic Interests

    1. Did the Defendants, or either of them, intend to injure the Class Members?
    1. Did the Defendants, or either of them, interfere with the economic interests of the Class Members by unlawful or illegal means?
    1. Did the Class Members suffer economic loss as a result of the Defendants' interference?
    1. What damages, if any, are payable by the Defendants, or either of them, to the Class Members?
    1. Can the amount of damages be determined on an aggregate basis and if so, in what amount?

1. Unjust Enrichment, Waiver of Tort and Constructive Trust

1. Have the Defendants, or either of them, been unjustly enriched by the receipt of an Overcharge? "Overcharge" means the difference between the prices the Defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the Defendants would have been able to charge in the absence of their wrongdoing.
1. Have the Class Members suffered a corresponding deprivation in the amount of the Overcharge?
1. Is there a juridical reason why the Defendants, or either of them, should be entitled to retain the Overcharge?
1. What restitution, if any, is payable by the Defendants, or either of them, to the Class Members based on unjust enrichment?
1. Should the Defendants, or either of them, be constituted as constructive trustees in favour of the Class Members for the Overcharge?
1. What is the quantum of the Overcharge, if any, that the Defendants, or either of them, hold in trust for the Class Members?
1. What restitution, if any, is payable by the Defendants to the Class Members based on the doctrine of waiver of tort?
1. Are the Defendants, or either of them, liable to account to the Class Members for the wrongful profits, if any, that they obtained on the sale of Microsoft Operating Systems or Microsoft Applications Software to the Class Members based on the doctrine of waiver of tort?
1. Can the amount of restitution be determined on an aggregate basis and if so, in what amount?

1. Punitive Damages

    1. Are the Defendants, or either of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and if so, in what amount and to whom?

1. Interest

    1. What is the liability, if any, of the Defendants, or either of them, for court order interest?

1. Distribution of Damages and/or Trust Funds

    1. What is the appropriate distribution of damages and/or trust funds and interest to the Class Members and who should pay for the cost of that distribution?

1. AND THIS COURT FURTHER ORDERS that the Litigation Plan shall be approved as sufficient for the purposes of certification.
1. AND THIS COURT FURTHER ORDERS that notice shall be given to Class Members and the time, manner and costs of the notice to be directed by the Court after further submissions by the parties.
1. AND THIS COURT FURTHER ORDERS that the time and manner for opting out of the proceeding shall be as directed by the Court after further submissions by the parties.

14 The relevant enactments are:

Supreme Court Rules, Rule 19(24):

1. Scandalous, frivolous or vexatious matters

1. At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

1. it discloses no reasonable claim or defence as the case may be,
1. it is unnecessary, scandalous, frivolous or vexatious,
1. it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
1. it is otherwise an abuse of the process of the court,

1. and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4 and 5:

1. Class certification

    1. The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

    1. the pleadings disclose a cause of action;
    1. there is an identifiable class of 2 or more persons;
    1. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
    1. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
    1. there is a representative plaintiff who

        1. would fairly and adequately represent the interests of the class,
        1. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
        1. does not have, on the common issues, an interest that is in conflict with the interests of other class members.

    1. In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

        1. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
        1. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
        1. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
        1. whether other means of resolving the claims are less practical or less efficient;
        1. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

1. Certification application

    1. An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.
    1. A copy of the notice of motion and supporting affidavit must be filed and

        1. delivered to all persons who are parties of record, and
        1. served on any other persons named in the style of proceedings.

1. Unless otherwise ordered, there must be at least 14 days between

    1. the delivery or service of a notice of motion and supporting affidavit, and
    1. the day named in the notice of motion for the hearing.

1. Unless otherwise ordered, a person to whom a notice of motion and affidavit is delivered under this section or on whom a notice of motion and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and deliver a copy of the filed affidavit to all persons who are parties of record.
1. A person filing an affidavit under subsection (2) or (4) must

    1. set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
    1. swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
    1. provide the person's best information on the number of members in the proposed class.

1. The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
1. An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

1. [Subsections (2), (3) and (4) of s. 5 have since been amended, effective July 1, 2010, to harmonize with the *Supreme Court Civil Rules*: 2010-6-29.]

Competition Act, R.S.C. 1985, c. C-34, ss. 36, 45:

1. Recovery of damages

1. (1) Any person who has suffered loss or damage as a result of

    1. conduct that is contrary to any provision of Part VI, or
    1. the failure of any person to comply with an order of the Tribunal or another court under this Act,

1. may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

1. Evidence of prior proceedings

1. In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

1. Jurisdiction of Federal Court

1. For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

Limitation

1. No action may be brought under subsection (1),

    1. in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

        1. a day on which the conduct was engaged in, or
        1. the day on which any criminal proceedings relating thereto were finally disposed of,

    1. whichever is later; and

    1. in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

        1. a day on which the order of the Tribunal or court was contravened, or
        1. the day on which any criminal proceedings relating thereto were finally disposed of,

    1. whichever is later.

1. R.S. 1985, c. C-34, s. 36; R.S. 1985, c. 1 (4th Supp.), s. 11.

* * *

1. Conspiracies, agreements or arrangements between competitors

1. (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

    1. to fix, maintain, increase or control the price for the supply of the product;
    1. to allocate sales, territories, customers or markets for the production or supply of the product; or
    1. to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

1. Penalty

1. Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

1. Evidence of conspiracy, agreement or arrangement

1. In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

1. Defence

1. No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

    1. that person establishes, on a balance of probabilities, that

        1. it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and
        1. it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

    1. the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

1. Defence

1. No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

    1. has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
    1. has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
    1. is in respect only of the supply of services that facilitate the export of products from Canada.

1. Exception

1. Subsection (1) does not apply if the conspiracy, agreement or arrangement

    1. is entered into only by companies each of which is, in respect of every one of the others, an affiliate; or
    1. is between federal financial institutions and is described in subsection 49(1).

1. Common law principles -- regulated conduct

1. The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Definitions

1. The following definitions apply in this section.

1. "competitor"

    1. "competitor" includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c).

1. "price"

    1. "price" includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product.

1. R.S. 1985, c. C-34, s. 45; R.S. 1985, c. 19 (2nd Supp.), s. 30; 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714; 2009, c. 2, s. 410.

DISCUSSION

A. CAUSES OF ACTION

1. Abuse of Market Dominance

15 As originally cast, the statement of claim alleged abuse of market dominance by Microsoft, contrary to Part VIII of the *Competition Act*, as an independent cause of action.

16 Mr. Justice Tysoe struck out those claims in decision No. 1 on the ground that Part VIII matters fell exclusively within the jurisdiction of the Competition Tribunal. He ruled (2006 BCSC 1047):

> 1. [46] I conclude that the fact that the Defendants' alleged conduct was of the nature described in Part VIII of the *Competition Act* does not, in the absence of an order of the Competition Tribunal, make such conduct unlawful for the purposes of the tort of interference with economic relations. Such conduct is not unlawful simply as a result of being of the nature described in Part VIII.
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> * * *
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> 1. [49] My ruling at this stage is that it is plain and obvious that, in the absence of an order of the Competition Tribunal and with no other reason to make it illegal or unlawful, conduct of the nature described in Part VIII of the *Competition Act* does not constitute illegal or unlawful means to satisfy the second element of the tort of interference with economic relations. I order that the portions of the Statement of Claim alleging that conduct of the nature described in Part VIII was illegal or unlawful be struck out.

17 No cross appeal is taken from that decision.

18 The plaintiffs sought leave to amend upon receiving this decision. They retained some of the abuse of dominance language (which is the nomenclature of Part VIII), but they redrafted the key paragraphs regarding market misconduct in relation to operating systems and applications software in terms of conspiracy. This was with the intention of bringing the misconduct within s. 36 of the *Competition Act*, which allows a civil right of action for conspiracies prohibited by s. 45.

19 In decision No. 2 (2006 BCSC 1738), Tysoe J. (as he then was) gave leave to amend, and the third amended statement of claim now reads in relevant part:

> 1. Beginning as early as 1988, Microsoft embarked upon a campaign to prevent or lessen competition substantially and to thereby increase the price of its products in the market for Intel-compatible PC operating systems. Microsoft Canada and others actively participated in or facilitated that campaign. As a part of the campaign, Microsoft and Microsoft Canada combined or agreed with others, including IAPs, ISVs OEMs, and Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. As a consequence, Microsoft has unlawfully maintained and abused its dominant position in the North American market for Intel-compatible PC operating systems and has charged supra-competitive prices.
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> * * *
>
> 1. Having secured its dominance in the Intel-compatible PC operating systems market, Microsoft has abused that dominance to gain unfair advantages in the complementary applications software markets. In the late-1980's, Microsoft recognized that the transition to GUIs, where it had a strong market position with its Windows operating environment, provided Microsoft an opportunity to gain an important presence in application, such as, word processors and spreadsheets.
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> * * *

1. When Microsoft's anti-competitive applications software campaign began in the late 1980's and early 1990's, there were several existing competitors in both markets. Lotus 1-2-3 was the market leader in spreadsheets, and WordPerfect was the market leader in word processors. Beginning as early as 1988, Microsoft embarked upon a campaign to prevent or lessen competition substantially and to thereby increase the price of its products in the market for Intel-compatible PC applications software. Microsoft Canada and others actively participated in or facilitated that campaign. As a part of the campaign, Microsoft and Microsoft Canada combined or agreed with others, including IAPs, ISVs, OEMs, and Intel to prevent or lessen, unduly, competition and to otherwise restrain or injure competition unduly. As a consequence, Microsoft has unlawfully maintained and abused its dominant position in the North American market for Intel-compatible PC operating systems and has charged supra-competitive prices.

20 Microsoft submits on appeal that:

1. despite the amendments, the real claim remains a complaint against abuse of market dominance; and
1. regardless of the reference to ss. 36 and 45, the substance of the allegations brings them into the administrative scheme of the *Competition Act* and the claim should be struck.

21 In the alternative, Microsoft says that the present form of the statement of claim is so replete with the language of abuse of market dominance, a matter invalidated by Tysoe J. in decision No. 1 and therefore irrelevant, this Court should strike the pleading. This would force the plaintiffs to strip away the extraneous words and narrow the pleading to the causes of action which survived the Rule 19(24) challenge.

22 I reject the contention that the amendments did not really change anything. What were Part VIII allegations are now recast as conspiracies under Part VI and actionable under s. 36 of Part IV. The jurisdiction of the court has been properly invoked and it is not ousted by the administrative scheme.

23 Microsoft cites *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609, in support of its argument that the *Competition Act* is a complete code which confers exclusive jurisdiction on the Tribunal. That case applies only if, despite the amendments to the statement of claim, the case remains in essence a Part VIII claim. Microsoft quoted the following passages from *Chrysler* at 406 and 408:

1. As for the civil part, Part VIII, as its heading indicates, lists the matters reviewable by the Tribunal. Section 8(1) *CTA* confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the *CA* therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the *CA* and the *CTA* that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII *CA*, since it involves complex issues of competition law, such as abuses of dominant position and mergers.

* * *

1. This cursory examination of the *CA* shows that Parliament intended the Tribunal to oversee Part VIII and that Parliament was strongly concerned with long-term compliance with the *CA*, in both its criminal and civil parts.

As I have said, I do not accept that the substance of the case is about Part VIII, and it follows that the exclusivity argument must be rejected.

24 As for the alternative remedy of striking the whole pleading to expunge references to abuse of market dominance, I can see no practical utility in such an order. No one concerned with the case will be lead astray by the terminology and I do not see how Microsoft could be prejudiced by having it left in place. While the phrase belongs to a Part VIII matter, it is not entirely out of place in a pleading where the plaintiffs allege that the conspiracies and other economic torts are actionable manifestations of market abuse.

2. Indirect Purchasers - No Claim

25 The plaintiffs are indirect purchasers of Microsoft's operating systems and applications software. They complain

that overcharges at the direct purchaser level were passed through to them. The third amended statement of claim defines, in para. 6 (aa), "overcharge":

> 1. "Overcharge" means the difference between the prices the defendants actually charged for Microsoft Operating Systems and Microsoft Applications Software in the PC market in Canada and the prices that the defendants would have been able to charge in the absence of their wrongdoing;

26 For the most part, direct purchasers fall under the designation "original equipment manufacturers" (OEMs), defined in para. 7(x) of the third amended statement of claim in this way:

> 1. "OEMs" or "original equipment manufacturers" means PC manufacturers such as Dell, Gateway, Hewlett Packard, Acer, Lenovo, Toshiba, Sony, LG Electronics, Panasonic, Fujitsu/Fujitsu Siemens, Averatec, and IBM and, in Canada, Budgetron;

27 The Supreme Court of Canada has definitively struck down the pass-through defence: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, per LeBel J. *Kingstreet* was decided after Tysoe J.'s decision on the pleadings.

28 A pass-through defence would allow Microsoft, on the facts alleged in this case, to resist a claim of overcharge by the OEMs on the ground that the overcharge was passed to others in the chain of distribution and hence the OEMs suffered no loss. Since the defence is unavailable in Canada, Microsoft says it would be exposed to multiple duplicate claims from direct purchasers and indirect purchasers were each category to have a cause of action. The result may be a double recovery of damages. This potential exposure plus the apprehended difficulty in proving where the overcharge ended up led in the United States to a determination that (1) the defence is invalid and (2) as a necessary corollary, to avoid multiple claims, indirect purchasers have no claim for overcharges that have been passed on: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

29 In the companion appeal, *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, I rejected the attempt to strike the action brought by indirect purchasers on this line of argument. For the reasons expressed in that case, I likewise refuse to give it effect in the present matter.

30 The facts alleged here demonstrate how Microsoft's position cannot be said to raise a plain and obvious barrier to the indirect purchasers' claim. One of the central facts of the plaintiffs' case is the allegation that Microsoft combined with the OEMs to achieve overcharges. If effect were given to Microsoft's pass-through analysis then the only class holding a valid claim would be the very group that participated in the illegal scheme and the innocent victims would be out of court.

3. Unlawful Act

31 An unlawful act is an essential ingredient in the claims for conspiracy, interference with economic interests and unjust enrichment.

32 The three essential requirements of the tort of interference are (P.H. Osborne, *The Law of Torts*, 3d ed. (Toronto: Irwin Law, 2007) at 297-298):

> 1. the intention to injure the plaintiff's economic interests;
> 1. an interference in those interests by illegal or unlawful means; and
> 1. economic harm.

33 Microsoft argues that the plaintiffs cannot supply the common element by proof of market behaviour said to be in restraint of trade. Unless and until such conduct is declared by the Competition Tribunal to violate Part VIII of the *Competition Act*, it is not illegal in Canada. Otherwise, the common law remains as expressed in such cases as *Mogul Steamship Co. Ltd. v. McGregor, Gow & Co.*, [1892] A.C. 25 (H.L.), to the effect that a contract in restraint of trade is voidable as between contracting parties but cannot ground an action by a third party for damages. According to Microsoft, Parliament altered the common law not by giving third parties a right of action but by creating an administrative scheme where the circumstances can be assessed by those with special expertise and where the remedy, if any, will be carefully measured. In short, Microsoft suggests that the plaintiffs advance a case not known to law. There is no unlawful interference with economic interests, no unlawful purpose for conspiracy, and the juridical reason for the benefits said to be unjust enrichment - namely the contracts and arrangements with OEMs - cannot be negatived.

34 The plaintiffs answer this contention by pointing to the right of a third party to enjoin restraints of trade. From this, they say, it is but a small incremental step to a full right of action for damages and they cite the opinion of Mr. Justice Lambert in *No. 1 Collision Repair & Painting (1982) Ltd. v. Insurance Corporation of British Columbia*, 2000 BCCA 463, 80 B.C.L.R. (3d) 62, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 488, supporting them.

35 Mr. Justice Tysoe dealt with the issue in this way (No. 1):

> 1. [50] The Defendants say that conduct amounting to a restraint of trade at common law does not satisfy the second element of illegal or unlawful means of the tort of interference with economic relations. In this regard, they point to the English decision of *Brekkes v. Cattel*, [1972] 1 Ch. 105, which was distinguished on another ground in *Harbord Insurance Services*, [1993] B.C.J. No. 3036. Relying on *Mogul Steamship Co. Ltd. v. McGregor Gow & Co.*, [1892] A.C. 25 (H.L.), Pennycuick V.-C. held that the mere circumstance of restraint of trade at common law does not render an act unlawful for the purpose of the tort of intentional interference with economic interests.
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> 1. [51] However, a contrary view was advocated by Lambert J.A. in his dissent in *No. 1 Collision*:
>
> > 1. If an act in restraint of trade is a wrong rectifiable, in relation to the time after the hearing, by the remedy of an injunction, then, in my opinion, that wrong ought, in appropriate circumstances, to be compensated for, with respect to the period from when the wrong was committed until the court hearing, by a money award, call it equitable compensation or call it damages, as you will. What is more, having been identified as a wrong, that is, an unlawful act which the perpetrator was not at liberty to commit, then, subject only to arguments about justification, the wrongful restraint of trade supports, in my opinion, a claim for the tort of deliberate unlawful interference with economic interests.
> >
> > 1. I realize that the conclusion that I have reached in that respect is not yet independently supported by Canadian authority, or, so far as I know, by direct Commonwealth authority. But once the principles about mingling law and equity in their remedies, as enunciated by the majority of the Supreme Court of Canada in *Canson v. Boughton & Co.*, [1991] 3 S.C.R. 534, have been applied to wrongful restraint of trade, those principles support the wrongful restraint of trade as being compensable by a money award, compensation or damages, and so lead to the view that as a deliberate unlawful act it will also support the tort of interference with economic interests.
> >
> > 1. (paras. 183 and 184)
>
> 1. [52] The comments of Lambert J.A. were made in a dissenting judgment and were not addressed by the majority, who decided the appeal on other grounds. Hence, the comments are not binding on me and constitute no more than a novel argument unsupported by authority. However, Lambert J.A. is a distinguished jurist and his views are deserving of respect. While it is a novel argument, it is one deserving of consideration upon all of the relevant evidence. Under *Hunt*, it is not an argument which should be rejected on a Rule 19(24) application.
>
> 1. [53] My conclusion is that it is not appropriate for me to order that the Plaintiffs' pleading of restraint of trade as the illegal or unlawful means of the tort of interference with economic relations be struck out.

36 Mr. Justice Lambert's opinion in *No. 1 Collision Repair* received favourable comment in *Reach M.D. Inc. v. Pharmaceutical Manufacturers Association of Canada* (2003), 65 O.R. (3d) 30 (C.A.), followed in *Barber v. Molson Sport & Entertainment Inc.*, 2010 ONCA 570, 322 D.L.R. (4th) 577 at para. 58, where it was listed as one of the several expressions of a broad view of "unlawful" in the law of torts. Mr. Justice Laskin for the court in *Reach M.D.*, wrote:

> 1. [49] The case law reflects two different views of "illegal or unlawful means", one narrow, the other broad. The narrow view confines illegal or unlawful means to an act prohibited by law or

by statute. See *Dunlop v. Woollahra Municipal Council*, [1981] 1 All E.R. 1202 (P.C.). Though unauthorized, the Committee's August 1990 ruling was not prohibited either by law or by statute.

> [50] The broader view, however, extends illegal or unlawful means to an act the defendant "is not at liberty to commit" -- in other words, an act without legal justification. Lord Denning espoused this broader view in *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 1 All E.R. 522, [1969] 2 Ch. 106 (C.A.) at p. 530 All E.R.:
>
> > I must say a word about unlawful means, because that brings in another principle. I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough.
>
> [51] The trial judge adopted the principle in *Torquay Hotel* in finding that Lucas' March 28 letter was "an improper and unwarranted act" that satisfied the second element of the tort. Several Canadian appellate courts have taken the same view. For example, the Nova Scotia Court of Appeal applied this principle in finding a franchisor liable for unlawful interference with economic interests because of its unauthorized instruction to a franchisee's bank not to honour certain cheques. See *Volkswagen Canada Ltd. v. Spicer* (1978), 91 D.L.R. (3d) 42, 28 N.S.R. (2d) 496 (S.C. App. Div.). See also *United Food and Commercial Workers, Local 1252 Fishermans' Union v. Cashin*, [1996] N.J. No. 343, 149 Nfld. & P.E.I.R. 112, aff'd [2002] N.J. No. 223, 217 D.L.R. (4th) 620 (Nfld. C.A.) and *No. 1 Collision Repair and Painting (1982) Ltd. v. Insurance Corp. of British Columbia*, [2000] B.C.J. No. 1634, 80 B.C.L.R. (3d) 62 (C.A.) *per* Lambert J.A., dissenting.
>
> [52] I think that the trial judge was right to take a broader view of illegal or unlawful means. It is, however, unnecessary to decide the outer limits of the principle in *Torquay Hotel*. Unlawful means at least include what occurred here: the Committee made a ruling that it was not authorized to make. Its ruling was beyond its powers. I see no policy reasons for taking a narrower view of unlawful means. Indeed, to do so would preclude redress against organizations like PMAC and others for any number of unauthorized acts that on a common sense view would be considered unlawful, but nonetheless, were not prohibited by law or by statute.

37 Novelty of a disputed claim is, as Tysoe J. held, not a basis for striking it out: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321. The treatment of restraint of trade activity as supplying the unlawful act ingredient for the claims may be a small or a large step, but I am not persuaded that the law is so fixed in the 19th century economic philosophy represented by *Mogul Shipping* that on the right facts the step cannot be taken.

38 It must be noted that in addition to restraint of trade, the plaintiffs also plead that Microsoft's impugned activity was found unlawful in litigation in the United States and the European Union and that it was also unlawful by reason that it contravened Microsoft's own internal policies obliging it to abide by competition law. The unlawful ingredient could also be found in the alleged violations of s. 45 of the *Competition Act*. While these added features were questioned by Microsoft on this appeal, none were shown to be plainly and obviously without substance or validity.

39 In my view, Tysoe J.'s disposition of the unlawful means issue was correct and in full accordance with this Court's decision in *Poirier v. Community Futures Development Corp. of Mt. Waddington*, 2005 BCCA 169:

> [14] In my opinion, in applying the principles that ought to be applied to a motion under Rule 19(24)(a) and confining the case closely to the pleadings as I have set them out, and having regard also to the nature of the cause of action for unlawful interference with economic relations, particularly to the statement by Lord Denning in the case of *Torquay Hotel Co. Ltd. v. Cousins*, [1969] 2 Ch.D. 106 (N.C.A.) at p. 39, where Lord Denning said:
>
> > I have always understood that if one person deliberately interferes with a trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract.

1. that the pleadings set out a known cause of action under all three heads of claim. It would be improper on this application to apply any test about the likelihood of proof or the weight that might be given to those causes of action, though it is important to understand the nature of the causes of action. There may be issues about what is meant by "unlawful means" in the tort of intentionally inducing interference with economic relations and whether the heads pleaded at para. 5 of the statement of claim come within the tort but that is not an issue which we should be trying to resolve without the benefit of any evidence on the hearing of an appeal from the decision on a motion such as this.

1. **4. Civil Conspiracy**

40 In a challenge to the pleading of conspiracy, but not limited to that tort, Microsoft asserts that the claim lacks an air of reality and that there are no material facts pleaded.

41 The argument is that it is preposterous to say that in its vast business enterprises Microsoft set out to cause injury to these plaintiffs as its predominant purpose.

42 Predominant purpose is discussed in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 at 471-472, 145 D.L.R. (3d) 385:

1. Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:

    1. whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
    1. where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

1. In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

43 I think it is arguable that the plaintiffs' claim of civil conspiracy may fall within the second category in the above formulation: that the alleged unlawful acts were directed in part at end users of Microsoft's products with the reasonable expectation that they would bear the overcharges.

44 As for the material facts setting out the means by which the conspirators effected their unlawful purpose, the statement of claim, in my opinion, sets out sufficient allegations to meet the pleading requirements. Those facts include allegations of licensing arrangements for operating systems, browsers and applications software that were intended to exclude competition. The statement of claim is not lacking in descriptive detail. There is, in my judgment, at least an air of reality to the conspiracy claim.

5. Unjust Enrichment - Restitution

45 Microsoft says the unjust enrichment claim must be struck on two grounds:

1. there is no direct relationship between Microsoft and the plaintiffs; and
1. there is in the case pleaded by the plaintiffs a juristic reason, namely, the contracts with OEMs, for enrichment.

46 I have already dealt with the second ground in the discussion on the unlawful nature of the contracts and the admittedly novel right of the plaintiffs to rely on their unlawfulness to found a claim. If at trial the plaintiffs can establish that the contracts are invalid, then arguably they cannot provide a juristic reason for the benefits which the plaintiffs say are illegal overcharges.

47 The first ground is closely akin to the issue of whether IPs can maintain an action. The lack of direct connection formed part of the rationale for the line of authority restricting overcharge claims to those who dealt directly with the seller, namely, direct purchasers. But I think the argument has another dimension as well. The legal theory of unjust enrichment, argues Microsoft, involves corresponding benefit and detriment and, in the case of indirect purchasers such as the plaintiffs, there is no such correspondence. For instance, in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 797, McLachlin J., as she then was, rejected the idea that any restitutionary claim could be made against the recipient of an indirect benefit:

> 1. The cases in which claims for unjust enrichment have been made out generally deal with benefits conferred directly and specifically on the defendant, such as the services rendered for the defendant or money paid to the defendant. This limit is also recognized in other jurisdictions. For example, German restitutionary law confines recovery to cases of direct benefits: Zwiegert and Kotz, *Introduction to Comparative Law*, vol. II (2nd ed. 1987), at pp. 234-35.

48 Microsoft would have us apply the flip side of that analysis: those complaining of an indirect detriment have no recourse in restitution.

49 Yet that is not the treatment the issue has consistently received in Canada. Mr. Justice Tysoe reviewed competing authority, including *Boulanger v. Johnson & Johnson Corp.* (2003), 174 O.A.C. 44 (C.A.), supporting Microsoft's position, and *Innovex Foods 2001 Inc. v. Harnett*, 2004 BCSC 928, for the contrary view, and arrived at this conclusion:

> 1. [73] In my opinion, it is not plain and obvious that the royalty received by the Defendants upon a sale of the personal computers purchased by the Plaintiffs was an incidental collateral benefit beyond the limits of recovery prescribed in *Peel*. Even if one accepts that *Boulanger* was correctly decided, the evidence presented in this action may make it distinguishable. In *Boulanger*, it does not appear that the amount payable by the retailer to the manufacturer was dependent upon the monies paid by the plaintiff to the retailer, and the benefit to the manufacturer as a result of the sale of the product by the retailer to the plaintiff might be properly regarded as an incidental collateral benefit. In this case, however, the pleadings allege that the manufacturers of the personal computers were required to pay a royalty to the Defendants. The evidence may establish that the Defendants did receive more than an incidental collateral benefit from the sale of the personal computers purchased by the Plaintiffs.

50 I am in respectful agreement with Tysoe J. His decision on this point can be supported by the Ontario Divisional Court judgment in *Serhan Estate v. Johnson & Johnson* (2006), 269 D.L.R. (4th) 279, 85 O.R. (3d) 665, where in the following discussion the benefit/detriment symmetry is found not to be essential to a constructive trust:

> 1. 80 The decision of the Supreme Court of Canada in [*Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217], the case upon which Cullity J. thought the plaintiffs could potentially rely for the remedy of a constructive trust, is seen as the most recent extension of the constructive trust. In that case, the court distinguished a separate type of constructive trust - one based on the concept of "good conscience". The defendant real estate agent had purchased property for himself that he had been negotiating to buy for his client, the plaintiff. When the plaintiff discovered the breach of fiduciary duty, he claimed a constructive trust over the property. However, land values had declined. As a consequence, the plaintiff was unable to show any loss on his part or any gain by the defendant. Even so, for his own idiosyncratic reasons, the plaintiff wanted the property and sought a constructive trust.
>
> 1. 81 In the opening words of her judgment, McLachlin J. (as she then was) said "this case stands for the proposition that a constructive trust over property may be imposed in the absence of enrichment of the defendant and corresponding deprivation of the plaintiff" (para. 1). Under the broad umbrella of the concept of good conscience, constructive trusts are recognized both to remedy unjust enrichment and corresponding deprivation, as well as to address wrongful acts like fraud.
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> 1. 82 McLachlin J. observed, at para. 14, that the appeal presented "two different views of the function and ambit of the constructive trust". One view sees the constructive trust arising only where

there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. *On the other view, the constructive trust may apply absent an established loss to condemn a wrongful act and maintain the integrity of the relationships of trust that underlie many of our industries and institutions.*

1. 83 It was McLachlin J.'s view that "the second, broader approach to constructive trust should prevail" and that the law of constructive trust embraces both "the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence" (paras. 15 and 25). In particular, McLachlin J. noted that good conscience has attracted the support of many jurists as "the unifying concept underlying constructive trust" and cited, at para. 27, the following comment by A. J. McLean ["Constructive and Resulting Trusts - Unjust Enrichment in a Common Law Relationship - *Pettkus v. Becker*" (1982) 16 U.B.C. L. Rev. 155]:

    1. "Safe conscience" and "natural justice and equity" were two of the criteria referred to by Lord Mansfield in *Moses v. Macferlan*, 97 E.R. 676 . . . in dealing with an action for money had and received, the prototype of a common law restitutionary claim. "Good conscience" has a sound basis in equity, some basis in common law, and is wide enough to encompass constructive trusts where the defendant has not obtained a benefit or where the plaintiff has not suffered a loss. It is, therefore, as good as, or perhaps a better, foundation for the law of restitution than is unjust enrichment.

1. 84 McLachlin J. then elaborated upon this second type of constructive trust, saying that it may be imposed where good conscience so requires. Significantly, at para. 33 she stated:

    1. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

1. 85 At para. 45 of *Soulos*, McLachlin J. identified four conditions that "*generally*" should be satisfied for a constructive trust based on wrongful conduct, the conditions (set out in para. 22 herein) that Cullity J. explored in order to determine if the plaintiffs may be entitled to a constructive trust based on waiver of tort ([McLachlin J.'s] emphasis).

1. 86 As will be discussed below, the first three conditions appear to attempt to limit the scope of the remedy by requiring the existence of a sufficient connection between a plaintiff and a defendant. A close examination of the relationship between the parties is central to the inquiries under these conditions. The fourth condition then demands that we ask whether, in light of this relationship, there is any other reason why the remedy should not be extended in these circumstances.

51 One of the elements of a wrongful conduct trust is a "sufficient connection" between a plaintiff and defendant. Arguably, that is supplied by the fact that Microsoft makes its products for the ultimate use of customers like the plaintiffs. If more is required, then the licences for use of the operating systems and applications software directly connect Microsoft and the indirect purchasers. See the reasons in the companion case, *Sun-Rype*, for a more complete discussion of the "proprietary link" issue.

52 Since Tysoe J.'s decision was rendered, this Court gave judgment in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 312 D.L.R. (4th) 419, and 2010 BCCA 91, 317 D.L.R. (4th) 122 ("*DRAM*"), leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 32.

53 One of the many issues in that case was the question whether at certification of a class action in which a restitutionary claim is made it is necessary for the plaintiff to present sufficient facts to establish an actual loss suffered by the

plaintiff. This is not dissimilar from the question whether there exists a correspondent benefit and detriment argued here. In *DRAM*, the court drew a distinction between loss-based claims and benefit-based claims and embraced the possibility that either can be pursued in a class action seeking a restitutionary remedy. Mr. Justice K. Smith referred, with approval, to *Serhan*:

> 1. [31] In her majority judgment in *Serhan*, Epstein J. (now Epstein J.A.) surveyed the law relating to unjust enrichment, constructive trust, and waiver of tort and noted that there is an argument to be made that these claims may be established on the basis of proof of wrongful conduct and resulting gain without proof of any loss by the plaintiff. As she notes, this view finds support among some academic commentators and some case authorities and is based on the principle against unjust enrichment - that a wrongdoer must be compelled to disgorge the fruits of the wrongdoing. These are benefit-based claims, as distinguished from loss-based claims such as claims in tort and contract, where the object is to compensate the innocent party for a loss. Accordingly, she reasoned,
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> > 1. [157] Given the uncertain state of the law concerning both waiver of tort and the potential of disgorgement liability and the circumstances under which the remedy of a constructive trust may be recognized, it is not appropriate that the court should embark upon an analysis of this nature and significance at this early stage without a complete factual foundation. This is particularly so given the policy implications of the issues raised in this proceeding, implications for which the class proceedings regime in this province is specifically designed in that it is intended to provide a mechanism for correcting the behaviour of wrongdoers who would, absent its specialized procedures, be immune from legal consequences for their behaviour.
>
> 1. As a result, since liability might be established without proof of loss, she approved the certification of an aggregate award as a common issue (paras. 138-39).

54 In my opinion, the law has evolved to the point where indirect harm can provide a basis for a claim in unjust enrichment.

B. CERTIFICATION ISSUES

1. 1. Conspiracy Contrary to Section 45 of the *Competition Act*

55 Microsoft raises for the first time a challenge to the plaintiffs' reliance on s. 36 of the *Competition Act* as a basis for its claim. As the point is not taken in Microsoft's factum, the plaintiffs asked the Court to disregard it. But no one wanted an adjournment so we heard the argument while reserving on the timeliness objection.

56 The first issue arises from the fact that s. 36 is not pleaded. There is an outstanding motion to amend by adding s. 36.

57 The order of Mr. Justice Myers of March 5, 2010, certified as one of the common issues: "Are the Class Members entitled to losses or damages pursuant to section 36 of the *Competition Act*, and, if so, in what amount?"

58 The statement of claim refers in several places to breaches of s. 45 of the *Competition Act*. The necessary implication is that s. 36 is or will be engaged because it is the only means by which a criminal conspiracy becomes actionable.

59 In light of all this, I consider the lack of pleading to be a purely technical objection without substance. Obviously the parties put their minds to s. 36 at the certification hearing and so no surprise or prejudice can be complained of.

60 The second issue is a limitations argument. Section 36(4) prescribes a two-year prescription period running from a day on which conduct contrary to any provision of Part VI was engaged in. While this is not strictly a pleadings point, on the submission of Microsoft, it should have the same effect as striking the claim because there is no possibility of overcoming the limitation obstacle. This is said to be the effect of the notoriety of the United States and European Union litigation in which the same or similar restrictive trade practices were alleged many years before the commencement of this action. In other words, no credible postponement or discoverability argument can arise and the claim has no reasonable prospect of success. In the alternative, Microsoft says the matter will break down into individual enquiries as to postponement and the class action will cease to be the preferable procedure.

61 The short and simple answer to this argument is that it is premature. Limitations problems like this are so bound up in the facts that they must be left to a later stage of the process. Moreover, the force of the argument is considerably diminished by the timing of its presentation - it looks and feels like an afterthought.

2. Proof Requirement at Certification

62 Section 5(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, provides that affidavit evidence must support an application for a certification order:

> 1. An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

63 The threshold requirement was described in the following passage from *DRAM*:

> 1. [65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: [*Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158] at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one - it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],
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> > 1. [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

64 Microsoft argues that *DRAM* should be distinguished as a less complex case and one in which the liability element was predetermined by the defendants' guilty plea in the United States. Here, says Microsoft, the plaintiffs needed to provide sufficient evidence as to both liability and loss and failed in the attempt.

65 The focus of the argument is on the evidence of the plaintiffs' expert, Dr. Janet S. Netz, an economist based in Michigan. Microsoft submits that her evidence in support of certification falls short of establishing a credible methodology for proof of pass-through. The chief deficiency is said to lie in her reliance on U.S. data and a failure to consider the Canadian market context.

66 In her principal affidavit, Dr. Netz deposed, at para. 49:

> 1. There is no theoretical reason, in my opinion, why the methods described above cannot be applied to the sales of Microsoft software in Canada. The applicability of the methods to different geographic regions is illustrated by the scholarly literature on the pass-through rate in gasoline distribution channels, which extends across countries and across regions within countries.

67 Microsoft argues that the plaintiffs had to go beyond theory and identify actual Canadian data available for the pass-through analysis.

68 The plaintiffs respond that such evidence was provided by Dr. James A. Brander, a U.B.C. Sauder School of Business economist, who deposed in his affidavit as follows:

> 1. My discussion of methods indicates that it is possible in principle to quantify, on a class-wide basis, economic damages suffered by Class members. To implement these methods, it is necessary to obtain appropriate data. I have assessed the availability of data necessary to carry out the quantification described in the previous sections. It is my belief that suitable data to carry out such quantification is available.

* * *

76		In order to apply pass-through results and other inferences based on U.S. data to British Columbia or to Canada more broadly it is necessary to consider the degree of relevant similarity between Canada and the U.S. I would expect pass-through to be similar in the two countries. One piece of evidence supporting this is the global or at least continent-wide decision-making undertaken by Microsoft and the other firms in question. In addition, income levels, the nature of supply and demand, and various market characteristics are sufficiently similar between British Columbia, other Canadian jurisdictions, and relevant jurisdictions in the United States that economists would normally take estimates of economic behaviour from one of these jurisdiction[s] as being relevant to the others.	

1. I would be able to test the validity of assuming significant integration and similarity between U.S. and Canadian jurisdictions. In particular I could test whether software prices in the two countries tend to move together. I would also emphasize that, while relying on U.S. results would be convenient, it is not essential. Estimates of relevant effects can be carried out relying strictly on Canadian price data, although considerable effort would have to go into data collection.

69 Is this good enough? Mr. Justice Myers thought it was (2010 BCSC 285):

1. [133] It is true that Dr. Netz has not used Canadian data in her analyses. But she is not required to do so. Once again, at the certification stage, the plaintiff must only show a credible or plausible methodology. That does not mean preparing an actual report. While the plaintiffs here rely on the reports done in the United States, they are not meant to be the reports to be used in this litigation; rather, they are pointed to in support of the contention that a credible or plausible methodology exists. The fact that Pro-Sys has the advantage of being able to point to such reports does not mean that that is the level of proof they need meet.

1. [134] Dr. Netz says that the methods she has used in the United States are equally applicable to Canada. I do not see that the defendants have raised a sufficient case to allow me to conclude otherwise. The markets might have different characteristics, but that does not mean that the methodologies used in the U.S. will not work here.

70 In my opinion, the decision of Myers J. in this regard is entitled to deference. He applied the standard enunciated in *DRAM* and committed no error of principle in his judgment. I do not accept that *DRAM* can be distinguished on the grounds asserted by Microsoft. Whether or not *DRAM* was a less complex case than this, and the point is debatable, and regardless whether the fault element was settled in *DRAM* and not here, the standard of proof at certification as settled by *DRAM* transcends the differences and is applicable here.

DISPOSITION

71 For these reasons, I would dismiss the appeal.

I.T. DONALD J.A.

Reasons for Judgment

The following is the judgment of

72 P.D. LOWRY J.A.:-- I have read a draft of Mr. Justice Donald's reasons for dismissing the appeal. I find, with respect, that for the reasons I have given in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company,* 2011 BCCA 187, I am unable to accept the plaintiffs have a cause of action. As that is determinative, I find it unnecessary to consider the other issues to which the appeal gives rise.

73 The question of whether the pleadings disclosed a cause of action that could be maintained, and thereby fulfilled the requirement of s. 4(1)(a) of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50, was addressed by Mr. Justice Tysoe in his dispositions of the defendants' applications to strike the pleadings under Rule 19(24) for reasons he gave over four years ago (2006 BCSC 1047 and 2006 BCSC 1738). That was before the Supreme Court of Canada's decision in *Kings-*

treet Investments Ltd. v. New Brunswick (Finance), 2007 SCC 1, [2007] 1 S.C.R. 3, in which what is referred to as the passing-on defence was rejected. The order for certification was made by Mr. Justice Myers for the reasons he gave (2010 BCSC 285) wherein it was made clear s. 4(1)(a) of the *Class Proceedings Act* was not at issue (para. 22). Thus, the significance of the rejection of the passing-on defence is raised for the first time in this action on this appeal.

74 As I have endeavoured to explain in *Sun-Rype,* I consider Canadian law to be consistent with American federal law as established by the Supreme Court of the United States in *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061 (1977).

75 In rejecting the passing-on defence, the Supreme Court of Canada conclusively determined in *Kingstreet* that, as a matter of law, a defendant cannot reduce its liability to those who paid an unlawful charge by establishing some or all of it was passed on to others. In my view, it follows that any passing on of the charge it is said there may have been is not recognized in law and so cannot give rise to a cause of action for its recovery by those to whom the charge was in whole or in part said to have been passed on. Were it to be otherwise, in the absence of the passing-on defence, a defendant would be liable for both the whole of the charge paid to it directly (liability to the direct purchasers) and for all or any portion of the charge passed on (liability to the indirect purchasers). That would result in liability for double recovery - some or all of the same charge being recoverable from the defendant twice - which our law does not permit.

76 In this action, the representative plaintiffs allege on behalf of the proposed class that, as a consequence of the defendants' unlawful conduct, in combination and agreement with computer manufacturers and others, the defendants defeated all competition and have charged more for their operating systems and application software licensed for, and installed on, personal and laptop computers since the 1980s than they otherwise could have done. The allegation is that, as the purchasers of computers for their own use, the members of the proposed class ultimately bore the entire overcharge that was paid to the defendants; it was passed on to them through the distribution channels.

77 Thus, the alleged overcharge, though paid to the defendants directly by other than the proposed class members, was passed on to them. They are then essentially in the same legal position as the indirect purchasers in *Sun-Rype.* I do not understand counsel for the proposed class to suggest otherwise, the contention in both appeals on the point being that the causes of action can be maintained despite the rejection of the passing-on defence in *Kingstreet.*

78 As in *Sun-Rype,* I consider it plain and obvious the representative plaintiffs have no cause of action maintainable in law. I would accordingly allow the appeal, set aside the certification order, and dismiss the action.

P.D. LOWRY J.A.
S.D. FRANKEL J.A.:-- I agree.

cp/e/qlrds/qljxr/qlced/qlhcs/qlced

Exhibit 13

Case Name:

Sun-Rype Products Ltd. v. Archer Daniels Midland Co.

Between
Sun-Rype Products Ltd. and Wendy Weberg, Respondents (Plaintiffs), and
Archer Daniels Midland Company, Cargill, Incorporated, Cerestar USA, Inc. formerly known as American Maize-Products Company, Corn Products International, Inc., Bestfoods, Inc., formerly known as CPC International, Inc., ADM Agri-Industries Company, Cargill Limited, Casco Inc., and Unilever PLC doing business as Unilever Bestfoods North America, Appellants (Defendants)

[2011] B.C.J. No. 689

2011 BCCA 187

305 B.C.A.C. 55

331 D.L.R. (4th) 631

201 A.C.W.S. (3d) 571

Dockets: CA038308, CA038314 and CA038324

British Columbia Court of Appeal
Vancouver, British Columbia

I.T. Donald, P.D. Lowry and S.D. Frankel JJ.A.

Heard: December 1 and 2, 2010.
Judgment: April 15, 2011.

(98 paras.)

Civil litigation -- Civil procedure -- Parties -- Class or representative actions -- Certification -- Procedure -- Appeal by defendants from an order certifying plaintiffs' action as a class proceeding allowed -- Order set aside and application remitted to trial court for further consideration -- Plaintiffs alleged that defendants fixed price of high fructose corn syrup, a sweetener used predominantly in soft drinks -- Plaintiff further alleged that defendants overcharged direct purchasers and overcharge was then passed on to indirect purchasers -- No basis for certification insofar as it related to indirect purchasers -- As there was no passing-on defence in Canadian law, indirect purchasers had no maintainable cause of action against defendants.

Appeal by the defendants from an order certifying the plaintiffs' action as a class proceeding pursuant to the Class Proceedings Act. The plaintiffs alleged that the defendants fixed the price of high fructose corn syrup, a sweetener used predominantly in soft drinks. They alleged that as a result of price-fixing activity, the defendants were able to overcharge direct purchasers (DPs), like the representative plaintiff Sun-Rype Products, for the syrup. As a further consequence of the defendants' misconduct, the plaintiffs alleged that the overcharge was passed on to indirect purchasers (IPs), like the representative plaintiff Weberg, who consumed the end product. On appeal, the defendants argued that that as only DPs could claim for an overcharge, the IPs' claim could not be certified.

HELD: Appeal allowed. The certification order was set aside and the certification application was remitted to the trial court for further consideration. The pleadings did not disclose a cause of action against the defendants for Weberg and the members of the proposed class she represented. There was no basis for certification insofar as it related to the IPs. The pleadings did not disclose a cause of action which, as a matter of law, the IPs could maintain against the defendants. The DPs were in law entitled to recover the whole of the amount of the overcharge for which they could establish the defendants were liable to them, regardless of how much of it had been passed on. In responding to a claim made by the DPs alone, it was no answer for the defendants to say the DPs suffered less than they were overcharged because they passed some of the overcharge on to the IPs. Their loss was complete at the time the overcharge (or each overcharge payment) was paid. If there was no defence of passing-on, it followed that even though an overcharge might have been passed on, the law did not recognize it. As a matter of law, the overcharge or the loss for which the wrongdoer was liable was sustained when the overcharge was paid at first instance. It was no defence to contend there was no loss (or it was something less) because the overcharge was passed on. If that was so, then those who sought to recover an overcharge that had been passed on were effectively claiming a loss that in law was not recognized. For that, there could be no cause of action. Thus, it followed that the IPs had no maintainable cause of action against the defendants. As there was no passing-on defence in Canadian law, there was no sound basis upon which it could be said a claim could be made for an illegal overcharge that might have been passed on. If a defendant could not raise a passing-on defence, it could have no liability to other than a DP for what might have been passed on.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, RSBC 1996, CHAPTER 50, s. 4(1)(a), s. 4(1)(b), s. 4(1)(e), s. 4(1)(e)(i), s. 4(1)(e)(iii), s. 4(1)(3)(iii)

Competition Act, R.S.C. 1985, c. C-34, s. 36

Appeal From:

On appeal from: Supreme Court of British Columbia, June 30, 2010 (*Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 922)

Counsel:

Counsel for the Appellants, Cargill, Incorporated, Cerestar USA, Inc. and Cargill Limited (CA038308): J.K. McEwan, Q.C. and T.C. Boyar.

Counsel for the Appellants, Corn Products International, Inc., Bestfoods, Inc., Casco Inc. and Unilever PLC (CA038314): S.R. Schachter, Q.C. and G.B. Gomery, Q.C.

Counsel for the Appellants, Archer Daniels Midland Company and ADM Agri-Industries Company (CA038324): G.J. Nash, D.M. Brown and J.L. Bolla.

Counsel for the Respondents, Sun-Rype Products Ltd. and Wendy Weberg: R.M. Mogerman and D.G.A. Jones.

[Editor's note: A corrigendum was released by the Court May 3, 2011; the corrections have been made to the text and the corrigendum is appended to this document.]

Dissenting reasons were delivered by I.T. Donald J.A. Reasons for judgment were delivered by P.D. Lowry J.A., concurred in by S.D. Frankel J.A. (para. 74).

Reasons for Judgment

I.T. DONALD J.A. (dissenting):--

Introduction

1 This is an appeal from the order of Mr. Justice Rice certifying the within class action: 2010 BCSC 922.

2 The plaintiffs allege that the defendants fixed the price of high fructose corn syrup ("HFCS"), a sweetener used in various food products, predominantly soft drinks. They allege that as a result of the defendants' price-fixing activity, they were able to overcharge direct purchasers ("DPs"), like the representative plaintiff, Sun-Rype Products Ltd., for the syrup. As a further consequence of the defendants' misconduct, the plaintiffs allege that the overcharge passed through to indirect purchasers ("IPs"), like the representative plaintiff, Wendy Weberg, who consumed the end product.

3 The defendants divided the grounds of appeal amongst themselves and each adopted the submissions of the others.

4 They took direct aim at the cause of action pleaded by the IPs. They submitted that since only DPs can claim for an overcharge, the IPs' claim cannot be certified.

5 The defendants challenge the plaintiffs' claims for a constructive trust on restitutionary principles. As against both DPs and IPs, there is said to be no direct link between the wrongs and the loss alleged. As against DPs, it is argued that they are improperly using constructive trust as a means of avoiding the consequences of a finding that their tort claims are barred by expiry of the applicable limitation period.

6 The defendants submit that Rice J. applied the wrong standard of proof on certification and that on the correct standard the plaintiffs failed to establish a case for overcharge.

7 The defendants take issue with the finding that the plaintiffs have met the certification requirement that they are an identifiable class. The argument is that at least as far as the IPs are concerned, they have no way of knowing whether they consumed the syrup rather than the alternative sweetener, liquid sugar.

8 Finally, the defendants say that the action should not have been certified as the representative plaintiffs lack the requisite attributes for that role.

9 I do not accede to these grounds and I would, for the reasons that follow, dismiss the appeal.

10 These reasons are released concurrently with the judgment in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2011 BCCA 186, heard consecutively because some of the issues overlap.

Certification Order

11 The order appealed from, made June 30, 2010, reads as follows:

> 1. THIS COURT ORDERS that:
>
> 1. The action is certified as a class proceeding against Archer Daniels Midland Company, Manufacturing Company [*sic*], Cargill, Incorporated, Cerestar USA, Inc. formerly known as American Maize-Products Company, Corn Products International, Inc., Bestfoods, Inc. formerly known as CPC International, Inc., ADM Agri-Industries Company, Cargill Limited, Casco Inc., and Unilever PLC doing business as Unilever Bestfoods North America (the "non-settling defendants");
> 1. The class is described as:
>
> 1. "the plaintiffs and all persons resident in British Columbia excluding the defendants who purchased high fructose corn syrup ("HFCS") or products which contained HFCS (collectively the "Class Members") from January 1, 1988 to June 30, 1995 (the "Class Period");
>
> 1. The nature of the claims asserted on behalf of the class is that the plaintiffs are seeking statutory, common law and equitable damages, restitution, and other relief against the non-settling defendants based on allegations that the defendants engaged in an international and unlawful conspiracy to fix the price of HFCS during the Class Period;

1. Sun-Rype Products Ltd. and Wendy Bredin (formerly Wendy Weberg) are appointed as the representative plaintiffs for the class;
1. The within proceeding is certified as a class proceeding on the basis of the common issues attached as Schedule "A";
1. The Litigation Plan attached as Schedule "B" to this Order is approved as sufficient at this stage;
1. Notice shall be given to Class Members in the form, time, manner, and at the cost of the party or parties to be directed by the Supreme Court after further submissions by the parties;
1. The time and manner for opting out of the proceeding shall be as set out in the order of the court dated June 25, 2010.

***Class Proceedings Act*, R.S.B.C. 1996, c. 50**

12 The relevant parts of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"), are:

1. Class certification

    1. The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

    1. the pleadings disclose a cause of action;
    1. there is an identifiable class of 2 or more persons;
    1. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
    1. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
    1. there is a representative plaintiff who

        1. would fairly and adequately represent the interests of the class,
        1. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
        1. does not have, on the common issues, an interest that is in conflict with the interests of other class members.

    1. In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

        1. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
        1. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
        1. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
        1. whether other means of resolving the claims are less practical or less efficient;
        1. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

1. Certification application

    1. An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

1. A copy of the notice of motion and supporting affidavit must be filed and

    1. delivered to all persons who are parties of record, and
    1. served on any other persons named in the style of proceedings.

1. Unless otherwise ordered, there must be at least 14 days between

    1. the delivery or service of a notice of motion and supporting affidavit, and
    1. the day named in the notice of motion for the hearing.

1. Unless otherwise ordered, a person to whom a notice of motion and affidavit is delivered under this section or on whom a notice of motion and affidavit is served under this section must, not less than 5 days or such other period as the court may order before the date of the hearing of the application, file an affidavit and deliver a copy of the filed affidavit to all persons who are parties of record.
1. A person filing an affidavit under subsection (2) or (4) must

    1. set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
    1. swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
    1. provide the person's best information on the number of members in the proposed class.

1. The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
1. An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

1. [Subsections (2), (3) and (4) of s. 5 have since been amended, effective July 1, 2010, to harmonize with the *Supreme Court Civil Rules*: 2010-6-29.]

* * *

1. Certain matters not bar to certification

7		The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:	

1. the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
1. the relief claimed relates to separate contracts involving different class members;
1. different remedies are sought for different class members;
1. the number of class members or the identity of each class member is not known;
1. the class includes a subclass whose members have claims that raise common issues not shared by all class members.

Contents of certification order

1. A certification order must

    1. describe the class in respect of which the order was made by setting out the class's

identifying characteristics,

1. appoint the representative plaintiff for the class,
1. state the nature of the claims asserted on behalf of the class,
1. state the relief sought by the class,
1. set out the common issues for the class,
1. state the manner in which and the time within which a class member may opt out of the proceeding,
1. state the manner in which and the time within which a person who is not a resident of British Columbia may opt in to the proceeding, and
1. include any other provisions the court considers appropriate.

1. If a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the certification order must include the same information in relation to the subclass that, under subsection (1), is required in relation to the class.
1. The court, on the application of a party or class member, may at any time amend a certification order.

* * *

1. Aggregate awards of monetary relief

    1. The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
    1. monetary relief is claimed on behalf of some or all class members,
    1. 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
    1. the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

    1. Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,

        1. submissions that contest the merits or amount of an award under that subsection, and
        1. submissions that individual proof of monetary relief is required due to the individual nature of the relief.

1. Statistical evidence may be used

    1. For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.
    1. A record of statistical information purporting to be prepared by or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.
    1. Statistical information must not be admitted as evidence under this section unless the party seeking to introduce the information

        1. has given to the party against whom the statistical evidence is to be used a

copy of the information at least 60 days before that information is to be introduced as evidence,

1. has complied with subsections (4) and (5), and
1. introduces the evidence by an expert who is available for cross-examination on that evidence.

1. Notice under this section must specify the source of any statistical information sought to be introduced that

    1. was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada,
    1. was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public, or
    1. was derived from reference material generally used and relied on by members of an occupational group.

1. Except with respect to information referred to in subsection (4), notice under this section must

    1. specify the name and qualifications of each person who supervised the preparation of the statistical information sought to be introduced, and
    1. describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

1. Unless this section provides otherwise, the law and practice with respect to evidence tendered by an expert in a proceeding applies to a class proceeding.
1. Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

1. Average or proportional share of aggregate awards

    1. If the court makes an order under section 29, the court may further order that all or a part of the aggregate monetary award be applied so that some or all individual class or subclass members share in the award on an average or proportional basis if

    1. (a) it would be impractical or inefficient to

        1. identify the class or subclass members entitled to share in the award, or
        1. determine the exact shares that should be allocated to individual class or subclass members, and

    1. failure to make an order under this subsection would deny recovery to a substantial number of class or subclass members.
    1. If an order is made under subsection (1), any member of the class or subclass in respect of which the order was made may, within the time specified in the order, apply to the court to be excluded from the proposed distribution and to be given the opportunity to prove that member's claim on an individual basis.
    1. In deciding whether to exclude a class or subclass member from an average distribution, the court must consider

i. the extent to which the class or subclass member's individual claim varies from the average for the class or subclass,

i. the number of class or subclass members seeking to be excluded from an average distribution, and

i. whether excluding the class or subclass members referred to in paragraph (b) would unreasonably deplete the amount to be distributed on an average basis.

l. An amount recovered by a class or subclass member who proves that member's claim on an individual basis must be deducted from the amount to be distributed on an average basis before the distribution.

Discussion

1. Pass-through: Do Indirect Purchasers Have a Cause of Action?

13 The first question in certification is whether the plaintiff has a cause of action: s. 4(1)(a), *CPA*. The test is whether it is "plain and obvious" that the claim cannot succeed. The novelty of a claim is not a basis for striking it out: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273.

14 In the argument advanced by counsel for Cargill, Incorporated, Cerestar USA, Inc. and Cargill Limited, the defendants say that it is plain and obvious that indirect purchasers have no cause of action because the law of Canada does not recognize the pass-through defence: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, per LeBel J.

15 The defence would allow an alleged wrongdoer to defeat the claim of a direct purchaser for an overcharge on the ground that the direct purchaser passed on any overcharge to subsequent (indirect) purchasers and suffered no loss. Since the defence is not available, it follows on the defendants' logic that indirect purchasers (IPs) cannot have a cause of action for the same overcharges because of the principle against double recovery.

16 In the Federal jurisdiction of the United States, this corollary proposition bars indirect purchaser claims: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). But a number of State courts do not accept that a rejection of the pass-through defence negates such claims: see, for example, *Bunker's Glass Company v. Pilkington, PLC*, 206 Ariz. 9, 75 P.3d 99 (2003) (Ariz. Sup. Ct.). This is a lively debate with the State court opinion seemingly more in accord with class action objectives than the federal view.

17 The question is wide open in Canada. Mr. Justice Rice did not find it plain and obvious that the rejection of the pass-through defence necessarily invalidates an IP claim. I will recite his reasons below. They are the fullest treatment of the controversy that I have been able to find so far.

18 The question has come up in other class actions in Canada, but always at the early stages where the judges moved the issue on to trial where all the relevant evidence can be considered and without saying much about the points supporting each side of the question: see, for example, *Chadha v. Bayer Inc.* (2003), 223 D.L.R. (4th) 158, 63 O.R. (3d) 22 (C.A.), and *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021 at para. 150 (S.C.J.).

19 No case has struck a class action on the ground advanced by the defendants.

20 In the companion case, *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, the pass-through argument was argued for the first time on appeal. It was not before this Court in *DRAM* [*Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*DRAM*")]. We are faced squarely with the issue, we have the benefit of full argument, and we can elaborate on why it is not plain and obvious that the IPs have no claim.

21 Mr. Justice Rice drew a distinction, validly in my respectful view, between the pass-through defence and the fact of pass-through. *Kingstreet* and LeBel J.'s judgment in *Canfor* note the difficulty in determining where in the chain of distribution an overcharge may end up. The discussion of the difficulty arises in the context of a wrongdoer foisting the problem on the victim and escaping responsibility, not only for the overcharge but also for some other less tangible losses such as market share created by the overcharge.

22 However, in the present context, the plaintiffs willingly take on the burden of proving that the overcharge passed to them and they have engaged competent experts to provide the evidence. The defendants' experts say it cannot be done but that must be left for trial upon a showing of a "credible or plausible methodology" at the certification stage: *DRAM*.

Mr. Justice Rice made that finding.

23 *Kingstreet* follows American authority in holding that proximity should govern and that the pass-through defence involves unacceptably remote transactions. I am not persuaded that when pass-through is seen from a different angle, as a basis for a claim rather than as a defence, the proximity principle carries the same force. If it can be shown that the overcharge created by price fixing made its way to the IPs as a class, there seems no point in worrying about proximity.

24 Apart from double recovery, discussed more fully later, why, in fairness, should wrongdoers be able to avoid liability for the ultimate victims of their misconduct on the basis of an abstract principle, namely proximity, applied in a different context?

25 I will set out Rice J.'s reasoning on this topic, with which I find myself in respectful agreement:

> 1. [49] More importantly, even if the pass-through defence were not available, the "corollary" submitted by the defendants does not follow necessarily from the premise. They state that because the defendants cannot use the defence to say that the plaintiffs "passed-through" their losses to third parties, the other side of the coin is that those third parties (in this case, the indirect purchasers) cannot in turn claim against the defendants by saying that the overcharge and losses were passed through to them.
>
> 1. [50] The defendants argue that the reasons advanced by the Supreme Court of Canada for rejecting the pass-through defence are equally applicable to reject the use of pass-through as a "sword". They ground this "corollary" in the prohibition on double recovery - that a plaintiff should not be able to recover twice for the same loss, and a defendant should not be made to pay twice for the same civil wrong. It offends restitutionary principles for a defendant to be made to reimburse more than 100% of what it wrongly received.
>
> 1. [51] The defendants reason that if pass-through is not a defence, then the direct purchasers can recover 100% of the overcharge. To then allow the indirect purchasers to use pass-through as a sword on top of this would allow a greater than 100% recovery.
>
> 1. [52] As I see it, the argument breaks down on the premise submitted in the defendants['] written argument that "once it is recognized that pass-through is not a defence at law, the defendants face potential liability to direct purchasers for 100% of any overcharge that is proven."
>
> 1. [53] There are two mistakes in this premise. Firstly, it is a mistake to equate pass-through as a defence at law with pass-through as a factual occurrence. It could be that pass-through actually occurred in fact, even if the court does not allow the defendants to use this fact as a defence to the plaintiffs' claims. The second mistake is that the defendants face potential liability not to "direct purchasers" but to the class as a whole. Using the "top-down" approach outlined in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252, 250 O.A.C. 87 (Div. Ct.) at para. 67, and employed in this province in both *DRAM* and *Microsoft* [2010 BCSC 285], the focus is not on which part of the class ended up with the loss. At this stage, it does not matter. Rather, it is how much, if anything, was wrongfully taken by the defendants. By including both the direct and indirect purchasers in the class, i.e., all those who potentially suffered a loss, and by using econometric methods that the plaintiffs['] claim will ascertain the entire amount and only that amount overcharged by the defendants to the class as a whole, there will be no possibility of overrecovery.
>
> 1. [54] The possibility of overrecovery was the reason for the United States Supreme Court's rejection of the use of pass-through as a sword in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), essentially ending, at the federal level, any indirect purchaser class action claims.
>
> 1. [55] In my view, the two arguments made by White J. in *Illinois Brick* are not applicable to the case at bar, and thus I am not persuaded by the decision. The first argument, that a greater-than-100% recovery is possible, is not a possibility in this case for the reasons mentioned above.

1. [56] The second argument was premised on the evidential difficulties and uncertainties in calculating pass-through due to the limits of economists' hypothetical models at the time that *Illinois Brick* was decided. Because of these difficulties, the Supreme Court argued that the already protracted proceedings in price-fixing cases would be greatly complicated and would have their effectiveness greatly reduced.

1. [57] However, what the Supreme Court did not have in *Illinois Brick* in 1977 was a "credible and plausible methodology" for calculating pass-through. If one has such a method (which is, not surprisingly, the requirement set out in the Canadian jurisprudence that has developed more recently), then the second concern that White J. had with pass-through becomes eliminated.

1. [58] Having found that *Illinois Brick* is inapplicable in the case at bar, it is not plain and obvious that the indirect purchasers do not have a cause of action. Thus, the plaintiffs have satisfied the requirement under s. 4(1)(a) of the *CPA*.

26 Double recovery provides the chief argument supporting the proposition that the obverse of rejecting the pass-through defence is that the IPs have no claim. I do not think that is universally true. Here, the remedies sought are either aggregate damages or a constructive trust in restitution - one amount for the entire class. There is no realistic possibility of double recovery with a single all-encompassing assessment. Furthermore, class proceedings are flexible enough to create ways and means of avoiding overrecovery. The majority judgment of the Arizona Supreme Court in *Bunker's Glass* is apposite:

1. para. 26 The question remains whether any sound reasons justify following *Illinois Brick* and limiting the range of plaintiffs who may sue to remedy state antitrust violations. We find none compelling.

1. para. 27 A principal reason motivating the Supreme Court to disallow indirect purchaser suits was the complexity of proof of damages in such cases. *Ill. Brick*, 431 U.S. at 737, 97 S.Ct. at 2070 (noting problems of proof and apportionment between direct and indirect purchasers). The Court reasoned that indirect purchasers would attempt to prove damages by showing that the direct purchaser passed-on overcharges from the manufacturer. *Id.* The Court had previously disallowed a pass-on defense in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494, 88 S.Ct. 2224, 2232, 20 L.Ed.2d 1231 (1968), decided just nine years before *Illinois Brick*. *See Ill. Brick*, 431 U.S. at 730, 97 S.Ct. at 2067 (explaining that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants"). The Court believed that to allow indirect purchaser actions, it would have to overrule *Hanover Shoe*, a path the Supreme Court was unwilling to take. *Id.* at 736-37, 97 S.Ct. at 2070. This court is under no such constraint.

1. para. 28 In *Illinois Brick*, the Court determined that use of pass-on evidence by indirect purchasers against defendants who could not present that same evidence in their defense against direct purchasers created a risk of multiple liability, increased the complexity of proving damages, and undercut direct purchasers' incentive to bring antitrust actions. *Id.* at 745, 97 S.Ct. at 2074. The Defendants in these cases assert all these reasons to convince the court to follow *Illinois Brick*.

* * *

1. para. 30 The risk of multiple liability for Defendants-that is, being subject to a direct purchaser action and also an indirect purchaser state case-is a legitimate and important concern. It is not, however, a problem that our trial courts are incompetent to handle. Indeed, most of the *Illinois Brick* repealer statutes leave the solution to the double-recovery problem to the courts. ...

1. para. 31 The complexity of proving damages through multiple levels of sales is a daunting task, but one to which our courts are equal. The plaintiffs bear the burden of proving the damages caused by a defendant's wrongful conduct. If the plaintiffs cannot present admissible and convincing proof, they cannot recover. For the purposes of these cases, in which we are compelled to

accept the allegations of the complaints as true, *see Donnelly Constr. Co.*, 139 Ariz. at 186, 677 P.2d at 1294, we assume that these Plaintiffs can present sufficient evidence of injury caused by illegal conduct. Unlike the Supreme Court, we are unwilling to foreclose their opportunity to attempt to prove their injury.

* * *

1. para. 33 In the years that have passed since the *Illinois Brick* decision, experience has shown that the courts can manage the complexity of indirect purchaser recovery in antitrust cases. Defendants raise the concern regarding the difficulty of the proof of damages, but fail to provide examples of cases of unresolvable complexity. Our research has similarly revealed none. In contrast, recent developments in multistate litigation show that plaintiffs may be able to produce satisfactory proof of damages. *Cf. In re S.D. Microsoft Antitrust Litig.*, 657 N.W.2d 668, 679 (S.D.2003) (noting that seven of nine courts reviewing the issue in that case upheld class certification of indirect purchaser plaintiffs based on their proffered testimony regarding proof of pass-on damages). We think our courts can resolve the complex damages issues that may arise.

27 The fact that the American debate has such strong policy arguments on both sides, combined with the judicial reluctance in Canada to strike IP claims prior to a full trial on the issue, compels me to reject the defendants' attack on the pleading at this stage.

28 The defendants submit that, given the principle against double recovery and the nature of the *CPA* as a procedural rather than a substantive rights-conferring statute, it can be demonstrated by reference to certain hypotheses that the IPs have no cause of action.

29 What if, they say, the DPs and IPs commenced separate class proceedings? If both have a cause of action, neither would have to share the recovery of the overcharge - the solution proposed in the present case by the plaintiffs and accepted by Rice J. - and the defendants would have to pay twice. Or consider the problem that arises where a DP sues independently of others in an action in Ontario, recovers judgment, and then a class of IPs sues for the same overcharge in British Columbia. If both have a cause of action, the defendants are exposed to double recovery.

30 I have no difficulty with the postulates behind this analysis: the rule against double recovery is a bedrock principle and the *CPA* cannot provide a cause of action to a party who would have no cause outside a class proceeding. See *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666 at para. 17. But, in my opinion, the double recovery rule should not in the abstract bar a claim in real life cases where double recovery can be avoided. In *Bisaillon*, LeBel J., for the majority, wrote:

1. 16 The class action has a social dimension. Its purpose is to facilitate access to justice for citizens who share common problems and would otherwise have little incentive to apply to the courts on an individual basis to assert their rights (*Nadon v. Anjou (Ville d')*, [1994] R.J.Q. 1823 (C.A.), at p. 1827; *ComitÈ d'environnement de La Baie inc. v. SociÈtÈ d'Èlectrolyse et de chimie Alcan ltÈe*, [1990] R.J.Q. 655 (C.A.); *Syndicat national des employÈs de l'HÙpital St-Charles BorromÈe v. Lapointe*, [1980] C.A. 568). This Court has already noted that legislation on class actions should be construed flexibly and generously: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, at para. 14; *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 51.

31 The fact that a problem case can be hypothesized is not a good reason to deny a claim in an actual case that does not have the problem. This is such a case. So is the companion case, *Microsoft*, where the DPs are alleged to have formed a conspiracy with Microsoft in restraint of competition, and they are therefore unlikely to sue for the same overcharge as the IPs.

32 As for the imagined possibility of multiple suits, this seems unlikely where the claim is for overcharges caused by market misconduct. These are the cases that bring up the pass-through issue. Experience shows that usually the only practical way such claims can be pursued is through class actions. Again, the present case is illustrative. The DPs and IPs need each other to amass a critical number to make the case economically viable.

33 To summarize: although the pass-through defence is dead, the corollary proposition barring a pass-through claim is by no means a logical or legal necessity. The plaintiffs offer evidence to overcome the assumed impossibility of proof

and they will not seek over-recovery. Other adequate safeguards will be available. As I will discuss more fully later, unless the IPs can participate in this class proceeding, the case may not be economically viable and the alleged wrong-doers will retain most of their ill-gotten gains with the result that the class action goals of deterrence and behaviour modification will be lost.

2. Constructive Trust

34 The argument of Corn Products International, Inc. (Casco), which the other defendants adopt, is that the restitutionary remedy of constructive trust for unjust enrichment is not available because there is no direct link or proprietary nexus between the proceeds of the alleged wrongs and that which is sought to be impressed with the trust. This would apply to DPs and IPs. Additionally, as against DPs only, Casco says it cannot be shown that damages are not an adequate remedy, and since this Court has decided that Sun-Rype's tort claims are statute barred, DPs cannot be permitted to sidestep a limitation barrier by resort to an equitable remedy.

35 Any proceeds of the alleged overcharge would, over the class period, have long been put into the defendants' businesses to pay expenses, distribute dividends, invest in plants and equipment, and so on, so that there is no discrete fund identifiably connected to the overcharges. Casco says there is no *corpus*, specific property, capable of forming a trust, and relies on *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 997:

> 1. ... in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed. Having said this, I echo the comments of Cory J. at p. 1023 that the courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.

36 Mr. Justice Rice found a sufficient link by reason that the overcharge paid by the class went into the profits of the defendants, and tracing would look after locating the money:

> 1. [37] If the plaintiffs are able, through econometric analysis, to determine the average overcharge paid by the plaintiffs to the defendants, then arguably, such overcharge formed part of the profits of the defendants. To put it bluntly, the plaintiffs paid the money and the defendants received it. It formed part of their profits. Short of tracing the physical bills, this would be as direct a link to the trust property as one might hope to establish.
>
> 1. [38] In the result, although the defendants raise a possible argument, it is not "plain and obvious" that the plaintiffs' claim must fail, and thus s. 4(1)(a) is satisfied in this case.

37 An argument not dissimilar from that advanced by the defendants in this case was made in *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357. This was a payday loans class action founded on criminal rates of interest. Madam Justice Newbury dealt with the proprietary link issue in this way:

> 1. [30] The defendants' primary argument is that the "threshold" requirement referred to in *Peter v. Beblow* - a "nexus between the contribution [here one may substitute "Unlawful Finance Charges"] and the property" - was non-existent in this case. In their submission, the trial judge found only that the plaintiffs had paid fees in excess of the criminal interest rate and erred in reasoning that by virtue of this fact, there was a direct link between "the contribution that founds the action and the property in which the constructive trust is claimed." (Para. 6.) They say that although this finding may have been sufficient to satisfy the 'deprivation' element of unjust enrichment, it did not satisfy the second requirement enunciated in *Peter v. Beblow* for the imposition of the proprietary remedy. In their submission, "No specific property is at issue here which could form the basis of a trust. Indeed, money or monetary compensation is what is being sought" by the plaintiffs.
>
> 1. [31] This argument seems to combine two points - first, that the subject-matter of the proposed trust, i.e., money, is inappropriate to found a constructive trust; and second, that the connection between the Unlawful Finance Charges and the defendants (or more properly, the Storefront Lenders) was insufficient for that purpose. In my view, the first point must fail: it is clear from the authorities that funds, or accounts, are a proper subject for a constructive trust. As the plain-

> tiffs note, Equity has since at least the 19th century permitted beneficiaries of trusts to assert proprietary interests in respect of funds and any property into which they have been transformed, by means of following (at law) or tracing (in law or in Equity). ...
>
> 1. [32] The second part of the defendants' submission requires consideration of whether funds or other property held by the defendants can be shown to be sufficiently connected to the Unlawful Finance Charges to satisfy the requirements for a constructive trust. ...
>
> 1. [33] The trial judge found that there was a sufficient connection to ground a finding of unjust enrichment against all the defendants. This finding was upheld. But whether it was also sufficient to establish a connection that meets the criteria for the imposition of a constructive trust *vis ‡ vis* the defendants other than the Storefront Lenders is in my opinion doubtful. However, if the plaintiffs successfully establish a proprietary entitlement to the Unlawful Finance Charges in the hands of the Storefront Lenders, they may trace those funds from there into the hands of other defendants, and even into the hands of third parties - subject always to the rules of court and the limitations of the tracing process. The plaintiffs would then be entitled to assert a constructive trust against the holder(s) of the funds or other property without the exercise of any further discretion by the court.

38 In light of that reasoning, I cannot say that Rice J. was wrong in finding the basis for a sufficient nexus. His refusal to strike out the claim is supported by *Smith v. Vancouver City Savings Credit Union*, 2008 BCCA 279, 83 B.C.L.R. (4th) 209 at paras. 14-17.

39 Sun-Rype, as the DP representative, cannot proceed with the damages claim because the limitation period has expired: 2008 BCCA 278, 81 B.C.L.R. (4th) 199. *Peter v. Beblow* holds that constructive trust is applied only when damages are not an appropriate remedy. The defendants argue that on the pleadings damages are obviously an appropriate remedy, but they are not available because of the time bar. The restitutionary remedy of trust is merely a device to get around the problem.

40 In *Harraway v. Harraway*, 2009 BCCA 561, 315 D.L.R. (4th) 182, a family case in which the trial judge granted a constructive trust in a farm, this Court substituted a monetary judgment as "adequate and sufficient". In his reasons for the Court, Chief Justice Finch said:

> 1. [54] In *Constructive Trusts and Other Remedies* (CLE: *Restitution*, April 2009), Geoffrey Gomery writes that in both *Tracey [sic] v. Instaloans Financial Solution Centres (BC) Ltd.*, 2008 BCSC 669 and *Kilroy*, [2006] B.C.J. No. 1885, *supra*, the British Columbia Supreme Court has emphasized "that the strongest argument for a constructive trust remedy is that it is necessary, as Brown J. put it in *Tracey*, to provide a meaningful remedy to the plaintiffs" (6.1.9). The corollary of this suggests that the strongest argument *against* a constructive trust is that a monetary remedy is adequate.

41 *Harraway* was fully tried and the question as to remedies was addressed at the end. In the present case, the defendants seek to strike out the constructive trust claim at certification. This Court, in *Smith v. Vancouver City Savings Credit Union*, was not prepared to disturb a trial judge's decision on a Rule 18A application that it was premature to determine whether a constructive trust remedy was available when not all the facts were yet before the court. Although the argument there was different, the timing aspect is the same.

42 An important feature of this case is the aggregate award aspect. If, as I apprehend it, the action is more about the benefits taken by the defendants in their alleged price fixing and an effort to make them disgorge the benefits or make restitution on a class-wide basis, rather than about individual losses, then the argument that damages are an adequate remedy is unpersuasive. I do not accept that alternative claims for damages and restitution disqualify restitution at the outset because they represent a concession that damages are an adequate remedy. That must be decided later in the case.

43 A distinction between "benefit-based" claims and "loss-based" claims was discussed by this Court in *DRAM*:

> 1. [31] In her majority judgment in *Serhan* [*Serhan Estate v. Johnson & Johnson* (2006), 269 D.L.R. (4th) 279, 85 O.R. (3d) 665 (Div. Ct.)], Epstein J. (now Epstein J.A.) surveyed the law relating to unjust enrichment, constructive trust, and waiver of tort and noted that there is an argument to be made that these claims may be established on the basis of proof of wrongful conduct

and resulting gain without proof of any loss by the plaintiff. As she notes, this view finds support among some academic commentators and some case authorities and is based on the principle against unjust enrichment - that a wrongdoer must be compelled to disgorge the fruits of the wrongdoing. These are benefit-based claims, as distinguished from loss-based claims such as claims in tort and contract, where the object is to compensate the innocent party for a loss. Accordingly, she reasoned,

> [157] Given the uncertain state of the law concerning both waiver of tort and the potential of disgorgement liability and the circumstances under which the remedy of a constructive trust may be recognized, it is not appropriate that the court should embark upon an analysis of this nature and significance at this early stage without a complete factual foundation. This is particularly so given the policy implications of the issues raised in this proceeding, implications for which the class proceedings regime in this province is specifically designed in that it is intended to provide a mechanism for correcting the behaviour of wrongdoers who would, absent its specialized procedures, be immune from legal consequences for their behaviour.

As a result, since liability might be established without proof of loss, she approved the certification of an aggregate award as a common issue (paras. 138-39).

44 Another way of expressing the distinction is to call this a "top down" rather than a "bottom up" case. A majority of the Divisional Court put it this way in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252 (S.C.J.), aff'd 2010 ONCA 466, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 348:

> [64] However, loss need not be quantified to establish breach of s. 61 [*Competition Act*, R.S.C. 1985, c. C-34]. The focus of s. 61 is on the conduct of the respondents, not upon the efficiency of the appellants as purchasers. The complaint of the franchisees relates to the mark-up and sourcing fees as opposed to the base price of the products of the suppliers. By focusing on individual product prices that the appellants would be able to obtain in an alternate buying scenario, rather than the conduct of the respondents and the franchisor mark-up and sourcing fees component of the product prices in the existing franchising system, the motions judge relied upon a "bottom up" model of proof.

> [65] A "top down" approach was preferred by the court in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594, [2000] O.T.C. 877 (S.C.J.), at paras. 35-39, 43-45 and 57. In reviewing different approaches for assessing damages in business-to-business price-fixing conspiracy, Cumming J. preferred an approach based upon the difference between the conspiracy prices and the prices that would have been charged for similar products absent (or "but-for") the alleged conspiracy. Such an inquiry was an objective one that did not depend on the lost profit or the expense items of individual class members. He noted that in some instances of sufficient "uniformity" amongst the class, collective class recovery may be calculated from the defendant's business records or computer systems. Cumming J. preferred this "top down" approach to the individualized approach to damages based upon the theory that the loss on the part of purchasers is not the increase in price, but rather the increase in cost to them which they are unable to pass on. Similarly, in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, [2003] O.J. No. 5703, 129 A.C.W.S. (3d) 1096 (S.C.J.-Master), at paras. 27 and 32, the court found that franchisees' profit was not relevant to a claim by franchisees against their franchisor for withheld supplier rebates and allowances.

45 These figures of speech each arise in different contexts but they illuminate the special nature of class-wide claims and assist in understanding why at certification it is simply too early to say that damages rather than a restitutionary constructive trust are the appropriate remedy.

46 Finally, I do not accept the contention that the constructive trust claim must be condemned as a ruse and struck out as such. Sun-Rype's tort actions are barred, but its separate claim for unjust enrichment was brought within time. They are independent causes of action and I see nothing improper in the pursuit of unjust enrichment.

3. Evidentiary Requirements at Certification

47 The defendants submit that the standard of proof at certification for the elements listed in s. 4(1)(b)-(e) should be the ordinary civil standard on the balance of probabilities.

48 The argument focuses on the methodology for determination of class-wide harm or gain and pass-through. Mr. Justice Rice applied the test set down in *DRAM*: "a credible and plausible methodology" in finding that there is a basis in fact to support the certification order. The defendants argue that sets the bar too low and that, had a more stringent and appropriate test been applied, the judge would have given effect to the objection that the plaintiffs' expert's approach is deeply flawed. They say the expert proposed to use the wrong market in his statistical analysis.

49 In the defendants' submission, *DRAM* is either wrong and should be reconsidered, or it is inapplicable, or it should not be followed because it was rendered *per incuriam*, not having considered the difference between Ontario legislation, on which the test is based, and the British Columbia *CPA*.

50 The flaw in the plaintiffs' methodology is said to lie in the fact that the United States and Canada have distinctly different markets for sweeteners. The plaintiffs' expert set out a method based on American data and the defendants say he failed to advert to Canadian data or even to assert that such data exists. To understand the difference in the markets, it is important to know that HFCS and liquid sugar are perfect substitutes and so in theory they compete with one another, but in the United States, sugar is a commodity protected by price supports and so the two products are not in competition, or at least not in the same way as in Canada where there is no such market intervention.

51 Mr. Justice Rice refused to be drawn into this area, as he thought it strayed from the threshold evaluation at certification and went into the merits, other than to say that the relevant market should be assumed to be that which is alleged by the plaintiffs and subject to actual proof at trial.

52 The judgment in *DRAM* addressed the evidentiary burden at certification in this way:

> 1. [64] The provisions of the *CPA* should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behaviour modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation): *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at paras. 26-29 [*Western Canadian Shopping Centres*]; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15 [*Hollick*].
>
> 1. [65] The certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding: *Hollick* at para. 16. The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading disclose a cause of action: *Hollick*, at para. 25. However, in conformity with the liberal and purposive approach to certification, the evidentiary burden is not an onerous one - it requires only a "minimum evidentiary basis": *Hollick*, at paras. 21, 24-25; *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 (S.C.J.) at para. 19. As stated in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 at para. 50, 73 O.R. (3d) 401 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50 [*Cloud*],
>
>> 1. [O]n a certification motion the court is ill equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.
>>
>> * * *
>
> 1. [68] The appellant was required to show only a credible or plausible methodology. It was common ground that statistical regression analysis is in theory capable of providing reasonable estimates of gain or aggregate harm and the extent of pass-through in price-fixing cases. ...

1. [Emphasis added.]

See also *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, 2010 ONCA 466 at paras. 44-45.

53 The defendants seek to distinguish *DRAM* on the ground that there was not in that case any question of a foundational fact, here the relevant market, in the methodology. With respect, I agree with Rice J. that discussion of foundational facts crosses the line into a merits analysis. I do not accept that *DRAM* can be distinguished in this way.

54 Then there is the argument that this Court in *DRAM* was not asked to consider whether authorities decided on the Ontario *CPA* are applicable to British Columbia certifications. In Ontario, the *CPA* contains no express evidentiary requirement at certification. In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, the Court endorsed the judge-made rule developed in Ontario:

1. [25] I agree that the representative of the asserted class must show some basis in fact to support the certification order.

55 In the British Columbia *CPA* the evidentiary requirement is explicit:

1. An application for a certification order under section 2 (2) or 3 must be supported by an affidavit of the applicant.

* * *

1. A person filing an affidavit under subsection (2) or (4) must

    1. set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
    1. swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
    1. provide the person's best information on the number of members in the proposed class.

1. [Emphasis added.]

56 As the plaintiffs point out, *Hollick* was released at the same time as an appeal from British Columbia: *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184. The Court's analysis in *Rumley* begins with a reference to *Hollick*:

1. [25] The only issue in this case is whether the Court of Appeal erred in granting certification. As the respondents do not cross-appeal from the decision of Mackenzie J.A., we need not consider whether certification could have been granted on a *broader* basis than was recognized by the Court of Appeal. The only question is whether, given the Court of Appeal's redefinition of the class and common issues, the certification requirements were met. Those requirements are set out in s. 4 of the British Columbia *Class Proceedings Act* and are similar to the certification requirements set out in Ontario's class action legislation, which I discuss at some length in *Hollick*. These reasons discuss the specifics of the British Columbia certification requirements only insofar as they differ materially from those set out in s. 5 of the Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6, and only to the extent that those differences bear directly on my analysis in this case.

1. [Underlining added.]

57 Nothing is said in *Rumley* about there being a different evidentiary requirement in British Columbia and Ontario. One would expect such an important difference to have been identified if it were seen to exist.

58 I do not accept that an interpretation of the two statutes gives rise to a different evidentiary test at certification. It follows that I reject the submission that *DRAM* should not be followed on the ground that this Court was unaware of a significant difference between the two jurisdictions.

4. Identifiable Class

59 This part addresses an argument related to the requirement of an identifiable class: s. 4(1)(b), *CPA*.

60 The defendants (ADM) argue that self-identification by IPs is a virtual impossibility. This is because HFCS and liquid sugar are used interchangeably and Canada's regulators did not, in the class period, require labelling on food products to specify which sweetener was used - someone drinking a cola or eating a cookie in British Columbia would not have known whether it contained HFCS and, thus, whether they were in the proposed class.

61 If consumers cannot know if they fall into the class, the defendants submit that two important procedural and substantive implications arise:

1. No one will be able to make an informed decision whether to participate in the action or to opt out.
1. A judgment or settlement must have a binding effect, but as against whom?

62 The defendants cite *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, for the elements of identification:

1. [38] While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. 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: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

63 The defendants submit that Rice J. turned these requirements on their head by holding that the difficulty in this regard provided a good reason for invoking the class procedure as the only avenue of recovery:

1. [92] In my view, the concern for commercial food and beverage buyers is not well-founded. If any such commercial entity did not have sufficient evidence to know whether it was a member of the class or not, then it seems unlikely that it would have sufficient evidence to succeed in its own individual action against the defendants. In that case, this action would be its only possibility for recovery.

64 I agree with the plaintiffs' rejoinder that there are objective criteria for defining the class and that it is not necessary at this stage to analyse each individual position of the class members. They propose to adduce evidence that HFCS was sold into the British Columbia market, the defendants fixed the price and earned an unjust profit. A not unlikely outcome if the plaintiffs can prove their case is that an aggregate award, measured by the improper gain, will be distributed cy-pres, perhaps through a charity. In that event, it may never be necessary to count the heads of who consumed HFCS. No IP will enjoy a windfall. Considerations of opting out and binding effect in this scenario are unrealistic concerns.

65 Moreover, if it is correct to say that individual self-identification is impossible, then the defendants are at no risk of separate actions taken by individuals. All that can be known is that a class was harmed.

66 Mr. Justice Rice followed, correctly in my view, the reasoning of Mr. Justice Myers, the certification judge in the companion *Microsoft* case, on this point:

1. [80] I do not accept the submissions of the defendants. The comments of Myers J. are instructive on the point. In *Microsoft* at paras. 173-76 he distinguished *Chadha* and *Ragoonanan* [*Ragoonanan v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 at para. 37, 20 C.P.C. (6th) 262 (S.C.J.), aff'd (2008), 236 O.A.C. 199, 54 C.P.C. (6th) 167 (Div. Ct.)]:

1. The other cases relied on by Microsoft present far greater levels of difficulty in identifying class members than here. *Ragoonanan* ... was a case where the class sought to be certified was "all persons in Canada who suffered injury, or loss, as a result of a fire that occurred after October 1, 1987, where the fire was caused by a cigarette manufactured by the defendant igniting upholstered furniture or a mattress." That definition involved a number of factual determinations that were not only difficult, but also depended on the merits of the case, namely causation. The class definition in the case at bar is predicated on the assumption that, for the tort claims, Pro-Sys will demonstrate at trial that harm was suffered by all of the class members.

1. In *Chadha*, the determination as to class membership would have involved the determination of whether a homeowner had brick that contained the defendants' iron oxide pigments.

1. No doubt there may be situations in this case that may present some difficulty; however, I am not convinced that they rise to the level which merits declining to certify this case.

1. Finally, while not necessary for my decision, I note that the issue of piracy would not appear to affect the calculation of damages which will be based in part on the volumes of each type of product sold by Microsoft: those sales volumes will be generated from Microsoft's data with respect to legitimate products. The same can be said with respect to the restitutionary claim. Therefore, if there is a problem with respect to piracy it will likely manifest itself at the stage of distributing the proposed aggregate damage or restitutionary award, as opposed to calculating the quantum of such damages or awards. That would not be a concern for Microsoft. As the Ontario Court of Appeal said at para. 49 of *Markson*, [2007] O.J. No. 1684, with respect to the aggregate damage provisions of the Ontario *CPA*:

    1. It may be that in the result some class members who did not actually suffer damage will receive a share of the award. However, that is exactly the result contemplated by s. 24(2) and (3) because "it would be impractical or inefficient to identify the class members entitled to share in the award".

1. [81] Thus, while it may be difficult or even impossible for some indirect purchaser class members to self-identify in this case, this need not affect the ability of the plaintiffs, assuming their claims to be true, to calculate the amount of wrongful gains of the defendants.

5. <u>The Representative Plaintiffs Do Not Have the Attributes for Certification</u>

67 The fifth requirement for certification is about the representative plaintiff. Section 4(1)(e) of the *CPA* reads:

1. The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

* * *

1. there is a representative plaintiff who

    1. would fairly and adequately represent the interests of the class,
    1. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
    1. does not have, on the common issues, an interest that is in conflict with the interests of other class members.

68 The defendants take two points on this requirement. First, in relation to s. 4(1)(e)(i), the plaintiffs were recruited

by counsel to initiate these proceedings, they have little knowledge of the issues, and will not likely be able to provide meaningful instructions to counsel in the carriage of the action. Secondly, in relation to s. 4(1)(3)(iii), the DP group is in a direct and irreconcilable conflict of interest with the IP group.

69 Dealing first with fair and adequate representation, while neither plaintiff had a grievance against the defendants prior to counsel bringing them into the action, it seems almost fanciful to challenge their representation on that ground in this kind of case. The individual losses are likely to be so small that separate proceedings are really out of the question. The only realistic approach is a class action. The focus shifts to the adequacy of counsel to pursue the matter and that has not been brought into question. I share the view taken by Mr. Justice Haines in *Segnitz v. Royal & SunAlliance Insurance Company of Canada* (2003), 40 C.P.C. (5th) 391 (Ont. S.C.J.):

> 1. [14] I am also satisfied that each of these plaintiffs has a demonstrated interest that is consistent with the balance of the proposed class and, as such, is an adequate representative plaintiff. It should perhaps be remembered in cases such as these that no representative plaintiff will have much of a stake in the ultimate outcome since the potential recoveries are so modest. Therefore reality dictates that the test for adequacy of the representative plaintiff is in large part a test of the capacity of class counsel to properly pursue the action in the best interests of the members of the class. I am satisfied that that requirement is fulfilled in these actions.

70 Turning to the question of a conflict of interest, on the surface there appears to be a problem. Mr. Justice Rice essentially said any conflict could be sorted out later. However, in theory, why would it not be in the DPs' best interest to join in the defendants' attempt to strike out the IPs' claim on the *Hanover Shoe* argument? If the IPs are out of the action, the DPs will not have to split the ultimate award.

71 I put this question in theoretical terms because there are strategic and pragmatic considerations that cast a different light on the matter. It is as simple as this: as they see things at this stage, the DPs and IPs need one another to form a large enough class to put the case on an economic footing. Counsel for the plaintiffs explained that the DPs do not wish to exclude the IPs only to find that their own numbers are too small to carry on. I think that disposes of the contention that the parties are in a hopeless conflict at the outset.

72 As to the future of the action, any sharing of an award will involve a divergence of interests, but I do not see how that presents an insuperable barrier to a resolution of the common issues. Neither group is prejudiced in taking the case on together and they may not be able to do it any other way. Separate representation at the damages stage can easily be arranged.

Disposition

73 For the foregoing reasons, I would dismiss the appeal.

I.T. DONALD J.A.

Reasons for Judgment

The following is the judgment of

74 P.D. LOWRY J.A.:-- I have had the opportunity of reading in draft Mr. Justice Donald's reasons for concluding the appeal should be dismissed. While I agree with my colleague's analysis insofar as it relates to the DPs, I find, with respect, I am unable to agree there is a basis for certification insofar as it relates to the IPs. In particular, I do not consider the order Mr. Justice Rice made, which is the subject of the appeal, can be supported under the provisions of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50, that govern certification. In my view, the pleadings do not disclose a cause of action which, as a matter of law, the IPs can maintain against the defendants (s. 4(1)(a)). I would also question whether there is an unacceptable conflict between the two representative plaintiffs in that regard (s. 4(1)(e)(iii)), and whether the IPs constitute an identifiable class (s. 4(1)(b)) in any event, but those are questions I need not decide.

The Passing-on Defence

75 It is alleged that, over a period of years, the defendants participated in an illegal price-fixing scheme. They overcharged the parties represented by Sun-Rype Products Ltd., the DPs, for a sweetener used in food products. Some of the overcharge was passed on to consumers, represented by Wendy Weberg, the IPs. Both the DPs and the IPs claim for the losses they say they suffered as a consequence of the defendants' scheme.

76 However, the DPs are in law entitled to recover the whole of the amount of the overcharge for which they may establish the defendants are liable to them, regardless of how much of it had been passed on. In responding to a claim made by the DPs alone, it would be no answer for the defendants to say the DPs suffered less than they were overcharged because they passed some of the overcharge on to the IPs. Their loss was complete at the time the overcharge (or each overcharge payment) was paid. This appears to me to have been made clear beyond question by the Supreme Court of Canada: passing on is not a defence that the defendants could raise: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3, and *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74 (*Canfor*), per LeBel J. in dissent but not on the point. In *Kingstreet*, speaking for the Court, Bastarache J. concluded on the point as follows:

> 1. 51 For the above reasons, I would reject the passing-on defence in its entirety.

77 This conclusion was drawn with reference to the analysis undertaken by LeBel J. in *Canfor* with respect to a province's loss of stumpage rates resulting from a forest fire where, suggesting the Court stood at a crossroads (para. 201), the passing-on defence would have been rejected with the "possible exception" of cases involving *ultra vires* taxation. LeBel J. cited and quoted from the analysis of the United States Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). In *Hanover Shoe*, it was held there was (with one narrow exception) no defence of passing on available to a defendant in what was a treble damages anti-trust action for illegal market monopolization under federal legislation. *Hanover Shoe* was affirmed by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061 (1977), where, as here, the passing-on defence was considered in the context of a claim by indirect purchasers who sought to recover treble damages under the same legislation on the basis of overcharges resulting from a price-fixing scheme having been passed on to them.

78 *Kingstreet* was an action for the return of a user charge tax on the purchase of alcohol for night clubs, said to have been constitutionally invalid, where the government contended the taxpayer had suffered no loss because the tax had been passed on to its consumers. Noting the defence had developed almost entirely in the context of taxes or other charges paid under a mistake of law, the Court rejected it in its entirety, including the possible exception LeBel J. had recognized in *Canfor,* because it was inconsistent with the basic premise of restitution law, it was economically misconceived, and it created serious difficulties of proof (para. 44). Bastarache J. said:

> 1. 48 In addition to being contrary to the basic principles of restitution law, the defence of passing on has also been criticized for being economically misconceived and for creating serious difficulties of proof. In *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, 2004 SCC 38, LeBel J., writing in dissent but not on this point, commented on the inherent difficulties in a commercial marketplace of proving that the loss was not passed on to consumers. LeBel J. noted that every commercial entity could be accused of passing on all or part of any damages suffered by it, by its own rates or charges to its customer. This is because it is difficult to determine what effect a change in a company's prices will have on its total sales. Unless the elasticity of demand is very low, the plaintiff is bound to suffer a loss, either because of reduced sales or because of reduced profit per sale. Where elasticity is low, and it can be demonstrated that the tax was passed on through higher prices that did not affect profits per sale or the volume of sales, it would be impossible to demonstrate that the plaintiff could not or would not have raised its prices had the tax not been imposed, thereby increasing its profits even further. LeBel J. referred to these various figures as "virtually unascertainable" (para. 205, citing White J. in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), at p. 493). LeBel J. ultimately concluded that "[t]he passing on defence would, in effect, result in an argument that no damages are ever recoverable in commercial litigation because anyone who claimed to have suffered damages but was still solvent had obviously found a way to pass the loss on" (para. 206, citing Ground J. in *Law Society of Upper Canada v. Ernst & Young* (2002), 59 O.R. (3d) 214 (S.C.J.), at para. 40).
>
> 1. 49 Although LeBel J. was criticizing the application of the passing-on defence in tort law, his criticisms are equally appropriate, if perhaps not more so, in the context of restitution law. This is because, unlike restitution law, tort law is premised on the concept of compensation for loss, such that concerns about potential windfalls are appropriate.

79 The rejection of the passing-on defence is consistent with the long-standing policy considerations reflected in what was said by Justice Holmes in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 at 533-534, 38 S.Ct.

186 (1918), quoted in the dissent in *Canfor* (para. 204) and substantially in *Hanover Shoe* (note 8):

> 1. The only question before us is that at which we have hinted: whether the fact that the plaintiffs were able to pass on the damage that they sustained in the first instance by paying the unreasonable charge, and to collect that amount from the purchasers, prevents their recovering the overpayment from the carriers. The answer is not difficult. The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. ... Perhaps strictly the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios*, with which the defendants were not concerned. If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. .... The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. ... Behind the technical mode of statement is the consideration ... of the endlessness and futility of the effort to follow every transaction to its ultimate result. ... Probably in the end the public pays the damages in most cases of compensated torts.

The Passed-On Overcharge Claim

80 If then it is right to say there is no defence of passing on, it must, in my view, follow that even though an overcharge may in fact have been passed on (as the invalid tax was said to have been passed on in *Kingstreet*), the law does not recognize it: as a matter of law, the overcharge or the loss for which the wrongdoer is liable is sustained when the overcharge is paid at first instance. It is no defence to contend there was no loss (or it was something less) because the overcharge was passed on. If that is so, then those who would seek to recover an overcharge that has been passed on are effectively claiming a loss that in law is not recognized. For that, there can be no cause of action.

81 Thus, it would follow the IPs have no maintainable cause of action against the defendants.

82 If it were otherwise - if both the DPs and the IPs had independent causes of action against the defendants who could not raise a passing-on defence - the defendants could be liable to the DPs for 100% of the overcharge they paid and could also be liable to the IPs for whatever amount of the overcharge may have been passed on: double recovery (the recovery of the same loss twice by different plaintiffs), which our law will not sanction.

83 The analysis undertaken by Rice J., as quoted by my colleague (para. 25), which counsel for the proposed class seeks to have upheld, endeavours to address double recovery in two ways. It first distinguishes between the passing-on defence and the fact of passing on, the suggestion being that the inability of the defendants to raise passing on as a defence to the DPs' action does not mean there is no action available to the IPs against the defendants for what may in fact have been passed on. But the distinction is not considered as a matter of law. The passing-on defence appears to have been seen as something a court will not "allow" a defendant to raise. But, in my respectful view, it is not a question of what a court may allow; rather it is a matter of what the law recognizes. The defence cannot be raised, not because it is for some reason not allowed, but because the law does not recognize it - it has been authoritatively rejected. Once that is accepted, the fact that some of the overcharge may have been passed on cannot be relevant to establishing a cause of action.

84 The second way in which the analysis seeks to address double recovery is the recognition that this is a class action. It is said there is no possibility of over recovery here because the defendants do not face liability to the DPs but to the class as a whole, the suggestion being the court will determine how any amount of the overcharge which the defendants may have received from the DPs and for which they may be liable to the class is to be distributed. But I am unable to see why the DPs would not as a matter of law be entitled to the whole of the amount they overpaid regardless of any amount that may have been passed on to the IPs in the same way they would if they were the only plaintiffs in the action. Anything less would serve to disadvantage them because of the nature of the proceedings such that they would be deprived of what they would legally be entitled to recover.

85 By the same token, if the defendants were now to admit liability to the DPs and pay them the full amount of what is alleged to have been the overcharge, which in the absence of a passing-on defence would be the DPs' legal entitle-

ment, there would be nothing left for the IPs to recover; barring double recovery, they would have no loss for which they could claim in this or any other action. They would have no cause of action.

86 The *Class Proceedings Act* is a procedural statute that can neither create nor modify a cause of action: *Bisaillon v. Concordia University,* 2006 SCC 19, [2006] 1 S.C.R. 666 at para. 17. The substantive positions of the parties in law are not altered by the legislation and the form of proceedings for which it provides. The DPs' substantive entitlement to the full recovery of any overcharge paid cannot be compromised by the form of procedure. To the same effect, the IPs cannot acquire a cause of action for any overcharge passed on to them they would not otherwise have.

87 Recognizing the difficulties faced by the proposed class with respect to the prospect of double recovery, the representative DP, Sun-Rype, maintains that it would not seek to recover any part of the overcharge it passed on to the IPs. I question how binding the position it takes now may be on itself and on all of the other DPs yet to be given notice of the action, but I do not consider it serves to resolve the difficulty in any event. One of several plaintiffs in an action cannot affect the legal liability of a defendant to other plaintiffs by gratuitously compromising its legal entitlement. It is, on the factual circumstances of any case, the law that determines a defendant's liability to any given plaintiff, not what another plaintiff may seek to recover.

88 Given there is now no passing-on defence in Canadian law, there does not appear to me to be any sound basis upon which it could be said a claim can nonetheless be made for an illegal overcharge that may have been passed on: if a defendant cannot raise a passing-on defence, it can have no liability to other than a direct purchaser for what may have been passed on. The law must be consistent. Passing on cannot be denied in one context and recognized in another.

89 There appears to be no decision of a Canadian court to the contrary. The most that can be said is that indirect purchaser claims, similar in nature to what the representative plaintiff seeks to advance here, have been certified in class action proceedings. Those cited are *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 [*DRAM*]; *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2010 BCSC 285 [*Microsoft*]; *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29 (S.C.J.), certification refused on other grounds (2001), 54 O.R. (3d) 520 (Div. Ct.), aff'd (2003), 63 O.R. (3d) 22 (C.A.); and three other decisions of the Ontario Superior Court of Justice: *Osmun v. Cadbury Adams Canada Inc.* (2009), 85 C.P.C. (6th) 148; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2000), 74 O.R. (3d) 758 and *Irving Paper Ltd. v. Atofina Chemicals Inc.*, [2009] O.J. No. 4021, leave to appeal refused, 2010 ONSC 2705. However, in each instance certification was either not contested in order to facilitate a settlement (*Osmun* and *Vitapharm*), or it was not opposed on the basis of indirect purchasers having no cause of action (*DRAM* and *Microsoft),* or, where it was opposed on that basis, it was said to be not clear the action would fail and it was considered appropriate that be addressed on a trial with the benefit of a full evidentiary record (*Chadha* and *Irving Paper*). Here, counsel for the proposed class does not seek to demonstrate that the court would be in any better position to decide what is a pure question of law - whether on the case pleaded the IPs have a cause of action - after a trial than it is now.

American Law

90 Under American federal law, it has been clear, since *Illinois Brick*, that passing on cannot be raised offensively to recover overcharges in an anti-trust action where it cannot also be relied on as a defence. Indeed, the majority opinion in *Illinois Brick* indicates the position in law in that regard there appeared sufficiently clear that it was conceded, at 2066:

> 1. The parties in this case agree that however s. 4 is construed with respect to the pass-on issue, the rule should apply equally to plaintiffs and defendants - that an indirect purchaser should not be allowed to use a pass-on theory to recover damages from a defendant unless the defendant would be allowed to use a pass-on defense in a suit by a direct purchaser. Respondents, in arguing that they should be allowed to recover by showing pass-on in this case, have conceded that petitioners should be allowed to assert a pass-on defense against direct purchasers of concrete block ...; they ask this Court to limit *Hanover Shoe's* bar on pass-on defenses to its "particular factual context" of overcharges for capital goods used to manufacture new products.

91 However, despite that concession, the court divided over whether *Hanover Shoe* precluded indirect purchasers from recovering overcharges that were passed on. The minority decided, largely for policy reasons, that there being no passing-on defence did not preclude recovery for what had been passed on. Since then, some state legislatures have enacted what are referred to as repealer statutes specifically providing for indirect purchaser recovery, and state courts have engaged in a policy debate over whether the objectives of anti-trust legislation, being primarily to preclude the retention of ill-gotten gain, are best served by permitting direct purchasers to recover all of the overcharges paid regardless of what may have been passed on (*Hanover Shoe*) or permitting those who ultimately bear some or all of the cost of

illegal overcharges to recover (the minority in *Illinois Brick*).

92 We are in this regard referred to the decisions of the supreme courts of Arizona, Iowa, and California: *Bunker's Glass Co. v. Pilkington, PLC*, 206 Ariz. 9, 75 P.3d 99 (2003); *Comes v. Microsoft Corporation*, 646 N.W.2d 440 (2002); and *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758 (2010). The course the debate has followed is outlined in the majority opinion in *Bunker's Glass* which declined to follow *Illinois Brick* in interpreting and applying state anti-trust legislation as permitting recovery by indirect purchasers. Some other state courts have taken the same course (see *Comes* in particular), but I find little in the decisions cited that alters the view I hold of the effect of the rejection of the passing-on defence in Canadian law. I say that principally because these American state court decisions appear to be largely policy driven; they do not come to grips with the absence of a legal basis for an indirect purchaser's cause of action once it is accepted there is no passing-on defence as, since *Kingstreet*, I consider it must be accepted here.

93 Broadly, where no repealer statute has been enacted, recovery appears to have been based on the particular wording of state anti-trust statues, the determination that state courts can adequately minimize the risk of double recovery, and acceptance that, where double recovery might occur, it is preferable to permitting anti-trust violators to escape liability.

94 Counsel for the proposed class here does attach importance to the wording of the *Competition Act*, R.S.C. 1985, c. C-34, as a basis for the IPs' cause of action:

> 1. Recovery of damages
>
> 1. (1) Any person who has suffered loss or damage as a result of
>
> 1. conduct that is contrary to any provision of Part VI, ...
>
> 1. may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

95 It is contended that "any person" must include indirect purchasers who have borne some of the overcharge the DPs are alleged to have paid to the defendants. But, in my view, a person who has suffered loss can only mean a person who has suffered a loss that is recognized in law.

Conclusion

96 The question with respect to certification is whether the pleadings allege a cause of action insofar as they relate to the claim the representative plaintiff makes on behalf of the IPs against the defendants. I recognize that the considerations are the same as those that govern striking pleadings: *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429, 90 B.C.L.R. (3d) 195 at paras. 20-21. They are as quoted in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 15:

> 1. 15 An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:
>
> 1. ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out. ...
>
> 1. The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is

only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

97 In my view, it is plain and obvious the IPs have no cause of action recognized in law against the defendants.

Disposition

98 I would allow the appeal and declare the pleadings do not disclose a cause of action against the defendants for Wendy Weberg and the members of the proposed class she represents. I would set aside the order for certification and remit the application for certification to the trial court for further consideration.

P.D. LOWRY J.A.
S.D. FRANKEL J.A.:-- I agree.

* * * * *

CORRIGENDUM

Released: May 3, 2011

[1] I.T. DONALD J.A.:-- In the listing of names of counsel for the parties on the cover pages of the reasons for judgment released April 15, 2011 2011 BCCA 187, the initials of counsel for the appellants, Archer Daniels Midland Company and ADM Agri-Industries Company, shown as "M. W. Brown", are corrected to read "D. M. Brown".

[2] In the first line of para. 14 of the reasons for judgment, the reference to "Archer Daniels Midland Company" is replaced with "counsel for Cargill, Incorporated, Cerestar USA, Inc. and Cargill Limited" so that para. 14 will now read:

1. [14] In the argument advanced by counsel for Cargill, Incorporated, Cerestar USA, Inc. and Cargill Limited, the defendants say that it is plain and obvious that indirect purchasers have no cause of action because the law of Canada does not recognize the pass-through defence: *Kingstreet Investments Ltd. v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, per LeBel J.

I.T. DONALD J.A.

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Exhibit 14

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JOHN SPELLMEYER, Individually and on Behalf of all others similarly situated, Plaintiff, vs. KEITH CORBIN, FRANK G. LARSON, GARY COOLEY, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL, INC. HOME CITY ICE COMPANY, REDDY ICE HOLDINGS, INC., REDDY ICE CORPORATION, AND ARCTIC GLACIER INCOME FUND, Defendants.	)	Case No. 11-1108-CM-KGG

NOTICE OF REMOVAL

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453, Defendants Reddy Ice Holdings, Inc. and Reddy Ice Corporation (collectively, "Reddy Ice") hereby remove the above-styled action from the Eighteenth Judicial District Court, Sedgwick County, Kansas to the United States District Court for the District of Kansas.

I. BACKGROUND

1. Keith Corbin, Frank G. Larson, Gary Cooley, Arctic Glacier, Home City, and Reddy Ice (collectively, "Defendants") have been named as defendants in a putative class action filed in the 18th Judicial District Court of Sedgwick County, Kansas, Civil Department, styled *John Spellmeyer, Individually and on behalf of those similarly situated, v. Keith Corbin, Frank G. Larson, Gary Cooley, Arctic Glacier Inc., Arctic Glacier International, Inc., Home City Ice*

Company, Reddy Ice Holdings, Inc., Reddy Ice Corporation, and Arctic Glacier Income Fund, Case No. 11-CV-0877 (the "State Court Action").

2. Defendants have not been formally served with process in the State Court Action.

3. Reddy Ice first received notice of the filing of the State Court Action through its counsel on March 14, 2011. This Notice of Removal is being filed within 30 days of the date that Reddy Ice first received notice of the State Court Action through service of process or otherwise. As a result, this Notice of Removal is filed timely.

4. A demand for trial by jury was made in the State Court Action.

II.
FEDERAL JURISDICTION

5. This lawsuit is subject to removal pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453 ("CAFA"). CAFA grants federal courts original jurisdiction over, and permits removal of, class actions in which: (1) the aggregate number of proposed plaintiffs is 100 or more; (2) any member of a class of plaintiffs is a citizen of a state different from any defendant, thereby establishing minimal diversity; (3) the primary defendants are not states, state officials, or other governmental entities; and (4) the aggregate amount in controversy of all of the putative class members' claims exceeds $5 million, exclusive of interest and costs. *See* 28 U.S.C. §§ 1332(d)(2)(A), (d)(5)(A)-(B), and (d)(6).

6. The allegations contained in the Petition filed in the State Court Action (the "Petition") and the evidence submitted by Defendants in support of this Notice of Removal demonstrate that the jurisdictional requirements of CAFA are satisfied in this action. Accordingly, this Court has original jurisdiction over this lawsuit pursuant to 28 U.S.C. § 1332(d), and this lawsuit is subject to removal pursuant to 28 U.S.C. § 1453.

A. The aggregate number of proposed class members exceeds 100 in this action.

7. Plaintiff alleges that the number of potential class members in this action is "thousands, if not millions." (Petition, ¶ 22). Based on that allegation, the aggregate number of proposed class members is greater than 100 and, therefore, satisfies the requirements of 28 U.S.C. § 1332(d)(5)(B).

B. Minimal diversity exists in this action.

8. CAFA requires only minimal diversity. 28 U.S.C. § 1332(d)(2)(A). Minimal diversity exists under CAFA when "any member of a class of plaintiffs is a citizen of a State different from any defendant[.]" 28 U.S.C. § 1332(d)(2)(A).

9. In the Petition, Plaintiff alleges that he is a citizen of the State of Kansas. (Petition, ¶ 2).

10. Plaintiff also alleges that Reddy Ice Holdings, Inc. is a Delaware corporation with its principal place of business located in Dallas, Texas. (Petition, ¶ 13). For purposes of diversity, Reddy Ice Holdings, Inc. is a citizen of Delaware and Texas. 28 U.S.C. § 1332(c)(1).

11. Thus, the allegations contained in the Petition establish that minimal diversity exists in this action because those allegations demonstrate that Plaintiff John Spellmeyer is a citizen of a state different than Defendant Reddy Ice Holdings, Inc.

C. The amount in controversy in this action exceeds $5 million.

12. Under CAFA, the amount in controversy must exceed $5 million exclusive of interest and costs for a federal district court to have original jurisdiction. 28 U.S.C. § 1332(d)(2). For purposes of CAFA, the claims of all class members shall be aggregated when evaluating the amount in controversy. 28 U.S.C. § 1332(d)(6).

13. In the Petition, Plaintiff has not stated the amount that he seeks to recover on behalf of the putative class in this action. Nevertheless, the allegations contained in the Petition

and the Declarations of Mark Steffek and Dave Potter submitted in support of Defendants' Notice of Removal demonstrate that the amount in controversy in this action exceeds $5 million exclusive of interest and costs.

14. In the Petition, Plaintiff alleges that Defendants engaged in "illegal and anticompetitive conduct by allocating markets so that Defendants were no longer in competition with each other. " (Petition, ¶ 35).

15. Plaintiff also alleges that the alleged allocation of markets in the packaged ice industry resulted in reduced competition in Kansas, and caused Plaintiff and other members of the alleged class to pay anticompetitive and higher prices for packaged ice than they would have in the absence of the alleged illegal conduct. (Petition, ¶¶ 37, 38).

16. Plaintiff further alleges that there are thousands, if not millions, of purported class members who purchased ice in Kansas over the alleged class period of January 1, 2001 to March 2008. (Petition, ¶¶ 22, 33).

17. Based on those allegations, Plaintiff has asserted claims for violation of the Kansas Restraint of Trade Act, violation of the Kansas Consumer Protection Act, and unjust enrichment. With respect to the claims under the Kansas Restraint of Trade Act and the Kansas Consumer Protection Act, Plaintiff seeks to recover actual damages allegedly incurred by persons that purchased packaged ice in Kansas from the period of January 1, 2001 through March 2008, in addition to treble damages and attorneys' fees. (Petition, ¶¶ 53, 57, Prayer for Relief, ¶¶ E, F, G, J).

18. For purposes of calculating the amount in controversy under the Kansas Restraint of Trade Act, Plaintiff seeks the full consideration paid by putative class members for packaged

ice, and treble damages. *Four B Corp. v. Daicel Chemical Indus., Ltd.*, 253 F. Supp. 2d 1147, 1150 (D. Kan. 2003).

19. During the period of January 1, 2001 through March 2008, Reddy Ice's sales of packaged ice to its customers in Kansas exceeded $9.3 million. (Declaration of Mark Steffek ("Steffek Decl.", ¶ 4) (attached hereto as Exhibit A).

20. During the period of January 1, 2001 through March 2008, Arctic Glacier's sales of packaged ice to its customers in Kansas exceeded $27 million. (Declaration of Dave Potter ("Potter Decl."), ¶ 4) (attached hereto as Exhibit B).

21. In addition, the vast majority of Reddy Ice's and Arctic Glacier's customers in Kansas are grocery stores and convenience stores that purchased ice from Reddy Ice or Arctic Glacier, and then resold such ice to indirect purchasers in Kansas. Virtually all, if not all, of the customers that purchased packaged ice from Reddy Ice or Arctic Glacier during the alleged class period independently marked-up the price of such ice prior to reselling it to indirect purchasers in Kansas. (Steffek Decl., ¶ 5; Potter Decl., ¶ 5).

22. Furthermore, in addition to full consideration damages, Plaintiff also seeks to recover treble damages and attorneys' fees. When the value of those categories of damages are combined with the actual, full consideration damages Plaintiff seeks to recover on behalf of the putative class in this case, it is beyond dispute that it is more likely than not that the amount in controversy in this action exceeds $5 million exclusive of interest and costs. *See Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 689 (9th Cir. 2006) (Under CAFA, if the proponent of jurisdiction establishes that it is more likely than not that class members seek more than $5 million, then the proponent has satisfied its burden with respect to the amount in controversy); *Valikhani v. Qualcomm Inc.*, No. 08CV786 WQH, 2008 WL 3914456, at *4 (S.D. Cal. Aug. 21,

2008) (finding the defendant established that it was more likely than not that the amount in controversy exceeded $5 million); *see also Armur v. Transamerica Life Ins. Co.*, No. 10-2136-EFM, 2010 WL 4180459, at *3 (D. Kan. Oct. 20, 2010) (finding that the defendant established that the amount in controversy exceeded $5 million even though plaintiff attempted to avoid federal jurisdiction by alleging that the plaintiffs sought less than $75,000 individually).

23. As a result, the jurisdictional minimum for the amount in controversy under CAFA is satisfied in this case.

D. Defendants are not states, state officials, or other governmental entities.

24. Reddy Ice, Arctic Glacier and Home City are corporate entities and are not states or other governmental entities.

25. In addition, Plaintiff alleges in the Petition that Defendants Keith Corbin, Frank G. Larson, and Gary Cooley are former employees of Arctic Glacier. (Petition, ¶¶ 42-44). None of those individuals are officials of the State of Kansas or any other state.

26. No Defendant is a state, state official, or other governmental entity. Removal under CAFA is therefore proper under 28 U.S.C. § 1332(d)(5)(A).

III.
ALL ADDITIONAL REQUIREMENTS FOR REMOVAL HAVE BEEN MET

27. Venue is proper in this Court pursuant to 28 U.S.C. § 1441(a), as the United States District Court for the District of Kansas is the district within which the State Court Action is pending.

28. Contemporaneously with the filing of this Notice of Removal, Defendants will provide all parties with written notice of the filing, and will promptly file a copy of this Notice of Removal with the Clerk of the 18th Judicial District Court of Sedgwick County, Texas.

29. In addition, attached hereto as Exhibit C is an index of all documents filed in the State Court Action, which clearly identifies each document and indicates the date the document was filed in the State Court Action, as required by 28 U.S.C. § 1446(a). Included with the index is a copy of each document filed in the State Court Action, individually tabbed and arranged in chronological order according to the state court filing date.

Wichita, Kansas is designated as the place of trial.

Respectfully submitted,

/s/Megan E. Garrett
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Attorneys for Defendants Reddy Ice Corporation and Reddy Ice Holdings, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of April, 2011, the above and foregoing was electronically filed with the clerk of the court by using the CM/ECF system, and mailed, postage prepaid and properly addressed, through the United States mail, to the following CM/ECF participants:

James Walker
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Ryan Hodge
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Chicago, IL 60601

/s/Megan E. Garrett

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JOHN SPELLMEYER, Individually and on Behalf of all others similarly situated, Plaintiff, vs. KEITH CORBIN, FRANK G. LARSON, GARY COOLEY, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL, HOME CITY ICE COMPANY, REDDY ICE HOLDINGS, INC., REDDY ICE CORPORATION, AND ARCTIC GLACIER INCOME FUND, Defendants.	)	Case No. _____

DECLARATION OF MARK STEFFEK
IN SUPPORT OF DEFENDANTS' NOTICE OF REMOVAL

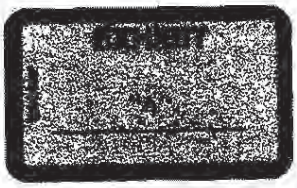
I, Mark Steffek, declare as follows:

1. I make this declaration in support of the Notice of Removal filed by Defendants in the above-styled action.

2. The following facts are within my personal knowledge and, if called as a witness, I could and would competently testify thereto.

3. I am the Vice President of Finance of Reddy Ice Corporation ("Reddy Ice"). In the performance of my duties as the Vice President of Finance of Reddy Ice, I have personal knowledge of the records Reddy Ice maintains with respect to its sales of packaged ice. I am also familiar with Reddy Ice's customers and the manner in which those customers use the packaged ice purchased from Reddy Ice.

4. I have reviewed the records relating to the amount of packaged ice Reddy Ice sold to customers in Kansas for the period of January 1, 2001 through March 2008. Between January 1, 2001 and March 2008, Reddy Ice's sales of packaged ice to customers in Kansas exceeded $9.3 million.



5. In addition, the vast majority of Reddy Ice's customers in Kansas are grocery stores and convenience stores that purchase ice from Reddy Ice and then resell that ice. It is my understanding that it is the normal course of business for virtually all, if not all, of Reddy Ice's customers that purchase packaged ice for resale from Reddy Ice to mark-up the price of such ice prior to reselling it in Kansas. As a result, the amount that indirect purchasers collectively paid for packaged ice originally sold by Reddy Ice in Kansas over the period of January 1, 2001 through March 2008 was significantly greater than $9.3 million.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed in Dallas, Texas on the 13th day of April 2011.

MARK STEFFEK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JOHN SPELLMEYER, Individually and on Behalf of all others similarly situated, Plaintiff, vs. KEITH CORBIN, FRANK G. LARSON, GARY COOLEY, ARCTIC GLACIER INC., ARCTIC GLACIER INTERNATIONAL, HOME CITY ICE COMPANY, REDDY ICE HOLDINGS, INC., REDDY ICE CORPORATION, AND ARCTIC GLACIER INCOME FUND, Defendants.	)	Case No. _____

DECLARATION OF DAVE POTTER
IN SUPPORT OF DEFENDANTS' NOTICE OF REMOVAL

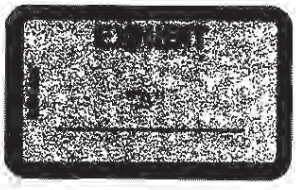
I, Dave Potter, declare as follows:

1. I make this declaration in support of the Notice of Removal filed by Defendants Arctic Glacier Inc., Arctic Glacier International Inc., Arctic Glacier Income Fund (collectively, "Arctic Glacier"), Keith Corbin, Frank G. Larson, Gary Cooley, Home City Ice Company, Reddy Ice Holdings, Inc. and Reddy Ice Corporation (collectively, "Defendants") in the above-styled action.

2. The following facts are within my personal knowledge and, if called as a witness, I could and would competently testify thereto.

3. I am currently Arctic Glacier's Vice President, Midwest Operating Division. In the performance of my duties as Vice President, Midwest Operating Division, I have personal knowledge of Arctic Glacier's sales in Kansas and the records Arctic Glacier maintains with respect to its sale of packaged ice. I am also familiar with Arctic Glacier's business practices, customers and the manner in which customers use the packaged ice purchased from Arctic Glacier.

4. I have reviewed the records relating to the amount of packaged ice Arctic Glacier



sold to customers in Kansas for the period of January 1, 2001 through March 2008. Between January 1, 2001 and March 2008, Arctic Glacier's sales of packaged ice to customers in Kansas exceeded $27 million.

5. In addition, the vast majority of Arctic Glacier's customers in Kansas are grocery stores and convenience stores that purchase ice from Arctic Glacier, and then resell that ice. Virtually all, if not all, of Arctic Glacier's customers that purchase packaged ice for resale mark-up the price of such ice, as they see fit, prior to reselling it in Kansas.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed in Omaha, Nebraska on the 12th day of April, 2011.

Dave Potter

SalesYear	ItemClass	SalesUnits	Sales
2001	ICE-BAG-LG	910,906	$1,494,662.20
2002	ICE-BAG-LG	932,922	$1,617,591.75
2003	ICE-BAG-LG	961,323	$1,687,017.33
2004	ICE-BAG-LG	988,937	$1,851,896.12
2005	ICE-BAG-LG	1,099,244	$2,165,382.16
2006	ICE-BAG-LG	1,196,310	$2,440,314.93
2007	ICE-BAG-LG	1,284,454	$2,799,949.35
2008	ICE-BAG-LG	112,041	$244,256.64
2001	ICE-BAG-SM	2,641,716	$1,703,072.76
2002	ICE-BAG-SM	2,602,609	$1,747,721.22
2003	ICE-BAG-SM	2,558,401	$1,757,525.41
2004	ICE-BAG-SM	2,458,722	$1,689,389.77
2005	ICE-BAG-SM	2,767,671	$1,897,840.31
2006	ICE-BAG-SM	2,651,136	$1,929,699.31
2007	ICE-BAG-SM	2,527,288	$1,912,660.43
2008	ICE-BAG-SM	267,050	$203,937.06
		25,960,730	$27,142,916.75

Dave Potter

From: Eric P. Enson [epenson@JonesDay.com]
Sent: Monday, April 11, 2011 4:47 PM
To: Dave Potter
Cc: Keith McMahon; Paula Render
Subject: Arctic Glacier - New Kansas Lawsuit
Attachments: LAI_3127743_1_Arctic _ Spellmeyer - Declaration ISO Removal.DOC; LAI_3128026_1_Arctic - Kansas Sales 2001-2008.XLS

Dave,

As we just discussed, a new lawsuit has been filed against Arctic in Kansas. The lawsuit makes all of the same old claims we have seen in the other litigation. Thus, we are going to seek to have the case transferred to the larger lawsuit pending in Michigan. One of the conditions we need to satisfy in order to make such a transfer is to establish that more than $5 million is at issue in the lawsuit.

This is where you come in. We would like you to sign a declaration estimating Arctic's sales in Kansas between 2001 and 2008, which we will file with the court. There is a very low likelihood that signing this declaration will require you to appear in court or to answer any questions about the declaration or Arctic's sales in Kansas.

Attached below is a list of Arctic's sales in Kansas during this time frame, which was generated under Keith McMahon's supervision. We would greatly appreciate it if you would review the sales figures, review the attached draft declaration and, if you are comfortable with the declaration, sign and return the declaration to me by email as soon as possible.

And if you would like to discuss this further, please let me know. Sorry for catching you before leaving for Las Vegas. Have a great trip.

Eric

JONES DAY

Eric P. Enson

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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CIVIL DEPARTMENT

JOHN SPELLMEYER,
Individually and on behalf of all others similarly situated
Plaintiff,

vs.

KEITH CORBIN, FRANK G. LARSON, GARY COOLEY, ARCTIC GLACIER, INC., ARCTIC GLACIER INTERNATIONAL, INC., HOME CITY ICE COMPANY, REDDY ICE HOLDINGS, INC, REDDY ICE CORPORATION, ARCTIC GLACIER INCOME FUND,
Defendants.

11CV0877
Case No.:
CLASS ACTION

(no summons)

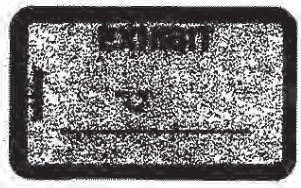
PURSUANT TO CHAPTER 60 of K.S.A.

CLASS ACTION PETITION

Plaintiff, individually and on behalf of all others similarly situated, files this Class Action Petition complaining of the restraint of trade and antitrust activities of Defendants. The allegations set forth below are based upon information and belief pursuant to the investigation of counsel, except as to those allegations regarding the plaintiff.

1. Defendants conspired to fix prices, allocate markets, and restrain trade of packaged cubed, crushed, block, and dry ice ("Packaged Ice") sold in the United States and Canada, resulting in Plaintiff and the putative Class paying higher prices for which they seek full consideration damages, trebled, plus attorney fees and prejudgment interest. K.S.A. 50-*101, et. seq*

2. Plaintiff John Spellmeyer is a citizen of the State of Kansas. He purchased packaged ice indirectly from one or more of the defendants' co-conspirators between 2001 and



2008. Plaintiff made such purchases at, among other places, retail establishments in Wichita, Kansas.

3. Defendant Keith E. Corbin at all relevant times, was employed by Arctic Glacier as Vice President of Sales and Marketing.

4. Defendant Frank G. Larson at all relevant times, was employed by Arctic Glacier as Executive Vice President of Operations.

5. Defendant Gary D. Cooley at all relevant times, was employed by Arctic Glacier as Vice President of Sales and Marketing.

6. Arctic Glacier Income Fund is a mutual fund trust organized under the laws of Alberta, Canada.

7. Defendant Arctic Glacier Inc. ("Arctic Glacier") is the operating subsidiary of a Winnipeg, Manitoba, Canada holding company. Arctic Glacier claims to be the "leading producer, marketer and distributor of high-quality packaged ice in North America under the brand name of Arctic Glacier® Premium Ice. Arctic Glacier operates 37 manufacturing plants and 50 distribution facilities across Canada and the northeast, central and western United States servicing more than 70,000 retail accounts." Arctic Glacier Inc. shows on its website that it has a production facility in Kansas at 215 E. 27th Street South, Wichita, KS 67216 and distribution centers in Independence and Salina, KS, but is not authorized to do business in Kansas and can be served through the Secretary of State or by serving it direct at its U.S. headquarters at 1654 Marthaler Lane, West St. Paul, MN 55118.

8. Defendant Arctic Glacier International Inc. ("Arctic Glacier International") is a wholly-owned subsidiary of Arctic Glacier Inc., and is a Delaware Corporation with its principal place of business located in West St. Paul, Minnesota, and is not authorized to do business in Kansas but can be served with process by serving the Secretary of State or by serving it at its principal place of business at 1654 Marthaler Lane, West St. Paul, MN 55118.

9. Arctic Glacier reported its 2007 total sales of $249.1 million. On its website, Arctic Glacier explains its market position as follows:

> We have grown significantly since our start in 1996, primarily through an aggressive acquisition strategy in the highly fragmented ice production and distribution industry. We

> have acquired 63 packaged ice businesses in Canada and the United States to date at a cost of more than $470 million. These geographically contiguous acquisitions have established our critical mass, allowing us to improve financial results by leveraging our investments in infrastructure and brand development. We are now the largest producer and distributor of packaged ice in each of the markets that we operate.

10. Defendant Reddy Ice Holdings, Inc. ("Reddy Ice") is a corporation, organized under the laws of the State of Delaware.

11. Reddy Ice Holdings is the parent of its wholly-owned subsidiary, defendant Reddy Ice Corporation ("Reddy Ice Corp"). Reddy Ice is a Delaware corporation.

12. Reddy Ice is the largest manufacturer and distributor of packaged ice in the United States. Reddy Ice's products are primarily sold throughout the southern United States. Within its territories, Reddy Ice is and has been the leading manufacturer and distributor of packaged ice. Reddy Ice has had over 80% of its packaged ice sales in territories where it is the leading manufacturer.

13. Defendant Reddy Ice Holdings, Inc. ("Reddy Ice") is a Delaware corporation with its principal place of business located in Dallas, Texas. It can be served by serving its registered agent, Capitol Corporate Services, Inc., 700 S.W. Jackson, #100, Topeka, KS 66603.

14. Reddy Ice is the largest U.S. maker and distributor of Packaged Ice products. It has the capacity to make about 15,000 tons of ice per day. It sells ice in a variety of shapes and sizes (ranging from seven-pound bags to 300 pound blocks) to retail, commercial, and industrial customers throughout the southern U.S. and the District of Columbia. It has described itself in Press Releases as follows:

> Reddy Ice Holdings, Inc. is the largest manufacturer and distributor of packaged ice in the United States. With over 2,000 year-round employees, the Company sells its products primarily under the widely known Reddy Ice® brand to approximately 82,000 locations in 31 states and the District of Columbia. The Company provides a broad array of product offerings in the marketplace through traditional direct store delivery, warehouse programs, and its proprietary technology, The Ice Factory®. Reddy Ice serves most significant consumer packaged goods channels of distribution, as well as restaurants, special entertainment events, commercial users and the agricultural sector.

15. Defendant Home City Ice Company ("Home City Ice") is a privately-held company, which has its headquarters in Cincinnati, Ohio. Home City Ice is not authorized to do business in Kansas but can be served with process by serving the Secretary of State or by serving it at its principal place of business at 5709 Harrison Avenue, Cincinnati,

OH 45248.

16. Home City is the third largest manufacturer and distributor of packaged ice in the United States with sales that have grown to more than $80 million per year.

17. Home City Ice retails ice in the Mideast. On its website, Home City Ice describes itself as follows:

> Home City Ice retails ice across all of Ohio, Indiana, Illinois, Kentucky, and West Virginia, as well as parts of Michigan, Pennsylvania, Tennessee, New York, and Maryland. Home City Ice manufactures 4,400 tons of ice per day in 28 state-of-the-art manufacturing plants, with 36 distribution centers, and has a fleet of over 500 trucks to serve the Midwest.

JURISDICTION AND VENUE

18. Jurisdiction and venue are proper in this Court as one or more Defendants are authorized to do business in Kansas and have done or are doing business in the County where Plaintiff and some members of the Class reside and were injured. The other Defendants are subject to personal jurisdiction as co-conspirators. Jurisdiction is further premised upon K.S.A. 50-110(a).

19. Venue is proper pursuant to K.S.A. 60-604, 605, and 608 in that the cause of action arises and/or accrues in this County and that Plaintiff sustained damages in this County.

20. Amount in Controversy. Plaintiff and the proposed class do not make a claim under any federal law. Individually, Plaintiff does not seek or claim any right to recover in excess of $75,000.

CLASS ACTION ALLEGATIONS

21. Plaintiff brings this antitrust class action pursuant to K.S.A. 60-223 on behalf of the "Class" defined as:

> All individuals or entities (excluding governmental entities, defendants, their officers, directors, subsidiaries or affiliates), who indirectly purchased, but not for resale, Packaged Ice in Kansas from at least January 1, 2001-until the effect of the conspiracy ceases. Excluded from the Class are: (1) all Defendants and their respective officers, directors, employees, subsidiaries, and affiliates; (2) all currently incarcerated persons in the federal, state or local prison or jail systems; and (3) all judges or justices assigned to hear any aspect of this case.

NUMEROSITY OF CLASS

22. The proposed Class is so numerous that the individual joinder of all of its members is

impracticable. The exact number and identities of Class Members are unknown to Plaintiff at this time and can be ascertained only through appropriate discovery. Plaintiff is informed and believes that thousands if not millions of consumers in the Class have indirectly purchased Packaged Ice during the Class Period. Accordingly, the Class is sufficiently numerous that joinder of all members of the Class is impracticable.

EXISTENCE OF COMMON QUESTIONS OF LAW AND FACT

23. Numerous questions of law and fact that are common and of general interest to the Class exist as to all members of the Class. Among the questions of law and fact common to the Class are:

a. Whether Defendants entered into an agreement to fix prices, allocate territories, or restrain trade for Packaged Ice;

b. Whether Defendants' agreement did, in fact, fix, raise, stabilize and/or maintain prices for Packaged Ice;

c. Whether Defendants' conduct constitutes a violation of K.S.A. 50-101, *et. seq.*;

d. Whether Plaintiff and members of the Class sustained damage as a result of Defendants' conduct.

e. Whether Defendants conduct violated various provisions of the Kansas Consumer protection act.

TYPICALITY OF CLAIMS

24. Plaintiff's claims are typical of those of the Class they represent because Plaintiff and all of the Class Members were injured in the same manner by Defendants' illegal practices and wrongful conduct in the conspiracy to restrain trade complained of herein, *i.e.*, they have been forced to pay supracompetitive prices for Packaged Ice.

ADEQUATE REPRESENTATION

25. Plaintiff will fairly and adequately protect and represent the interests of the members of the Class. The interest of the Plaintiff is coincident with, and not antagonistic to, those of the Class. Plaintiff has retained counsel competent and experienced in class action antitrust litigation.

PREDOMINANCE AND SUPERIORITY

26. Class action treatment is a superior method for the fair and efficient adjudication of the controversy, in that, among other things, such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort and expense that individual actions would require. The benefits of proceeding through the class mechanism, including providing injured persons or entities with a method for obtaining redress on claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in management of this class action.

27. Plaintiff knows of no difficulty to be encountered in the maintenance of this action that would preclude its maintenance as a class action.

28. This cause of action may be maintained as a class action pursuant to K.S.A. 60-223 in that separate prosecution of Class Member claims creates the risk of inconsistent adjudications with respect to behavior that is equally applicable to the entire Class and/or members individually as set forth with more specificity below. Furthermore separate prosecution of Class Member claims could establish incompatible standards for one or more of the defendants that oppose the class and as a practical matter such adjudications would be dispositive to the interests of the class members not parties to such individual adjudications or such individual actions would impair or impede the ability of class members that were not parties to such individual adjudications to protect their interests. Therefore, class action treatment of this dispute is superior to all other available means of resolving this controversy.

SUBSTANTIVE ALLEGATIONS

29. The United States Department of Justice ("U.S. DOJ"), Antitrust Division has investigated the possibility of anti-competitive practices in the packaged-ice industry, and each Defendant has acknowledged the existence of the investigation and that each has received a subpoena or search warrant. On March 9,2008 an Arctic Glacier News Release acknowledged the subpoena, and on March 6, 2008 a Reddy Ice Press Release acknowledged the search warrant. Reddy Ice admitted its board of directors has formed a special committee of independent directors to conduct an internal

investigation. The U.S. DOJ did in fact take various documents and information from Reddy Ice.

30. In the months just preceding the execution of the search warrant, the Chief Executive Officer and President of Reddy Ice (Jimmy C. Weaver) and the Chief Operating Officer of Reddy Ice (Raymond D. Booth) both resigned. This was confirmed by Reddy Ice Press Releases dated November 30, 2007 and dated January 2, 2008.

31. Defendants' anticompetitive scheme has directly and substantially affected intrastate commerce and Defendants have deprived Plaintiff and the Class of the benefits of free and open competition in the Packaged Ice market.

32. Sales of Packaged Ice in the United States and Canada are believed to be over $1 billion annually. About half of those sales are produced by third-party manufacturers, with the other half produced in-house (ice machines). Sales by Defendants comprise approximately 70% of third-party manufacturers' sales of Packaged Ice.

33. Beginning at least as early as January 1, 2001, the exact date being presently unknown to Plaintiff, and continuing thereafter to at least March of 2008, Defendants engaged in an unlawful contract, combination, or conspiracy with the purpose and effect of fixing prices, allocating markets, and committing other anti competitive practices designed to unlawfully fix, raise, maintain, and/or stabilize prices of Packaged Ice in violation of the Kansas antitrust statutes.

34. The Packaged Ice industry has high barriers to entry. The industry has high start-up and replacement costs, and many retailers carry only one brand of ice and have long-term relationships with the manufacturer from whom they purchase Packaged Ice products.

35. During the Class Period, Defendants engaged in illegal and anticompetitive conduct by allocating markets so that Defendants were no longer in competition with each other.

36. This resulted in the following market division: (1) Reddy Ice has the dominant market position in the U.S. Sunbelt states, from Florida to Arizona, and the Northwest; (2) Arctic has a dominant market position in Minnesota, the Central and Northeastern states and California; and (3) Home City Ice has a dominant market position in the Midwest. During the conspiracy there was virtually no

overlap between the geographic markets in which each Corporate Defendant operated. Defendants agreed not to compete head to head in any of the markets in which one of them was dominant.

37. This allocation of the Packaged Ice market among the Defendants reduced or eliminated price competition throughout the United States and Canada including Kansas.

38. As a result of the aforesaid scheme:

    a. price competition for Packaged Ice has been suppressed, restrained, and/or eliminated in Kansas;

    b. the price of Packaged Ice has been raised, fixed, maintained, and stabilized at artificial and non-competitive levels in Kansas; and

    c. purchasers of Packaged Ice were deprived of free and open competition in the Packaged Ice market in Kansas.

39. Defendants' wrongful conduct has damaged Plaintiff and the Class in that they paid anticompetitive and higher prices than they would have paid in the absence of the illegal conduct.

CRIMINAL CONVICTIONS RELATED TO THE CONSPIRACY

40. On June 7, 2008, Thomas E. Sedler, President and Chief Executive Officer of Home City, on behalf of Home City, pleaded guilty to violating Section 1 of the Sherman Act. In the plea Sedler indicated under oath that since 2001 Home City was a part of a conspiracy among packaged ice producers. He further indicated and that the purpose of the conspiracy was to divide customers and territories in south eastern Michigan and the Detroit Michigan area. According to Sedler the conspiracy was furthered by discussions and meetings with representatives of other packaged ice producers and that during these discussions agreements were reached to divide customers and territories in southeastern Michigan and Detroit.

41. On November 10, 2009, Hugh A. Adams, Secretary and General Counsel of Arctic Glacier, on behalf of Arctic Glacier, pleaded guilty to violating § 1 of the Sherman Act. Adams indicated under oath that since 2001, and continuing until at least July 17th, 2007 that Artic Glacier and co-conspirators entered into and engaged in a

conspiracy to suppress and eliminate competition by allocating packaged-ice customers in southeastern Michigan and the Detroit, area.

42. On October 13, 2009, Corbin pleaded guilty to violating § 1 of the Sherman Act. Corbin indicated under oath that beginning as early as March 1, 2005 and continuing until at July 17, 2007, he participated in a conspiracy to allocate customers of packaged ice sold in southeastern Michigan and the Detroit metropolitan area.

43. On October 13, 2009, Cooley pleaded guilty to violating § 1 of the Sherman Act. Cooley indicated under oath that at least as early as June 1st, 2006, and continuing until at least July 17th, 2007, Arctic Glacier and other co-conspirators entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in southeastern Michigan and the Detroit area.

44. On October 13, 2009, Larson pleaded guilty to violating § 1 of the Sherman Act. Larson indicated under oath that at least as early as March 1st, 2005, and continuing until at least July 17th, 2007, Arctic Glacier and co-conspirators entered into and engaged in a conspiracy to suppress and eliminate competition by allocating packaged-ice customers in southeastern Michigan and the Detroit area.

45. Given that the defendants, some of whom did not have a presence in the Southeastern Michigan and Detroit area plead guilty to anti trust, it is reasonable to infer that some of the defendants we given territories outside of Southeastern Michigan and Detroit as a quid pro quo for the allocation of the market for packaged ice in the Southeastern Michigan and Detroit area to a single one of the corporate defendants.

46. Because the corporate defendants operate throughout the United States it is reasonable to infer that part of that market allocation included Kansas.

COUNT I: VIOLATION OF KANSAS RESTRAINT OF TRADE ACT

47. Plaintiff hereby adopts and incorporates by this reference each of the preceding paragraphs as if fully set forth herein.

48. Defendants have engaged in a continuing combination, and conspiracy in restraint of trade and commerce as described herein, all in violation of Kan. Stat. Ann. 50-101 *et seq.*

49. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and the

Class were injured in that they were forced to pay higher prices for Packaged Ice than they would have had to pay if the prices charged by Defendants were the product of fair and open competition.

50. Plaintiff and the Class are therefore entitled to treble full consideration damages, plus costs, pre- and post-judgment interest, and attorneys' fees.

COUNT II: CONSUMER PROTECTION STATUTE

51. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

52. Through paying more for packaged ice than they would have in the absence of defendants' wrongful conduct, plaintiff and the class have conferred a benefit on defendants.

53. As a result of defendants' wrongful conduct, defendants were able to charge more for packaged ice which overpayments were made by plaintiff and the class.

54. The plaintiff in this case and the class are consumers as defined in the Kansas Consumer Protection Act and as further refined in the class action allegation section of this petition.

55. The transactions between one or more of the defendants with the plaintiff and the plaintiff class were consumer transactions as defined in the Kansas Consumer Protection Act.

56. One or more of the corporate defendant's is a supplier as defined in the Kansas Consumer Protection Act.

57. The corporate defendants' actions constitute deceptive acts and practices under the Kansas Consumer Protection Act. More specifically, the actions set out in this petition violate the Kansas Consumer protection act in that by failing to disclose that the prices of its products were artificially high because of an illegal agreement the defendants engaged

    a. in a willful failure to state material facts; and

    b. in the willful concealment, suppression and omission of material facts when it engaged in sales transactions with the plaintiff and the plaintiff class.

58. The corporate defendants further committed unconscionable acts under the Kansas Consumer protection act in that:

a. The supplier took advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor;

b. When the consumer transaction was entered into, the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by similar consumers;

c. The consumer was unable to receive a material benefit from the subject of the transaction

d. The transaction the supplier induced the consumer to enter into was excessively one sided in favor of the supplier;

COUNT THREE: UNJUST ENRICHMENT

59. Plaintiff repeats and re-alleges each and every allegation set forth in the preceding paragraphs as if fully set forth herein.

60. Through paying more for packaged ice than they would have in the absence of defendants' wrongful conduct, plaintiff and the class have conferred a benefit on defendants.

61. As a result of defendants' wrongful conduct, defendants were able to charge more for packaged ice which overpayments were made by plaintiff and the class.

62. Defendants have been unjustly enriched by overpayments made by plaintiff and the class. Equity demands that defendants be required to make restitution and return the overpayments to plaintiff and the class.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays this Court award them the following relief:

A. That the Court determine that this action may be certified and maintained as a Class under K.S.A. 60-223(b)(1) and (3);

B. That the Court appoint Plaintiff as representatives of the Class;

C. That the Court appoint Plaintiff s counsel as counsel for the Class;

D. That the Court adjudge and decree the alleged combination and conspiracy among the Defendants and their co-conspirators to be in violation of the Kansas Restraint of Trade Act;

E. That the Court enter judgment against Defendants and in favor of Plaintiff and the members of the Class they represent for three-fold overcharge damages determined to have been sustained by Plaintiff and members of the Class they represent, and that a joint and several judgment be entered against the Defendants;

F. That the Court award the Class full consideration damages under K.S.A. 50-115, trebled under K.S.A. 50-801, against Defendants, both jointly and severally, in an amount to be proven at trial;

G. That the Court award Plaintiff and the members of the Class interest at the maximum rate allowed by law or equity and reasonable attorneys' fees; and

H. That the Court award Plaintiff and the members of the Class the represent costs reasonably incurred in the prosecution of this litigation.

I. That the Court find that defendants collectively and individually engaged in violations of the consumer protection act including deceptive and unconscionable acts and practices.

J. That the Court award damages, penalties and attorneys fees as allowed by law in accordance with the Kansas Consumer Protection Act.

Submitted by:

RAY HODGE & ASSOCIATES, L.L.C.

Ryan Hodge, #16180

JURY DEMAND

Plaintiff hereby demands a trial by jury, of all issues so triable in this case.

Ryan Hodge, #16180

FILED
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18TH JUDICIAL DISTRICT
SEDGWICK COUNTY, KS
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Case Subsections:

- Defendants
- Plaintiffs
- Hearings
- Case Judge
- Registry of Actions

Case Number: 877		
Case Year: 2011	Case UID: 2011-CV-000877-OT	
Case Type: CV	Filed: 2011-03-04	
Case Sub-type: Other		
Advisement Date:	Remand Date:	
Appealed: N	Appealed Date:	
Status Code: I	Status Date:	
Status Description: Pending		
Defendant		
Party 1		
Defendant Number: 1		
Last Name (or Business Name): Corbin		
First Name: Keith	Middle:	Suffix:
Description		
Sex: M	Race:	
Height:	Weight:	
Party 2		
Defendant Number: 2		
Last Name (or Business Name): Larson		
First Name: Frank	Middle: G	Suffix:
Description		
Sex: M	Race:	
Height:	Weight:	
Party 3		
Defendant Number: 3		
Last Name (or Business Name): Cooley		
First Name: Gary	Middle:	Suffix:
Description		
Sex: M	Race:	
Height:	Weight:	
Party 4		
Defendant Number: 4		
Last Name (or Business Name): Arctic Glacier Inc		
First Name:	Middle:	Suffix:
Description		
Sex:	Race:	
Height:	Weight:	

Party 5		
Defendant Number: 5		
Last Name (or Business Name): Arctic Glacier International Inc		
First Name:	Middle:	Suffix:
Description		
Sex:	Race:	
Height:	Weight:	
Party 6		
Defendant Number: 6		
Last Name (or Business Name): Home City Ice Company		
First Name:	Middle:	Suffix:
Description		
Sex:	Race:	
Height:	Weight:	
Party 7		
Defendant Number: 7		
Last Name (or Business Name): Reddy Ice Holdings Inc		
First Name:	Middle:	Suffix:
Description		
Sex:	Race:	
Height:	Weight:	
Party 8		
Defendant Number: 8		
Last Name (or Business Name): Reddy Ice Corporation		
First Name:	Middle:	Suffix:
Description		
Sex:	Race:	
Height:	Weight:	
Party 9		
Defendant Number: 9		
Last Name (or Business Name): Arctic Glacier Income Fund		
First Name:	Middle:	Suffix:
Description		
Sex:	Race:	
Height:	Weight:	
Plaintiff		
Party		
Plaintiff Number: 1	Amount Claimed: 0.00	
Last Name (or Business Name): Spellmeyer		
First Name: John	Middle:	Suffix:
Description		
Sex: M	Race:	
Height:	Weight:	
Plaintiff Attorney		
Last Name: Hodge	First: Ryan	Middle: E
Primary Attorney: Y	Court Appointed: N	Conflict Attorney: N
Withdrawn: N	Send Notices: Y	
Practice or Office: Ray Hodge & Associates		
Hearings		

Hearing			
Hearing Number: 1	Jury Hearing: N		
Hearing Type: Civil Discovery Conference			
Starts: 2011-05-04 at 09:15:00			
Court Room Number: Courtroom 6-4			
Ends: 2011-05-04 at 09:30:00	Results Code:		
Hearing Results:			
Hearing Comments:			
Judge			
Last Name: Lahey, Div. 8	First: Timothy	Middle: G	Suffix:
Case Judge			
Last Name: Goering	First: Jeffrey	Middle: E	Suffix:
Registry of Actions			
Action 1			
Action Date: 2011-03-04	Action Type: AOR		
Action Agent: Jeffrey E Goering			
Description: Plaintiff: Spellmeyer, John Attorney of Record Ryan E Hodge			
Action 2			
Action Date: 2011-03-04	Action Type: PET		
Action Agent: Jeffrey E Goering			
Description: Petition (no summons) &			
Action 3			
Action Date: 2011-03-04	Action Type: DJT		
Action Agent: Jeffrey E Goering			
Description: Demand for Jury Trial p/atty Ryan Hodge			
Action 4			
Action Date: 2011-03-07	Action Type:		
Action Agent: Jeffrey E Goering			
Description: Filing: Civil Docket Fee Paid by: Hodge, Ryan E (attorney for Spellmeyer, John) Receipt number: 1179103 Dated: 3/7/2011 Amount: $175.50 (Check) For: Spellmeyer, John (plaintiff)			
Action 5			
Action Date: 2011-03-07	Action Type: HEAR		
Action Agent: Timothy G Lahey, Div. 8			
Description: Hearing Scheduled (Civil Discovery Conference 05/04/2011 09:15 am)			

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