Court File No. 820/17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ERIN DAWN CHRISTIANSEN

Plaintiff/Moving Party

- and -

METTRUM LTD.

Defendant/Responding Party

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

PLAINTIFF'S FACTUM
(Settlement Approval)

December 9, 2020

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PART I: OVERVIEW

1. This motion is for an order approving the settlement agreement between the plaintiff Erin Christiansen ("Christiansen" or "Plaintiff") and the defendant Mettrum Limited ("Mettrum" or "Defendant"), dated June 16, 2020 (the "Settlement Agreement").

2. This class action relates to the sale and subsequent recall ("Recall") of medical marijuana products that were exposed, or potentially exposed, to one or two pesticides namely, pyrethrins and myclobutanil (the "Recalled Products"). Neither pesticide was approved for use by Health Canada on medical marijuana plants. While the products were recalled, the Defendant only provided refunds for unused products that were returned to the Defendant. The Defendant did not refund the purchase price for all of the Recalled Products to the Class Members. This Class Action was commenced with the primary goal of recovering some or all of that purchase price for the Class Members.

3. Following several years of litigation (including the exchange of affidavits and cross-examinations), an unsuccessful mediation and many months of hard-fought negotiations, the parties agreed to settle this action for the all-inclusive amount of $6.95 million. The key features of the Settlement include:

    a. Mettrum will pay the all-inclusive amount of $6.95 million. Mettrum's payment will be distributed as refund of some or all of the Recalled Products and will also cover all fees, expenses, the Class Proceeding Fund's mandatory 10% levy and taxes;

    b. Payments to Class Members (by cheque) will be made automatically (i.e. Class Members will not have to make a claim or application to receive compensation). The compensation payments will be calculated based on a review of Mettrum's records of the purchase price paid by each Class Member for the various waves of the Recalled Products. The distribution to Class Members will return:

        i. 100% of the purchase price for any Recalled Products that tested positive for trace amounts of myclobutanil (Waves 2 and 3); and

        ii. 20% (and potentially more) of the purchase price for Recalled Products where: the plants from which the products were produced were exposed to pyrethrins at some point in the cultivation or production process but there were no detectable levels of pyrethrins in the actual products sold (Wave 1); and some of the plants from which the products were produced may (or may not) have been exposed myclobutanil (Wave 4).

    c. The Settlement will be paid out in two stages:

        i. The first stage payments (based on 100% of the purchase price paid by each Class Member for the Recalled Products involved in Waves 2 and 3, and 20% of the purchase price by each Class Member for Waves 1 and 4) will be paid by cheque; and

        ii. The funds that remain after the first stage (including an estimated minimum $363,000 plus any additional funds remaining from uncashed cheques or because Class Members opted-out) will be used to top-up or increase the payments for the purchase prices paid for the Recalled Products in Waves 1 and 4.

d. Legal fees and related disbursements (including taxes), the costs of administration expenses and a 10% statutory levy for the Class Proceedings Fund will be deducted from the Settlement Fund;

e. Class Members who do not agree with the Settlement or who feel that they may have been otherwise harmed through the use of the Recalled Products can opt-out of the Settlement and will not receive any payments under this Settlement but can pursue (if they so wish) individual claims;

f. The total value of the Settlement Fund will not be affected by any opt-outs;

g. Any funds remaining after stages one and two are completed will be transferred to the Centre for Addiction and Mental Health Foundation; and

h. For its part, Mettrum will receive a full release of all claims that Class Members may have against it for any alleged or perceived damages. For clarity and to repeat, any Class Member who opts out of this Class Action will not be deemed to have released the Defendant.

4. On a whole, the result provided by this Settlement is as good or better than what the Class Members could reasonably expect to receive at trial. This Settlement is available without the risks that the case would not be certified as a class proceeding. The Settlement is available now without the risk and delay of a trial, which would be compounded by the delay and risks of any appeals and of potential individual damages assessments that could follow a trial. Both the Plaintiff and Class Counsel believe that no better settlement could have been achieved. But, even if any particular Class Member is not prepared to accept the Settlement, he or she is at liberty to opt-out and will not be bound by this Settlement.

5. Class Counsel and the Plaintiff submit that this Settlement is excellent and clearly falls in the "zone of reasonableness" considered by courts on settlement approval motions.

PART II: THE FACTS

The Defendant

6. The Defendant, Mettrum Ltd. ("Mettrum" or the "Defendant") is a Health Canada licensed producer of marijuana. [1]

7. At the time of the Recall, Mettrum was required to comply with the requirements of the *Access to Cannabis for Medical Purposes Regulations* ("ACMPR") in order to sell medical marijuana to the public. Under those regulations, Mettrum was only allowed to use certain approved pesticides in the cultivation of its medical marijuana plants/products.[2]

The Recall

8. In late 2016, Health Canada discovered that some of Mettrum's medical marijuana products had been exposed or potentially exposed to pyrethrins. Following that discovery, the Defendant, under the supervision of Health Canada, voluntarily commenced the Recall which ultimately proceeded in four waves[3]. The Recall was classified by Health Canada as a Type III recall, which is defined as "*a situation in which the use of, or exposure to, a product is not likely to cause any adverse health consequences.*"[4]

9. The Recall proceeded in four waves. As described below, Wave 1 related to the use or potential use of pyrethrins (a pesticide) earlier in the cultivation process (namely, pyrethrins), while Waves

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[1] Affidavit of J.A. Dewar sworn December 9, 2020 ("Dewar Affidavit") at para. 10, Amended Statement of Claim ("Claim") at para. 2
[2] Dewar Affidavit at para. 11, Claim at paras 4-6
[3] Dewar Affidavit at para. 12, Claim at paras. 17, 18, 21-23
[4] Claim at para. 21

2, 3 and 4 related to the use or potential use of another pesticide (myclobutanil). A description of, and related information on, the four waves, the pesticides and the prices paid are set out below:

a. ***Wave 1*** – Wave 1 recall was carried out because a foliar spray containing pyrethrins was used on plants in the cultivation or growth of the underlying plants. The Defendant advised that it did not know that the foliar spray used on the plants contained pyrethrins because pyrethrins were not listed as one of the ingredients on the label for the third-party manufactured foliar spray. Wave 1 commenced on November 2, 2016, and related to marijuana products sold between September 30, 2014 and October 21, 2016.[5]

   Pyrethrins are a natural pest control product derived from chrysanthemum flowers that are approved for use on organic and conventional crops but are not authorized for use on food products/crops that are smoked or combusted. It is important to note that the samples of the Recalled Products in Wave 1 were tested and no detectable traces of pyrethrins were identified in the actual marijuana products (that were sold) at all. For clarity, Wave 1 was carried out because the Defendant could confirm that the foliar spray containing pyrethrins was used at some point during the cultivation process of the plants from which the marijuana products were derived – but none of the samples of the actual products sold to the Class Members tested positive for even trace amounts of pyrethrins.[6]

   The Class Members paid a total of $5.375 million for the Wave 1 Recalled Products. As discussed further below, because not even trace amounts of pest control products were even detected in the Wave 1 Recalled Products, the Defendant argues in this litigation that, for various reasons and particularly since none of the Wave 1 Recalled Products sold were in fact contaminated, consumers got what they paid for and should not be entitled

[5] Dewar Affidavit at para. 13
[6] Dewar Affidavit at para. 13

to any refund or compensation.[7]

b. ***Wave 2*** – commenced on December 5, 2016, and related to lots of products sold in the 120 days prior to December 5, 2016 for which the samples in the possession of the Defendant tested positive for trace levels of myclobutanil. Myclobutanil is a fungicide approved for use on food crops (including fruits and vegetables), but is not authorized for use on tobacco and marijuana (i.e. products that can be smoked or combusted).[8]

Wave 3 – commenced on January 7, 2017, and related to lots of products sold in the 121 to 240 days prior to December 5, 2016 that tested positive for trace levels of myclobutanil.

The payments Class Members made for Waves 2 and 3 totaled approximately $1.877 million.

c. ***Wave 4*** – Wave 4 did not involve any new testing of products (the retained samples of the products sold). Donald Henderson, the former general counsel of Mettrum (who swore an affidavit in response to the Plaintiff's certification motion) testified and explained that Wave 4 was a precautionary measure taken *"in an effort to ensure, in as expeditious a manner as possible, that absolutely no product derived from plants that had ever come in contact with myclobutanil remained, Mettrum expanded the recall for a fourth and final time."*[9]

The Wave 4 recall commenced on January 28, 2017, and related to: (a) cannabis oils produced in any batch of dried cannabis that had previously tested positive for any trace amounts of myclobutanil; and (b) any products purchased between January 1, 2016 to March 21, 2016 because some of the plants from which those products were derived could potentially have been exposed to myclobutanil. It is accordingly not known

[7] Dewar Affidavit at para. 13
[8] Dewar Affidavit at para. 13
[9] Affidavit of Donald Douglas Henderson sworn June 29, 2018, paragraphs 63-69.

whether or what portions of the Wave 4 Recalled Products would have tested positive for trace levels of myclobutanil. Mr. Henderson testified that Mettrum understood that the vast majority of the products would have tested positive for trace amounts of the pesticide.[10]

Class Counsel understood that to some extent the Wave 4 recall was a catch-all and would not necessarily correlate to product that would have tested positive for trace amounts of myclobutanil. In the context of the settlement negotiations, the parties discussed using the percentage of positive test results for trace amounts of myclobutanil in the other Waves as a proxy for the percentage of products that may have tested positive for myclobutanil in Wave 4. The Defendant has advised that 159 lots or batches of oil and dried products were tested for myclobutanil, and that trace levels of myclobutanil were detected in 29 lots or batches. In other words, approximately 18.2% of the products tested positive for trace amounts of myclobutanil.[11]

For settlement purposes, Class Counsel rounded that percentage up to 20%. Applying that percentage (20%) to the total paid for the Wave 4 products to generate an estimate for products in Wave 4 that may have tested positive for trace amounts of myclobutanil. The total price paid for the Wave 4 products was approximately $5,536,357. Applying the 20% to that total results in an estimate total price paid for potentially affected product of approximately $1,107,271.[12]

10. On March 9, 2017, Health Canada issued a "clarification" regarding the risks arising from the use of the unapproved pesticides at issue in this action. According to Health Canada's clarification:

> *"Health Canada has already outlined many of the known health risks of cannabis use, including risks from inhalation. However, recent media reports about these recalls have suggested that there was a significantly increased risk to the health of Canadians who inhaled the recalled cannabis products, due to the release of hydrogen cyanide.*

[10] Cross-examination of Donald Douglas Henderson on October 3, 2018, Questions 301-303.

[11] Dewar Affidavit at para. 13

[12] Dewar Affidavit at para. 13

Here are the facts. When the cannabis plant is combusted, a number of compounds are produced, including very low amounts of hydrogen cyanide. Health Canada's analysis of the recalled cannabis products show that the trace levels of myclobutanil that were present would have produced a negligible amount of additional hydrogen cyanide upon combustion, in comparison to the levels already produced by marijuana alone. Specifically, the level of cyanide from the burning of myclobutanil found on the cannabis samples is more than 1000 times less than the cyanide in cannabis smoke alone, and is 500 times below the acceptable level established by the U.S. National Institute for Occupational Safety and Health. As such, the risk of serious adverse health consequences resulting from the inhalation of combusted myclobutanil in the recalled cannabis products was determined by Health Canada to be low.

... Health Canada's enforcement response considered the low health risk posed by the trace amounts of unauthorized pesticides detected and took into account the companies' full cooperation with the Department during the recall process and subsequent investigations...

While the risk of harm to Canadians was low in these recent cases, Health Canada has engaged all 39 licensed producers to ensure that they understand the federal regulatory requirements around authorized pesticide use, and that a repeat of the situation that led to these recalls is unacceptable...

Health Canada would like to assure Canadians that had there been any evidence to show that a licensed producer had acted with indifference or recklessness and engaged in activities that put the health or safety of Canadians in danger, the Department would have responded with appropriate enforcement actions, including licence suspension or revocation..." [emphasis added].[13]

The Plaintiff & This Class Action

11. The Plaintiff resides in Thunder Bay, Ontario and is required to rely on Ontario Disability Support Program ("ODSP") to support herself. Around March 2016, the Plaintiff was, for the first time, prescribed medical marijuana to treat chronic back pain arising from surgery to treat scoliosis and spina bifida. In March of 2016, the Plaintiff registered to purchase medical marijuana from Mettrum.[14]

[13] Dewar Affidavit at para. 14, Exhibit G to Dewar Affidavit
[14] Christiansen Affidavit at paras. 3-5, Claim at paras. 30-34

12. Between approximately March 2016 and November 2016, the Plaintiff purchased several orders of medical marijuana products from Mettrum, including some of the Recalled Products. The Plaintiff estimates that she paid more than $3,000 for her medical marijuana products.[15] The Plaintiff received a number of Recall Notices from the Defendant and requested a refund from the Defendant but was refused.[16]

13. The Plaintiff contacted Class Counsel in early 2017 after seeing news coverage of the Recall and retained Class Counsel to commence this action.[17] The Statement of Claim was issued on March 6, 2017 and was amended on March 17, 2017 ("Claim").[18] The Claim is framed in breach of contract, negligent misrepresentation, breach of Ontario's *Consumer Protection Act* and *Sale of Goods Act* (as well as equivalent or similar legislation in other provinces), breach of the *Competition Act*, negligence and unjust enrichment.[19]

14. The main focus of the Plaintiff's claim, certification record and proposed common issues was always limited to the Class Members' economic losses, which were essentially the purchase price paid for the Recalled Products.[20] The Plaintiff was effectively alleging that the Class Members paid for medical marijuana that was not contaminated with unauthorized pesticides and, given the contamination, they did not get what they paid for. Although the Claim raised certain issues

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[15] Christiansen Affidavit at para. 4
[16] Christiansen Affidavit at paras. 6-8
[17] Christiansen Affidavit at paras 9-10, Dewar Affidavit at para. 15-16 & Dewar Affidavit Exhibit H
[18] Shortly after the Claim was issued, a proposed class action was commenced by Wagners in Halifax, Nova Scotia in respect of the same subject matter, namely *Partington v. Canopy Growth Corporation, Mettrum Health Corp. and Mettrum Ltd.*, Halifax Court File No. 461301. RO and Wagners subsequently agreed to work together as co-counsel to prosecute this action in Ontario. The *Partington* action has been held in abeyance pending the resolution of this action. As set out at paragraph 45(b) of the Settlement Agreement, the *Partington* action will be dismissed if the proposed settlement is approved.
[19] Dewar Affidavit at para. 16, Claim at paras. 37-62
[20] The proposed Common Issues, as served in 2017, are appended to this factum as Schedule "C".

related to health or personal injuries, this class proceeding did not seek to certify any common issue for any alleged or perceived negative health effects or personal injuries[21]. While the Plaintiff was ill in the summer of 2016 that illness was not linked to the Recalled Products.[22]

15. The reasons the case focusses on the Class Members' economic damages and not on any perceived personal injuries are discussed further below in the section setting out the reasons why Class Counsel recommends this Settlement.

Preparation for Hearing of Certification Motion

16. The Plaintiff served her certification motion record in of May 2018. The Defendant served its responding certification motion record in July 2018. The Plaintiff served a reply affidavit in July of 2018. The cross-examination of Mettrum's affiants proceeded on October 3, 2018. The Defendant did not cross-examine the Plaintiff. The Defendant provided answers to undertakings in several tranches in October 2018.[23] The certification motion was scheduled or expected to proceed during the week of November 26, 2018.[24]

Related Actions Issued Against Additional Defendants

17. Following the cross-examinations, it became apparent that other corporations related to Mettrum may have been involved in the cultivation, production and/or processing of some of the Recalled Products. Out of an abundance of caution, the Plaintiff (through Class Counsel) issued two additional proposed class actions (the "Related Actions") against those related corporations

[21] Dewar Affidavit at para. 17
[22] Christiansen Affidavit at para. 5
[23] Dewar Affidavit at paras. 20-23
[24] Dewar Affidavit at para. 25

seeking the same damages as those sought in this Action. As set out at paragraph 45 (b) of the Settlement Agreement, these Related Actions will be dismissed if the Settlement is approved.[25]

Mediation & Settlement Negotiations

18. Following the exchange of certification *factums* and on the eve of the week for the argument of the certification motion, the possibility of attending a mediation was raised by the Defendant. The parties subsequently agreed to attend a mediation before Mr. Derry Millar. Mr. Millar a very senior member of Ontario's litigation bar, former Treasurer of the Law Society, and an experienced and well-respected mediator. The certification motion scheduled for the week of November 26th was adjourned by the Court to allow that mediation to proceed.[26]

19. The parties exchanged mediation briefs in advance of the mediation. The Plaintiff travelled from Thunder Bay to Toronto to prepare for and attend the mediation. While the parties and counsel attended before Mr. Millar for hours on December 13, 2018, the mediation was not successful and did not result in a settlement at that time. While the outcome of the December 13th mediation was discouraging, the parties discussed attending before Mr. Millar again in January of 2019 for a potential second round of mediation. As the date for the second round of mediation approached, it did not appear that the parties were remotely close in their settlement positions or demands, and the parties agreed to cancel that second round of mediation. With the mediation cancelled, Class Counsel immediately returned to the litigation/certification track. The

[25] Dewar Affidavit at para. 24, Exhibits J & K to Dewar Affidavit
[26] Dewar Affidavit at para. 26

Plaintiff secured May 13, 2019 as the next available date from the Court for a contested certification motion.[27]

20. Following the rescheduling of the certification motion, and while Class Counsel was pressing forward toward that motion, there were subsequent and further discussions about potential settlement amongst the parties. While of the view that the certification may inevitably have to be argued, Class Counsel did meet with Defence Counsel and, at least once, with the Defendant's executives to explore settlement possibilities. Counsel also engaged in other numerous discussions, exchanges of email and telephone calls. The upcoming date for the certification hearing focused the efforts of the parties, provided some pressure and provided an effective deadline to conclude any settlement.[28]

21. The parties gradually narrowed the issues between them and a final agreement in principle to settle this action was reached on May 7, 2019, approximately 6 days before the hearing of the certification motion.[29]

22. The negotiations from 2018 and into 2019 were intense and, on a number of occasions, broke down and appeared to be lost as the parties were simply too far apart. Over the course of the negotiations, Class Counsel were eventually able to secure the $6.95 million payment, which was well above the Defendant's initial offer. Class Counsel believes that the Defendant was not prepared to pay any more than $6.95 million. The $6.95 million was well into the Plaintiff's

[27] Dewar Affidavit at para. 27, Christiansen Affidavit at para. 11
[28] Dewar Affidavit at para. 28
[29] Dewar Affidavit at para. 29

reasonable range of settlement – indeed, for the reasons discussed below, the $6.95 million amount was an excellent result for the Class Members.[30]

23. Class Counsel advised Justice Salmers that an agreement in principle had been reached and the hearing of a settlement approval motion was scheduled to proceed on February 7, 2020.[31]

Approval of Settlement by Provincial Health Insurers

24. After reaching the agreement in principle, the parties turned to drafting the formal settlement agreement. An issue regarding the theoretical subrogated claims of Provincial Health Insurers ("PHI") took longer to resolve than anticipated. As the Defendant required a full release – including the release of any potential personal injury claims, the Plaintiff, out of an abundance of caution, sought the approval of OHIP and any other PHI who had a theoretical subrogated claim under their respective provincial health insurance statutes. The hearing of the settlement approval motion was adjourned to allow the Plaintiff to seek the approval of the various PHIs. Between November 2019 and June 2020, Class Counsel worked to obtain the consent of the various PHIs to this Settlement. By June 25, 2020 all of the PHIs had advised Class Counsel of their approval of the Settlement including the terms of the Release.[32]

The Proposed Settlement Terms

25. Mettrum and the Plaintiff have agreed to settle this Class Action for a total, all-inclusive payment of $6.95 million ("Settlement Fund"). The Settlement Fund will cover all compensation to the

[30] Dewar Affidavit at para. 30
[31] Dewar Affidavit at para. 31, Exhibit L to Dewar Affidavit
[32] Dewar Affidavit at paras. 32-34, Exhibit M to Dewar Affidavit

Class Members for all damages arising from their purchase and use of the Recalled Products as well as all legal fees and related disbursements (including taxes), the costs of administration and distribution of the Settlement Fund to the Class Members, and a 10% statutory levy payable to the Class Proceedings Fund ("CPF").[33]

26. In exchange for its $6.95 million payment, the Defendant will receive a full release of all claims and potential claims that Class Members may have against it for any sort of alleged or perceived damages in respect of the Recalled Products. Such alleged or perceived damages will, as noted above, include any alleged adverse health effects which were or could have been alleged in the action.[34]

27. The compensation paid to Class Members will be paid from the amount of money remaining after deducting the Court-approved legal fees and disbursements (including taxes) as well as the costs of administering and distributing the money to Class Members, from the Settlement Fund.[35]

28. The distribution to Class Members aims to return:

    a. 100% of the purchase price for any Recalled Products that tested positive for trace levels of myclobutanil (Waves 2 and 3) – in other words, 100% of the price paid for products that actually tested positive for the presence of unauthorized pesticides (albeit trace amounts);
    b. 20% (or possibly more – as discussed further below) of the purchase price for Recalled Products where the plants were exposed to pyrethrins during the cultivation phase but where there were no detectable levels of pyrethrins in the samples of the products sold (Wave 1). The twenty (20) percent figure was adopted or used for Wave 1 Recalled

[33] Dewar Affidavit at para. 43
[34] Dewar Affidavit at para. 44
[35] Dewar Affidavit at para. 45

Products because, among other things, it is a level that recognizes that the products in question did not test positive for even trace levels of pyrethrins and recognizes the argument that Class Members received what they paid for. The 20% still represents a level of real (non-nominal) compensation or partial reimbursement for these products. The 20% also accords or is consistent with the level of compensation for Wave 4 (as noted below); and

c. 20% (or possibly more – as discussed further below) of the purchase price paid for the Wave 4 Recalled Products. As explained above, 20% is the (rounded up) percentage of such products that were estimated as product that would have tested positive for trace amounts of myclobutanil.[36]

No Opt-Out Threshold

29. There is no opt-out threshold under the terms of the Settlement. No matter how many putative Class Members elect to opt-out of the Settlement, the Defendant will still be required to fund the full amount of the $6.95 million Settlement Fund.[37] In other class actions, proposed settlements allow a defendant to void the settlement if a certain number or level of Class Members opt-out. This Settlement does not involve any potential such exit provision.

Payment of Compensation

30. If approved by the Court, the Settlement will be paid out in two stages. The first-stage payments will be based (as set out above) on 100% of the purchase price paid by each Class Member for the Recalled Products involved in Waves 2 and 3, and 20% of the purchase price paid by each Class Member for the Recalled Products involved in Waves 1 and 4. As noted below (see

[36] Dewar Affidavit at para. 46
[37] Dewar Affidavit at para. 47

paragraph 45(c)(iv)), it is estimated and expected that at least $363,000 will remain after phase one (even after the proposed fees, expenses and taxes are paid) and will be used to increase or top-up the payments for Waves 1 and 4.[38] To the extent that Class Members opt-out or do not cash cheques as part of phase one, the amount available for distribution in phase two will be even higher than $363,000.

31. The payment to any Class Member will be reduced by any refund of any purchase price already provided to them by Mettrum.[39]

Compensation will be Paid Automatically

32. Class Members will not have to make an application to receive compensation. Compensation payments will be calculated based on a review of Mettrum's records. Class Members will receive a letter or letters explaining the calculation of their entitlement to compensation for each stage and a corresponding cheque for the total amount of their compensation.[40]
33. Given administration expenses, which are to be deducted from the Settlement Fund, if any payment to a Class Member totals less than $25.00, that payment will not be made to the Class Member and will instead remain in Trust with the Settlement Administrator. Any funds remaining after stages one and two above will be paid to a charity (namely, the Centre for Addiction and Mental Health Foundation).[41]

[38] Dewar Affidavit at para 48
[39] Dewar Affidavit at para. 49
[40] Dewar Affidavit at para. 51
[41] Dewar Affidavit at para. 50

PART III: ISSUES & THE LAW

34. The issue on this motion is whether the Settlement should be approved.

General Principles

35. Class action settlements are subject to court approval. The settlement must be fair, reasonable, and in the best interests of the settlement class.[42]

36. On a settlement approval motion, "the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement." An objective and rational assessment of the pros and cons of the settlement is required.[43]

37. A settlement must fall within a zone of reasonableness. According to Justice Perell in the relatively recent decision in *Quenneville v. Volkswagen Group Canada, Inc.*, 2018 ONSC 2516 (CanLII) at paragraph 57:

> "The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation. A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally."[44]

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[42] *Class Proceedings Act, 1992*, SO 1992, c 6, s 29, *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.) at para. 57, *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.) at para. 43, *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868 (CanLII), *Mancinelli v Royal Bank of Canada*, 2016 ONSC 6953 at para. 29

43 *Mancinelli v Royal Bank of Canada*, supra, at para. 31, *Baxter v. Canada (Attorney General) (2006)*, 2006 CanLII 41673 (ON SC), 83 O.R. (3d) 481 (S.C.J.) at para. 10, *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.) at para. 23, *Rothman v. Kaba Ilco Corp.*, 2018 ONSC 4761 (CanLII) at para. 31

[44] See also: *Good v. Toronto Police Services Board*, 2020 ONSC 6332 (CanLII) at para. 31, *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572 (S.C.J.) at para. 70, *Mancinelli v Royal Bank of Canada*, supra, at para. 32, *Rothman v. Kaba Ilco Corp.*, 2018 ONSC 4761 (CanLII) at para. 32

38. The court is not required to determine whether a better settlement might have been reached. Where the parties are represented by reputable counsel with expertise in class action litigation, the Court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking their reputation and experience on the recommendation.[45]

39. A number of factors may be relevant in determining whether a settlement falls within the zone of reasonableness and is in the best interests of the class. Those factors may include the following:

    a. the likelihood of recovery or likelihood of success;
    b. the proposed settlement terms and conditions;
    c. the amount and nature of discovery, evidence or investigation;
    d. the recommendation and experience of counsel;
    e. the future expense and likely duration of the litigation;
    f. the number of objectors and nature of objections;
    g. the presence of good faith, arm's-length bargaining and the absence of collusion;
    h. the dynamics of the settlement negotiations; and
    i. the nature of communications by counsel and the representative plaintiff with class members during the litigation.[46]

40. Class Counsel note that a number of those factors overlap or inform one another, and that the factors that are the most relevant depends on the nature of the particular case. The factors are

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45 *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited*, 2012 ONSC 6626 (CanLII) at para. 29, *Dabbs v. Sun Life Assurance Co. of Canada*, supra, at p. 440

[46] *Fantl v. Transamerica Life Canada, supra*, at para. 59, *Corless v. KPMG LLP*, [2008] O.J. No. 3092 (S.C.J.) at para. 38, *Farkas v. Sunnybrook and Women's Health Sciences Centre, supra*, at para. 45

generally addressed below, with some of the factors being combined at times to avoid unnecessary duplication of submissions.

The Likelihood of Recovery or Success

41. The likelihood of recovery or success (or what could be expected at a trial) in this proceeding is discussed in greater detail in the sections below, including under the heading "Experience & Recommendations of Class Counsel". In short, and as noted further below, Class Counsel are of the view that the benefits of the Settlement outweigh the risks of proceeding to a contested certification motion and subsequent trial, and that the benefits of this proposed Settlement equal, or more likely exceed, what would be the quantum of damages awarded to the Class.[47]

The Proposed Settlement Terms & Conditions

42. The terms and conditions of the Settlement are summarized at paragraphs 25-33 above. In short, the Settlement achieves the Plaintiff's primary goal in this action, namely, obtaining significant compensation for the purchase prices paid by the Class (particularly as judged against the underlying facts and what may have been awarded at trial), while minimizing any administrative barriers that could prevent or discourage Class Members from claiming compensation.

Amount & Nature of Discovery, Evidence or Investigation

43. The nature and extent of factual investigation varies from case to case depending on the nature of the case, and can vary based on the specific allegations or issues being considered as part of any particular

[47] Dewar Affidavit at para. 41

case. The nature and extent of the factual investigation of the purchase price paid for the products in question, the members of the Class and the prices paid for the products was not necessarily complicated as that information was readily available from the Defendant.[48] The investigation of other issues relating to the pesticides and related issues was more nuanced and involved. In Class Counsel's view, more than enough information was obtained to allow us to recommend the Settlement to the Court and the Class Members. Information was obtained in this action as follows:

a. the parties exchanged an extensive factual record leading up to the certification motion and the Plaintiff cross-examined both of the Defendant's affiants;[49]
b. as part of the settlement negotiations, the Defendant disclosed information that included the total revenue received for each Wave of Recalled Product as well as a breakdown of the Recalled Products (i.e. whether the they related to dried cannabis or oil products) sold in each Wave. Class Counsel used that information (and other information) to, among other things, estimate a reasonable range of the Class Members' likely economic damages as well as a reasonable range for a settlement in this proceeding;[50]
c. Class Counsel made a *Freedom of Information Act* ("FOIA") request to Health Canada for documents relating to the Recall. The Government of Canada disclosed several thousand pages of documents that included, among other things, internal Health Canada memoranda, testing results and correspondence with the Defendant. Class Counsel has reviewed the foregoing material and found that it largely confirms the positions taken by the Defendant in this action;[51] and
d. Moreover, while this action focused primarily on economic damage, Class Counsel did conduct investigations into issues relating to personal injuries. Class Counsel consulted with a number of potential expert witnesses including toxicologists, chemists and regulatory affairs experts about the matters at issue in this proceeding. In the course of

[48] Dewar Affidavit at para. 56
[49] Dewar Affidavit at paras. 20-22 & 40
[50] Dewar Affidavit at paras. 13 & 59
[51] Dewar Affidavit at para. 60

those discussions, Class Counsel were advised by a toxicologist associated with a major Canadian University that, according to the existing scientific literature, the pesticides at issue in this proceeding are not the likely cause of effects reported to Class Counsel by some of the Class Members. That toxicologist opined that symptoms referred to by Class Members had essentially been identified previously in the literature as symptoms resulting from marijuana use generally. That toxicology expert further opined that any particular reaction by any person was likely not related to any exposure to unapproved pesticides, and more likely caused by the THC level in the particular cannabis product consumed and the THC and CBD ratio in the product;[52]

Experience & Recommendations of Class Counsel

44. The recommendation of Class Counsel is an important factor to consider in evaluating the appropriateness of a settlement. Class Counsel has a duty to the entire class, and must keep this duty in mind in recommending a settlement. It also has a duty to the Court, including a duty to identify any limitations in a settlement. Class Counsel is uniquely situated to assess the risks and benefits of the case and the advantages of a settlement. There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's length by class counsel, is presented for Court approval.[53]

45. Both Roy O'Connor LLP and Wagners are experienced Class Counsel that have advanced some of Canada's leading and precedent setting class proceedings.[54] Class Counsel have no hesitation in

[52] Dewar Affidavit at para. 61

[53] *Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2643 at para. 45, aff'd 2010 ONCA 841, *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited,* supra, at para. 30, *Dabbs v. Sun Life Assurance Co. of Canada*, supra, at p. 440, *Makris v. Endo International PLC*, 2020 ONSC 5709 (CanLII) at para. 34

[54] Dewar Affidavit at paras 7-9

recommending that this Honourable Court approve the Settlement. Class Counsel believe that the Settlement is fair and reasonable, and indeed an excellent result, for the following reasons:

a. the primary focus of this Class Action was to obtain some reasonable refund (partial or full) of the purchase price paid for the Recalled Products. This Settlement provides that Class Members will receive significant or real compensation toward the purchase price of the Recalled Products from the Defendant;

b. refunds will be made without requiring Class Members to take any additional steps or incur any additional expenses;

c. The settlement amount and distribution take into consideration various facts, including:

    i. no pesticides were detected in the Wave 1 Recalled Products and, among other things and as noted, the Defendant could have argued at trial that Class Members got exactly the product that they contracted for (i.e. a product without even trace amount of pesticides);

    ii. pyrethrins are authorized for use on food products that are not smoked or combusted and any concerns about pyrethrins are, to the understanding of Class Counsel, dramatically less than those associated with myclobutanil;

    iii. for Waves 2 through 4, Health Canada subsequently advised or clarified that the level of cyanide from the burning of the trace amounts of myclobutanil found in samples was 500 times below the acceptable level established by the U.S. National Institute for Occupational Safety and Health. Again, the Defendant could argue at trial that marijuana products that would generate 500 times less cyanide than the acceptable level when smoked would have provided Class Members with the product that they bargained for;

    iv. many of the Recalled Products were not in the form of dried cannabis and were rather in the form of ingestible oils, which are not supposed to be smoked or combusted - accordingly, any oil product containing even trace amounts of

myclobutanil were not intended to be smoked or combusted which would be required to release cyanide;

v. a reasonable estimate of the Wave 4 Recalled Products that may have tested positive for trace amounts of myclobutanil is 20% (as noted above);

vi. The $6.95 million fund (even taking into account all proposed fees and expenses) will be more than adequate to pay out the phase one distributions set out above. The total amount required to reimburse Class Members for 20% of the total purchase price of Waves 1 and 4 and 100% of Waves 2 and 3 under phase one of the proposed distribution protocol is $3,912,367, broken down as follows:

100% of Waves 2 and 3 - $1.877 million
plus 20% of Wave 1 - $1.075 million (20% of $5.375 million)
plus 20% of Wave 4 - $1.107 million (20% of $5.536 million)
less total refunds already paid - $146,633
Total = $3,912,367

When the $6.95 million fund is reduced by the amounts sought for disbursements, fees and taxes and the maximum amount estimated for administrative expenses (the details of the amounts for which are set out in more detail later in this affidavit), the net balance available is $4,275,535.63, calculated as follows:

Total Fund	$6,950,000
Less:	
(a) disbursements (incl taxes)	$27,858.34
(b) fees	$2,076,642.50
(c) taxes/HST on fees	$269,963.53
(d) est'd (max) admin expenses	$300,000
Net Available	***$4,275,535.63***

The $4,275,535.63 net balance available exceeds the $3,912,367 amount required for phase one of the distribution by $363,168.63 ($4,275,535.63 - $3,912,367 = $363,168.63), as noted above.

vii. As noted earlier, the aforesaid $363,168.63 excess will be available for phase two distribution to Class Members to top-up the payments towards the purchase prices of Waves 1 and 4. If any Class Members opt-out or do not cash cheques from phase one, the excess available to top-up payments to Class Members for Waves 1 and 4 will be even higher than $363,168.63.

viii. Class Counsel also note that many Class Members have already (outside this proposed settlement) taken advantage of the product credits for subsequent purchases made available by Mettrum to those who purchased the Recalled Products. The Defendant has advised that those credits totaled approximately $880,000;

ix. At a trial, the Defendant would inevitably argue that even the 100% and 20% figures used above for the various Waves should be reduced. For example, if the Defendant was able to argue successfully that Wave 1 products did not have even trace amounts of pyrethrins, a court might not find liability and, even if it did, may not award anything above a nominal level of damages (and not the $1.075 million referred to above). If the Defendant argued successfully that a full refund for Waves 2 and 3 was not appropriate because (as the Defendant would argue) Class Members did get some benefit from the products in question and the trace amounts of myclobutanil were hundreds of times below any concerning level, much of, if not all of, the $1.877 million referred to above for Waves 2 and 3 could be lost.

d. all settlements involve some element of compromise and litigants should not reasonably expect to recover 100% of their purported damages (although some Class Members may recover 100% of their potential damages in this case). The Settlement provides Class Members with a remedy that is likely as good or better than that they could reasonably

hope to achieve after a successful judgment on the common issues. This Settlement avoids the risks associated with proceeding to trial;

e. even if the Plaintiff is successful at a trial of the common issues, there is no guarantee that an aggregate assessment of damages would be awarded by the trial judge or that each individual Class Member would proceed to establish his/her purported damages at an individual damage assessment;

f. the law in this area is unsettled. The production and sale of marijuana (for medical or recreational purposes) has only recently been legalized in Canada and precedents by which to judge the Defendant's conduct are largely unknown. While Class Counsel strongly believed in the factual and legal foundation of this case, there is uncertainty about what direction the Court would take when presented with all of the facts and arguments at trial;

g. putting cash compensation into the hands of Class Member today outweighs the risks of further years of delays, risks and unknown results, and a potential unfavourable finding, if the case had otherwise proceeded to a contested certification motion and, if such motion was successful, a contested trial. Based on Class Counsel's experience, that process could easily take, including appeals, 5 or more years to complete. If approved, this Settlement will remove that kind of procedural risk and provide more timely and meaningful compensation;

h. the Class Members are relatively vulnerable. As set out above, this action involves the sale of medical marijuana and all of the Class Members were prescribed the Recalled Products to treat a pre-existing medical condition and will benefit from the refunds payable under the Settlement. The Class Members will not need to do anything to self-identify or make a claim – they will simply receive a cheque; and,

i. a number of the Class Members are of limited financial means. These individuals will almost certainly benefit from receiving compensation now rather than waiting for possibly less or no compensation several years from now.[55]

46. As set out above, this Class Action did not seek to certify common issues for any alleged or perceived personal injuries. As noted above, any putative Class Members who believe that they were somehow injured (in a transitory or any other way) by the Recalled Products can opt out of this proceeding. There are several reasons why the Plaintiff did not seek to certify any common issues relating to personal injury damages, including the following:

a. In Class Counsel's experience, it is difficult in Ontario to certify common issues that seek to address what defendants inevitably argue are idiosyncratic personal injuries.

b. While Class Counsel did receive some anecdotal reports from some Class Members advising of a number of alleged largely transitory effects (e.g. headaches, nausea, etc) that they either: (i) felt could possibly have occurred at or around the same time that they were consuming the Recalled Products; or (ii) felt in their subjective (and lay) view were somehow linked to the consumption of the Recalled Products. However, to the best of Class Counsel's knowledge, none of the putative Class Members, including the Plaintiff, with whom Class Counsel have had contact, have received a medical professional diagnosis linking their transitory symptoms to consuming the Recalled Products. It is important to note that, as set out above, Class Counsel understands that various reported effects by some Class Members (e.g. nausea, headache, breathing issues) are largely indistinguishable from the effects of simply consuming marijuana generally. It is also important to note that the majority of those subjective personal reports do not make a clear or unequivocal temporal connection between the alleged effects or symptoms and the consumption of the Recalled Products;

[55] Dewar Affidavit at para. 65

c. As set out above, not all of the Recalled Products, and by extension not all of the Class Members, were necessarily exposed to even trace amounts of the unapproved pesticides at issue in this proceeding;

d. Samples of the Recalled Products in Wave 1 were tested and no detectable traces of pyrethrins were identified at all. The Wave 1 Recall was carried out because the Defendant could confirm that the foliar spray was used on certain plants earlier in the cultivation process;

e. Only trace levels of myclobutanil, vastly below any level indicated as harmful to human health, were detected in samples from the lots of the Wave 2 and 3 Recalled Products;[56]

f. Wave 4 did not involve any new testing of samples. It is accordingly not known whether or what portions of the Wave 4 Recalled Products would have tested positive for trace levels of myclobutanil. In other words, Class Members who consumed products from Wave 4 may have some real difficulty establishing that that product contained any unauthorized pesticides;

g. The Defendant adduced evidence that there was no causative link between health complaints and the use of the Recalled Products. The Health Canada clarification from March 2017 quoted from above itself advised that the trace levels of myclobutanil found in any Recalled Products would have produced when burned (smoking dried marijuana) only a tiny fraction (1/1000) of the hydrogen cyanide produced when smoking marijuana generally. It is also noteworthy that approximately 60% of Waves 2 and 3 were comprised of oil products (not dried cannabis), while 40% of Wave 4 was comprised of oil products (not dried cannabis). Oil products (as sold at the time of the Recall) were intended solely for ingestion and are generally not intended to be smoked, further reducing the risk of exposure to hydrogen cyanide from the combustion of product containing myclobutanil;[57]

[56] Dewar Affidavit at para. 58(e)
[57] Dewar Affidavit at para. 58(g)

h. The Defendant adduced, among other things, reports from Dr. Keith Solomon providing background information on myclobutanil and pyrethrins, the toxicity of hydrogen cyanide and a risk assessment. The expert reports of Dr. Solomon indicated that there was no real risk or exposure to consumers from the ingestion of the Recalled Products, as discussed immediately below:

   i. For all exposure scenarios relating to myclobutanil, including the worst-case assumption of ingestion (10 grams of cannabis per day), Dr. Solomon opined that exposures were all less than the acceptable daily intakes (ADI). Dr. Solomon concluded that all risks are considered *de minimis* and indicated that adverse effects arising from myclobutanil identified on the Recalled Products are unlikely, even from a lifetime of exposure;

   ii. Regarding pyrethrins, Dr. Solomon confirmed that there were no measurable concentrations of pyrethrins in the cannabis products in question (Wave 1), and while it was not possible to provide an accurate numerical estimate of risk, *"[e]ven if a worst case is assumed, the risks are de minimis. If smoked, the pyrethrins would be destroyed by the elevated temperatures of combustion, and there would be no exposures. Thus, the risk from exposure to pyrethrins via smoking is essentially zero."* At cross-examination, Dr. Solomon testified that the risk associated with salt on your food is greater than the risk from ingesting the Wave 1 Recalled Products. Class Counsel also noted that pyrethrins are derived from organic compounds and are in fact authorized for use on certain food products like fruit and vegetables; and,

i. There is also the practical consideration that, even if it was possible to prove some general potential causative link, the legal requirement to prove actual causation for any individual would be very costly and challenging in this case, given that their pre-existing health issues and given that the side effects informally reported by proposed Class Members

(e.g. nausea, headache, dizziness) were temporary, and the same as the side effects of consuming marijuana generally.[58]

Future Duration of the Litigation

47. If this Settlement is not approved, it could easily take, based on Class Counsel's experience, five years to bring this action to an adjudicated resolution on the merits. In fact, given appeals and other procedural steps, a longer timeframe is well within the realm of possibility even with Class Counsel doing its utmost to push this case to a resolution.[59]

48. If the Settlement is not approved, the following steps would likely have to be completed before Class Members receive any compensation:

    a. the hearing of a certification motion;

    b. depending on the result of the certification motion, a motion for leave to appeal or an appeal from that decision could follow. In some cases, such as where a cause of action is struck but the action is certified in part, simultaneous motions for leave to appeal to the Divisional Court and an appeal as of right to the Court of Appeal are possible;

    c. the resolution of any appeal from the certification decision;

    d. the exchange of affidavits of documents and the completion of examinations for discovery;

    e. the resolution of any motions arising from the discovery process and any appeals therefrom;

    f. the exchange of expert reports;

    g. a common issues trial or motion for summary judgement on the common issues;

    h. a possible appeal from the common issues trial or summary judgment motion on the common

[58] Dewar Affidavit at para. 66
[59] Dewar Affidavit at para. 67

issues;

i. depending on the nature of the certified common issues, a procedure may be set for the determination of non-common or individual issues (potentially including individuals claims and damage assessments); and

j. resolution of such individual claims and damage assessments.[60]

49. Class Counsel's estimate as to the possible duration of this litigation is supported by its experience. By way of illustrative example, the *Fresco v. CIBC* unpaid overtime class action was launched in 2007. Certification was bitterly contested and denied at first instance in 2009. After certification was allowed by the Court of Appeal in 2012, the defendant sought leave to the Supreme Court. Since that leave application was denied, the Plaintiff has been vigorously pursuing a summary judgment motion but only received judgment on the common issues in a decision released in March of 2020. Despite winning summary judgment on the common issues, issues relating to the Class Members' damages are still to be resolved and the defendant has already appealed the liability decision made against it.[61]

50. As to the likely future expense of this litigation, Class Counsel have already incurred fees in excess of $1 million. While difficult to predict, Class Counsel estimates that millions more in fees and disbursements could be required to bring this action to a resolution for the Class Members.[62]

Objectors & Other Class Member Responses

51. As of the date of this factum, Class Counsel have received no objections to the proposed Settlement. Pursuant to this Court's Order dated October 5, 2020, Class Counsel caused the

[60] Dewar Affidavit at para. 68
[61] Dewar Affidavit at para. 69
[62] Dewar Affidavit at para. 71

Notice of Certification and Settlement Approval ("Notice") to be delivered by email or regular mail to the approximately 20,000 putative Class Members.[63] The Notice was also posted on Class Counsel's websites and linked to a widely distributed press release. The Notice, among other things, invited Class Members to submit comments on the Settlement.

52. As of the date of this factum, Class Counsel has received approximately 250 phone calls and emails from Class Members in response to the Notice. Of those calls and messages, no one has indicated that they intend to object to the Settlement and only four individuals have expressed an intention to opt-out.[64]

53. While no submissions from Class Members have been received to date, Class Counsel will, of course, file any Class Member submissions, supporting or objecting to the Settlement, in advance of the hearing of the Approval Motion.

The Presence of Arms-Length Bargaining & Dynamics of the Settlement Negotiations

54. The dynamics of the settlement negotiations are generally set out above at paragraphs 18 through 22 of this factum.

55. As set out above, the Settlement is the product of an extensive series of arms-length and hard-fought negotiations. Each side zealously advanced the interests of their clients in the negotiations. The parties did not collude to reach the Settlement.[65]

[63] Dewar Affidavit at para. 35, Endorsement of Justice Salmers dated September 15, 2020
[64] Dewar Affidavit at para. 74
[65] Dewar Affidavit at para. 77

56. As set out above, the negotiations ultimately resulted in the Defendant increasing its initial unacceptable offer to the agreed upon $6.95 million. The total value of the $6.95 million Settlement Fund is well into the Plaintiff's reasonable range of settlement and represents a significant percentage of the Class Members' possible damages (and potentially more than may have been secured even if liability was found by a court). Class Counsel is of the view that the maximum settlement amount was extracted from the Defendant.[66]

Communications with the Plaintiff

57. Class Counsel consulted the representative plaintiff (Ms. Christiansen) throughout this litigation. Class Counsel sought out Ms. Christiansen's input and confirmed her instructions on every major decision in this proceeding as required.[67]

58. Ms. Christiansen has reviewed and approved the terms and structure of the Settlement.[68] Ms. Christiansen supports the Settlement and states, among other things that:

> "In the circumstances, I believe that the Settlement is an excellent result and is a fair deal for my fellow Class Members. I have weighed the benefits that would be available to Class Members under the Settlement against what might be available after a trial as well as the costs, risks and delay if we continued the case through a trial and the likely appeal process. The balance was overwhelmingly in favour of the Settlement. This Settlement appears to be as good a result – in fact likely better than the result - reasonably possible to expect in the circumstances."[69]

[66] Dewar Affidavit at para. 78
[67] Dewar Affidavit at para. 79
[68] Christiansen Affidavit at paras. 13-16
[69] Christiansen Affidavit at para. 15

The Certification Requirements Have Been Met

59. As per paragraphs 12 and 13 of the Settlement Agreement, the Defendant consents to the certification of this action for settlement purposes.[70]

60. Courts in Ontario have consistently held that the test for certification for settlement is not as onerous or rigorous or as strictly applied or required as it would be in the context of a contested certification hearing.[71] The Plaintiff previously filed an extensive certification record relating to and supporting the prerequisites for certification and all certification criteria are met in this instance.[72] A copy of the certification factum previously served by Class Counsel is attached as Schedule D hereto.

61. In summary, the Plaintiff asserts that the certification requirements have been satisfied as follows:

    a. 5(1)(a) – Cause of Action – the Plaintiff's Claim discloses well known causes of action (that have often been accepted and certified in class actions) framed in breach of contract, breach of the *Sale of Goods Act*, misrepresentation, breach of the *Consumer Protection Act*, breach of the *Competition Act*, negligence, and unjust enrichment;
    b. 5(1)(b) – Class Definition – the Class is defined as anyone who purchased the Recalled Products between September 2014 and November 2016. The Class is clearly defined and the members of the Class are known from the records of the Defendant;
    c. 5(1)(c) – Common Issues - for the purpose of this settlement the parties have agreed to the following common issue:

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[70] If the Settlement is not approved Mettrum retains the right to resist certification.

[71] *Rothman v. Kaba Ilco Corp.*, 2018 ONSC 4761 (CanLII) at para. 25, *Osmun v. Cadbury Adams Canada Inc.,* [2009] O.J. No. 5566 at para. 21, *Makris v. Endo International PLC,* 2020 ONSC 3930 (CanLII), at para 33; *Kings Auto Ltd. v. Torstar Corporation,* 2018 ONSC 2451 (CanLII), at para 18; *Cass v. WesternOne Inc.*, 2018 ONSC 4794 (CanLII), at para 46; and *Corless v. KPMG* LLP, 2008 CanLII 39784 (ON SC), at para 30.

[72] Dewar Affidavit at para. 37

Did Mettrum breach its contracts with the Class Members by selling the Recalled Products to the Class and/or misrepresent to the Class Members that its medical marijuana products conformed to all relevant Health Canada requirements?

d. 5(1)(d) – Preferable Procedure – a single class proceeding is clearly the preferable procedure to determine the common issues on behalf of the Class Members rather than 20,000 individual small claims or simplified rules actions. No viable alternative procedure has been identified;

e. 5(1)(e) – Representative Plaintiff – As previously conceded by Mettrum, Ms. Christiansen is a suitable Representative Plaintiff. Ms. Christiansen has no conflict of interest with the Class Members.[73]

PART IV: ORDER SOUGHT

62. The Plaintiff respectfully requests an Order approving the Settlement Agreement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th of December, 2020

David F. O'Connor

J. Adam Dewar

[73] Dewar Affidavit at para. 37

TAB A

Schedule "A" – Authorities

1. *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 (S.C.J.)
2. *Farkas v. Sunnybrook and Women's Health Sciences Centre, [2009] O.J. No. 3533 (S.C.J.)*
3. *Kidd v. Canada Life Assurance Company, 2013 ONSC 1868 (CanLII)*
4. *Mancinelli v Royal Bank of Canada, 2016 ONSC 6953*
5. *Baxter v. Canada (Attorney General) (2006), 2006 CanLII 41673 (ON SC), 83 O.R. (3d) 481 (S.C.J.)*
6. *Al-Harazi v. Quizno's Canada Restaurant Corp. (2007), 49 C.P.C. (6th) 191 (Ont. S.C.J.)*
7. *Rothman v. Kaba Ilco Corp., 2018 ONSC 4761 (CanLII) at para. 31*
8. *Quenneville v. Volkswagen Group Canada, Inc., 2018 ONSC 2516*
9. *Good v. Toronto Police Services Board, 2020 ONSC 6332 (CanLII)*
10. *Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (S.C.J.)*
11. *Rothman v. Kaba Ilco Corp., 2018 ONSC 4761 (CanLII)*
12. *Toronto Community Housing Corporation v. Thyssenkrupp Elevator (Canada) Limited, 2012 ONSC 6626 (CanLII)*
13. *Dabbs v. Sun Life Assurance Co. of Canada*
14. *Corless v. KPMG LLP, [2008] O.J. No. 3092 (S.C.J.)*
15. *Osmun v Cadbury Adams Canada Inc, 2010 ONSC 2643, aff'd 2010 ONCA 841*
16. *Dabbs v. Sun Life Assurance Co. of Canada, supra, at p. 440, Makris v. Endo International PLC, 2020 ONSC 5709 (CanLII)*
17. *Osmun v. Cadbury Adams Canada Inc., [2009] O.J. No. 5566*
18. *Makris v. Endo International PLC, 2020 ONSC 3930 (CanLII)*
19. *Kings Auto Ltd. v. Torstar Corporation, 2018 ONSC 2451 (CanLII)*

20. *Cass v. WesternOne Inc., 2018 ONSC 4794 (CanLII)*

21. *Corless v. KPMG LLP, 2008 CanLII 39784 (ON SC)*

TAB B

Schedule "B"

TBD

TAB C

Schedule "C" – Proposed Common Issues

PROPOSED COMMON ISSUES
REVISED - MAY 4, 2018

NOTE: The following proposed common issues adopt the defined terms as set out in the Plaintiff's Amended Statement of Claim.

Common Issue 1: Breach of Contract

a. What are the terms (express or implied or otherwise) of the Class Members' contracts regarding their purchase of the Recalled Products from the Defendant?

b. Did the Defendant breach any of the contractual terms? If so, how?

Common Issue 2: Breach of the Sale of Goods Act & Equivalent Sale of Goods Statutes

a. Pursuant to section 15 of the *Sale of Goods Act* (and the Equivalent Sale of Goods Statutes) did the Defendant (expressly or by implication) warrant to the Class Members that the Recalled Products were reasonably fit or safe for human consumption and the Recalled Products complied with or exceeded the relevant Health Canada regulations regarding the production, testing and sale of medical marijuana, and that the Recalled Products were of merchantable and/or acceptable quality?

b. Did the Defendant breach the foregoing warranty? If so, how?

Common Issue 3: Negligent Misrepresentation

a. Is the Defendant in a special relationship with the Class Members?

b. Did the Defendant make the Representations (expressly, impliedly, by omission or otherwise) regarding the safety, regulatory compliance, or its ability to lawfully sell the Recalled Products?

c. Were any of the Representations false or otherwise misleading?

d. Did the Defendant act negligently in making any of the foregoing Representations?

e. In the circumstances of this case, can the reliance of the Class Members on the Representations be inferred?

Common Issue 4: Negligence

a. Did the Defendant owe the Class Members a duty of care regarding the cultivation, production, testing, processing, manufacture, distribution, advertising, marketing, promotion and sale of the Recalled Products? Did the Defendant owe the Class Members a duty to warn?

b. If "yes", what is the content of the duty of care?

c. Did the Defendant breach the foregoing standard of care? If so, how?

Common Issue 5: Breach of the Competition Act

a. Did the Defendants breach section 52 of the *Competition Act* in the course of advertising, marketing or promoting the Recalled Products to the Class Members?

b. If "yes" what remedy ore remedies or damages, if any, are the Class Members entitled to under the *Competition Act*?

Common Issue 6: Consumer Protection Act & Equivalent Consumer Protection Act Breaches

a. Did the Defendant breach part III of the *Consumer Protection Act* (or any of the Equivalent Consumer Protection Statutes) in relation its marketing and sale of the Recalled Products?

b. If "yes", what remedy, if any, are the Class Members entitled to under the Consumer Protection Act (including, but not limited to, the statutory remedy of rescission)?

c. Does the Class, or any portion thereof, require, and is it entitled to, a declaration waiving the notice provisions of section 18 of the Consumer Protection Act?

Common Issue 7: Unjust Enrichment

a. Was the Defendant enriched by, among other things, failing to pay refunds to Class Members in respect of the Recalled Products?

b. If the answer to common issue 7(a) is "yes":

   i. Did the Class suffer a corresponding deprivation?

   ii. Was there no juristic reason for the enrichment?

Common Issue 8: Remedies

a. Should the Defendant be required to fund, or otherwise compensate the Class Members for, the costs of operating and administering an adequate system for health monitoring relating to the consumption of the Recalled Products?

b. Subject to further order of the Common Issues Trial Judge, if the answer to any of common issues 1-7 is "yes", and the Defendant's liability (or potential liability) to the Class Members (or any part of the Class) is established, what remedies are the Class Members (or any part of the Class) entitled to?

c. If the Class Members are entitled to an award of monetary damages:

   i. Can damages (or a common minimum portion thereof) be assessed on an aggregate basis for all or part of the Class?

   ii. What is the quantum of aggregate damages owed to Class Members or any part thereof?

   iii. What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?

d. Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Defendant's conduct? If "yes",

a. Can these damages awards be determined on an aggregate basis?

b. What is the appropriate method or procedure for distributing any aggregate aggravated, exemplary or punitive damages to Class Members?

TAB D

Court File No. 820/17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ERIN DAWN CHRISTIANSEN

Plaintiff/Moving Party

- and -

METTRUM LTD.

Defendant/Responding Party

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

FACTUM OF THE PLAINTIFF
(Certification)

October 28, 2018

ROY O'CONNOR LLP
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Court File No. 820/17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ERIN DAWN CHRISTIANSEN

Plaintiff/Moving Party

- and -

METTRUM LTD.

Defendant/Responding Party

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

FACTUM OF THE PLAINTIFF
(Certification)

PART I: OVERVIEW

1. The Plaintiff moves for the certification of this action as a class proceeding. This is a consumer protection action where consumers purchased an unlawful product – which should never have been available for sale – and that carried risks of which they were unaware.

2. The Plaintiff alleges and the Defendant admits that between January 2014 and December 2016 it sold medical marijuana to the Class Members that had been improperly treated with or exposed to two unlawful pesticides, namely: myclobutanil and pyrethrins.

3. At all material times, licensed medical marijuana producers, such as Mettrum, were only allowed to lawfully produce and sell medical marijuana if they complied with all applicable regulations, including the prohibition on the use of myclobutanil and pyrethrins.

4. In October and November 2016, Health Canada discovered Mettrum's use of unlawful pesticides and directed that Mettrum undertake a Level III Recall of the tainted products ("Recall" or "Recalls"). More than 20,000 of Mettrum's customers ("Class Members"), all of whom were prescribed medical marijuana to treat an underlying medical condition, were eventually affected by the Recall. Despite recalling the products in question ("Recalled Products") and effectively admitting that it was not allowed to sell the tainted marijuana in the first place, the Defendant refuses to refund the money paid by the Class Members to purchase and obtain the Products.

5. Mettrum lead its customers to believe that they were purchasing legal and safe medical marijuana that was grown and processed in accordance with all Health Canada regulations. Mettrum mislead and breached its contracts with its customers with its use of myclobutanil and pyrethrins. Given, among other things, their preexisting health issues, the Class Members would not have purchased the Defendant's products if they had known that there was any risk that they had been treated with unlawful pesticides. Class Members, who were taking medical marijuana for their health issues, would only reasonably have turned to other suppliers for untainted products readily available in the market.

6. The Plaintiff seeks a refund of the monies paid to the Defendant, plus shipping costs and taxes. The Plaintiff submits that it is fundamentally unfair for the Defendant, now owned by Canopy Growth Corporation, Canada's largest licensed marijuana producer, to keep money for products it was not legally allowed to sell. The Plaintiff also seeks punitive damages arising from Mettrum's allegedly intentional or reckless use of unlawful pesticides, or alternatively, its failure to investigate, detect and destroy the tainted products

(and plants) in a timely manner or otherwise. For clarity, the Plaintiff is not seeking to certify a common issue regarding the Class Members' possible personal injury damages.

7. The Class Members' core allegations regarding the Defendant's use of unlawful pesticides give rise to common issues framed in breach of contract, negligence, misrepresentation and breach of consumer protection legislation, all of which can be determined at a single common issues trial. Any residual non-common or individual issues can be fairly and efficiently resolved through the powerful procedural tools of the *Class Proceedings Act, 1992* ("CPA").

8. A single class proceeding is clearly preferable to 20,000 individual actions, and for the vast majority if not all Class Members, it is the only viable means of securing access to justice. The Class Members' claims, generally amounting to at most a few thousand dollars, are not large enough to be advanced as individual actions in the Superior Court or any other adjudicative forum. Moreover, the Defendant has failed to identify any alternative procedure, let alone a superior procedure, to resolve the common issues advanced in this proceeding.

9. It is respectfully submitted that the motion to certify this action as a class proceeding should be granted, with costs.

PART II: THE FACTS

The Defendant

10. The Defendant, Mettrum Ltd. ("Mettrum" or the "Defendant") is licensed by Health Canada to produce medical marijuana. Mettrum received its first license to produce medical marijuana on November 1, 2013 and a second license on December 17, 2015.

Amended Statement of Claim, dated March 17, 2017 ("Claim") at para. 2

Affidavit of Tamara Markovic, sworn May 4, 2018 ("Markovic Affidavit") at para. 2
Affidavit of Donald Henderson, sworn June 29, 2018 ("Henderson Affidavit") at paras. 10 -11

11. In order to lawfully sell medical marijuana to the Canadian public Mettrum was required to comply with the requirements of the *Access to Cannabis for Medical Purposes Regulations* ("ACMPR").[1] Marijuana was, as set out below, otherwise illegal in Canada.

Claim at para.4
Markovic Affidavit at para. 3, Exhibits B & C
Henderson Affidavit at para. 7

12. On January 31, 2017, Mettrum became a wholly-owned subsidiary of Canopy Growth Corporation ("Canopy Growth" or "Canopy"). Canopy Growth is one of the largest licensed marijuana producers in Canada. Since this class action was issued Mettrum's products have been rebranded as "Spectrum" and its cannabis products are now sold through Canopy Growth Corporation.

Markovic Affidavit at para. 2
Henderson Affidavit at para. 5

The Plaintiff & the Proposed Class

13. The Plaintiff, Erin Christiansen, is 32 years old and resides in Thunder Bay Ontario. The Plaintiff was diagnosed with spina bifida and scoliosis as a child. At age 17 the Plaintiff underwent surgery to fuse a number of vertebrae in her neck and has suffered from chronic back pain ever since. In March 2016, the Plaintiff was prescribed medical marijuana to treat her pain.

Christiansen Affidavit at para. 4
Claim at para. 30

[1] Before the ACMPR was passed, Mettrum was required to comply with the substantially similar requirements of the *Marihuana for Medical Purposes Regulations* ("MMPR").

14. In the spring of 2016, the Plaintiff, after reviewing Mettrum's website and viewing Mettrum's Representations (as defined below), decided to register with the Defendant. Between approximately March 2016 and December 2016, the Plaintiff purchased several orders of medical marijuana products, including Recalled Products, from Mettrum.

    Christiansen Affidavit at para. 6
    Henderson Affidavit at para. 82

15. The Plaintiff purchased more than $3,000 in medical marijuana products from Mettrum between in 2016.

    Claim at para. 31
    Christiansen Affidavit at para. 7 & Exhibit C
    Henderson Affidavit at paras. 82-84 & Exhibit D

16. In late May of 2016, after using Mettrum's medical marijuana products for approximately three months, the Plaintiff began to feel unwell. The Plaintiff experienced symptoms including, facial swelling, rash, fever, and severe head and body aches. The Plaintiff sought medical attention and was hospitalized in August 2016. The Plaintiff discontinued her use of Mettrum's medical marijuana products over the course of her hospitalization and her condition improved. The Plaintiff's symptoms returned when she returned to using the Defendant's marijuana products following her hospitalization. The Plaintiff subsequently stopped taking Mettrum's medical marijuana products and switched to a different licensed medical marijuana producer. The Plaintiff's symptoms did not return after she switched producers. The Plaintiff believes that the Recalled Products harmed her health. The Plaintiff received recall notices from Mettrum.

    Christiansen Affidavit at paras. 8-12, 14 Exhibit D, & F
    Christiansen Reply Affidavit at para. 4
    Claim at para. 32

17. The proposed class consists of anyone who purchased the Recalled Products between September 2014 and December 2016. *The Claim refers to November 2016 (and not December 2016) but should be amended to more accurately refer to December 2016 in light of certain unclear evidence offered by the Defendant on this motion about the end date of the Recalls.*[2] *In any event, the Class remains those who received the Recalled Products.*

Claim at para. 29
Christiansen Affidavit at para. 20

18. The Plaintiff estimates that the class consists of approximately 20,000 people. The Defendant states that 21,058 are included in the proposed class definition. The Defendant has confirmed that the identities of the Class Members are known to it and that Mettrum has email addresses and/or phone number for all of its customers affected by the Recall.

Christiansen Affidavit at para. 21
Henderson Affidavit at para. 91
Henderson Affidavit at para. 38

The Cultivation & Sale of Medical Marijuana

19. At all material times throughout the class period, marijuana and its derivatives were controlled substances in Canada. The cultivation, possession and sale of marijuana were, but for the application of the AMCPR, criminal offences. The *Controlled Drugs and Substances Act* provided maximum penalties of 5 years in prison for possessing marijuana and a life sentence for trafficking marijuana.

Henderson Affidavit at para. 6;
Controlled Drugs and Substances Act, SC 1996, c. 19 sections 4(a) & 5(3)(a)

[2] See for example Henderson Cross, q. 245-246.

20. In order to obtain medical marijuana, a Class Member had to be a client of a licensed producer. To obtain medical marijuana, a patient was required to obtain a form from a doctor (effectively a prescription) prescribing medical marijuana and register with a specific licensed producer

Section 3(2) of the *ACMPR*
Christiansen affidavit at para. 5
Henderson affidavit at paras. 13 & 15

21. Mettrum knew it was selling Medical Marijuana for the express purpose of treating a number of health conditions, including, but not limited to, anxiety, PTSD, and the side effects of chemo therapy.

Christiansen Affidavit at para. 35
Henderson Affidavit at para. 19
Claim at paras. 29 & 36
Henderson Cross at q. 325

22. As set out below, Mettrum represented to the Class Members that its medical marijuana met or exceeded Health Canada regulations regarding quality and chemical contamination. As a licensed producer, Mettrum was subject to a numerous regulations intended to protect the safety of its customers including:

a. Pursuant to section 66 of Subdivision D of the ACMPR, the Defendant was not permitted to use any pest control products unless the product is one of the 13 such products approved for use on cannabis under the *Pest Control Products Act* ("PCPA"). Licensed cannabis producers such as the Defendant cannot sell any medical marijuana products that have been treated with any unapproved pest control products;

Claim at para.13
Markovic Affidavit at para. 4, Ex. D
Henderson Affidavit at para. 26

b. Licensed producers are required to have adequate controls within their facilities to ensure that unauthorized pest control products are not used. Controls may include, among other things, restricting access to pest control products, monitoring the application of products to fresh or dried marijuana, marijuana plants or seeds, and/or testing for unauthorized pesticide use. Contrary to the foregoing requirements, the Defendant's CEO (Bruce Linton) admitted that the facilities were "not a properly controlled and operated environment".

Claim at para. 7
Henderson Cross at q. 82-83
Markovic Affidavit, Exhibit M(1)

c. As a licensed producer, Mettrum is required to videotape and retain footage of its production facilities. Mettrum has retained video footage regarding the facilities in question.

Henderson Affidavit at para. 80(e)
Henderson Cross at q. 327-335
Markovic Affidavit Ex. M1

d. Licensed producers are subject to periodic inspections to verify compliance with the regulations.

Henderson Affidavit at para. 9

The Defendant's Representations

23. Mettrum made consistent written representations to the effect that it complied with Heath Canada regulations (which included a prohibition on the use of unauthorized pesticides), that its products were safe and that it could legally sell its medical marijuana products. Examples of the Mettrum's consistent representations include the following:

a. *"Mettrum™ is a Health Canada licensed producer of medicinal cannabis and is committed to ongoing research, regulatory compliance, producing quality products, and providing comprehensive customer service.*

...Health Canada has recently implemented new regulations to improve access to medical marijuana patients Canada-wide. As a Licensed Producer, Mettrum operates in compliance with these regulations to meet the needs of our clients."

b. *"Mettrum uses high standards of quality to meet Health Canada regulations"*

c. *"Mettrum products are grown under strictly controlled conditions to ensure the finest quality. Our plants are grown in a medical laboratory facility that allows for a tightly controlled growing environment. ...*

All Mettrum products pass through rigorous quality control processes to ensure they are naturally safe for your consumption and are pharmaceutically tested to ensure the highest quality cannabis."

d. *"Mettrum utilizes only the highest quality nutrients and state of the art growing techniques. All finished products must meet or exceed international pharmacopoeial guidelines for microbial and chemical contaminants, prior to being made available for sale."*

Markovic Affidavit at para. 5 & Exhibits E(3), E(10), E(8), E(6) & E(6)

The Recall & Related Disclosures/Admissions

24. The two pesticides at issues in this action are pyrethrins and myclobutanil. Neither are registered for use on Medical Marijuana under the PCPA. Myclobutanil, is sold under, among other things, the brand name "Nova 40" and/or "Eagle 20" and is generally used to control mildew. Mildew can destroy a marijuana crop and cause significant financial losses to companies that are affected by it. Myclobutanil produces hydrogen cyanide when heated. Smoking a substance (inhaling the substance into the lungs) bypasses many metabolic safeguards and passes substances directly into the blood stream.

Markovic Affidavit at para. 7(b), & Exhibits M(1), M(2), M(3)
Christiansen Affidavit at paras. 12, 14-15, 17 & Exhibits D, F & H
Claim at para. 12-13
Supplemental Markovic affidavit, Exhibit C

Henderson Affidavit at para. 26-29
Solomon Affidavit, Exhibit B at p. 158
Solomon Cross q. 18-22 & 30
Exhibit 1 to Solomon Cross Examination

25. The Plaintiff alleges that the Defendant was aware of the use of myclobutanil at its facilities as early as October 2014. From news reports and statements released by Mettrum's parent (Canopy), an employee of Mettrum reported that on October 15, 2014 (having returned early from lunch) he witnessed two growers and "key members of the company" of the company illegally applying myclobutanil to cannabis plants despite knowing that it was prohibited for use on cannabis. The same employee reported that Mettrum staff concealed their use of myclobutanil from Health Canada inspectors by hiding the products containing myclobutanil inside the ceiling tiles of the company's offices. The employee brought his concerns to the attention of Mettrum, including to the attention of the Defendant's then CEO Michael Haines. The employee alleges that the CEO told him not to worry about the use of the chemical. The CEO of Mettrum's parent (Canopy Growth Corporation) subsequently advised that the employee's concerns were raised with Mettrum management in October 2014, which led to an internal investigation at that time (i.e. an internal investigation at Mettrum in 2014).[3]

26. Interestingly, on cross-examination, the Defendant's primary affiant and its general counsel, Donald Henderson, advised that he inquired about the facts described above (the report of the use of myclobutanil in 2014 and an internal investigation at Mettrum at the time) and was advised by his executive superior at Mettrum that there was in fact no internal investigation at Mettrum at that time relating to the potential use of pesticides.

[3] See references/citations for next paragraph.

Moreover, the CEO of Canopy (Mettrum's parent) Mr. Linton indicated, after it acquired Mettrum in February 2017, that Canopy itself was carrying out a further investigation of the allegations noted above regarding the use of myclobutanil. As was stated in a release from Canopy after it acquired Mettrum:

> *"The information on historical practices is still being traced through available records. Mettrum management suspects that some staff may have applied the product in response to a mildew issue in limited areas of the facility. However, there is no conclusive evidence that supports this suspicion or points to individuals that may have been involved. This investigation will continue under Canopy's new management oversight."*

The only fact witness put forward to provide any evidence from Mettrum/Canopy in respect of this motion (Mr. Henderson) did not, however, recall any mention of such a further investigation under Canopy's watch and he could not speak to "whether there was or was not [such] an investigation." Mettrum/Canopy now has refused to advise if any such further investigation was underway or conducted by Canopy after it acquired Mettrum in February 2017.

Claim at paras. 14-5

"Marijuana supplier hid pesticide from inspectors, former worker says", The Globe and Mail, February 9, 2017, Markovic Affidavit M(1).

"FAQ on Recent Recalls & Canopy Growth", February 22, 2017, Markovic Affidavit Exhibit J;

"Canopy Growth CEO apologizes over tainted medical marijuana", CBC News, February 24, 2017, Markovic Affidavit Exhibits M(3).

Henderson Cross at q. 43, 50-51, 120-135

Mettrum Answers to Undertakings/Under Advisements, page 2, item 2

Markovic May Affidavit, Exhibit J.

27. In November 2016, the first recall of Mettrum medical cannabis products began. This was subsequently followed with what Mettrum has now called three (3) more "waves" of recalls. These recalls were required to address Mettrum's use of the foregoing unauthorized

pest control products. Each of the recalls or waves of recalls (as the Defendants puts it) were designated by Health Canada as a Type III recall, which is defined as a "situation in which the use of, or exposure to, a product is not likely to cause any adverse health consequences." The four waves are described below in more detail.

Claim at para. 11
Henderson Affidavit at para 27.

Recall - Wave 1

28. The Defendants use of unlawful pesticides was discovered by Health Canada in October 2016. In the course of a Health Canada inspection, the Defendant was advised by Health Canada that Mettrum was using "Mega Wash," a foliar spray that contained pyrethrins (which are not permitted for use on medical cannabis). In its answers to undertakings from the cross-examination of Mr. Henderson, the Defendant has indicated that Health Canada advised of the presence of pyrethrins on October 26, 2016. The Defendant was apparently unaware that the fact that Mega Wash contained pyrethrins had previously been discovered and publicly disclosed in the United States. In early November 2016, the first "wave" of the Recall began.

Claim at paras. 17-18
Henderson Affidavit at paras 28, 31-33 & 34
Markovic Affidavit at paras. 6 & 7, & Exhibit F.
Henderson Cross at q. 67, 71-73 & 283
Answers to Undertakings, page 2, item 5.

29. On November 1, 2016, the Defendant posted a news release on its website setting out, among other things: that it had been using pyrethrins on its cannabis plants; that pyrethrins were not registered for use on medical cannabis under the *Pest Control Products Act*; that products that had been exposed to the pyrethrins were being recalled; and that quality, purity and transparency were Mettrum's top priorities. The Defendant contacted Class

Members by email and phone to advise them of the recall. This recall covered certain lots of products sold between September 2014 and October 21, 2016.

Claim at para. 21
Markovic Affidavit at para 7 & Exhibit G
Henderson Affidavit at paras 38-42
Christiansen Affidavit at para 12.
Henderson Cross, q. 197.

Wave 2

30. In the process of investigating and testing the products subject to the first wave of the Recall, Health Canada's Pest Management Regulatory Agency (which is responsible for pesticide regulation in Canada) determined that some of Mettrum's plants or products also contained myclobutanil. In Mr. Henderson's affidavit, Mettrum has phrased this situation as some of its plants having "come into contact" with myclobutanil during the growing process. Mettrum was advised on November 16, 2016 that myclobutanil had been used and detected. Two weeks later (in December 2016), the Recall was expanded (what it calls wave 2 of the recall) as a result of the discovery of the use of myclobutanil. As set out above, myclobutanil is not a permitted pest control product for use on medical cannabis. As with the first wave of the Recall, the Defendant contacted Class Members by phone and electronic messages to advise them of the recall.

Henderson Affidavit at para 45, 46, 49-53 & 54
Markovic Affidavit at para 8 and Exhibits H & M(2)
Henderson Cross q. 238.
Answers to Undertakings, page 2, item 8.

31. On January 3, 2017, Mettrum issued a news release titled, "A Message to Our Clients" stating, among other things, that it had undertaken an investigation and that it had removed several products from its store.

Markovic Affidavit para 9 and Exhibit I

Wave 3

32. On January 7, 2017, the Recall (what Mettrum calls the third wave) was expanded based on the results of testing for myclobutanil done on products which had been made available for purchase 121-240 days prior to December 5, 2016.

Henderson Affidavit at para 56 & 61.

Wave 4

33. The Recall was expanded for a fourth and final time on January 28, 2017 to included oils produced from any batch of dried cannabis released in the 240 days prior to December 5, 2016 that tested positive for any traces of myclobutanil. In addition, any client product purchased between January 1, 2016 and March 21, 2016 was also included in the scope of the recall. As noted above, the Recalls (each of waves 1, 2, 3 and 4) were determined by Health Canada to be a Type III recall -- a "situation in which the use of, or exposure to, a product is not likely to cause any adverse health consequences."

Henderson Affidavit at paras 63-64.
Henderson Cross at q. 287

34. As of February 7, 2017, Health Canada reported that it had received 10 adverse reaction reports related to Mettrum products sold during the period covered by the Recalls. Health Canada further advised that anyone affected by the Recalls should immediately stop consuming the Recalled Products.

Claim at para. 23
Markovic Affidavit at para 10 & Exhibit F

35. In an open letter posted on the internet dated February 23, 2017, Canopy Growth Corporation's CEO, Bruce Linton, made a number of statements including the following:

a. *"In the first weeks, Canopy's management team has taken steps to enhance quality assurance practices and operational controls in order to bring operations up to our world class standard"*

b. *"Customer safety and trust are always our top priorities, and they are particularly important following the Mettrum product recall";*

c. *"We have also established a detailed process map to change growing and quality assurance processes throughout the production cycle, bringing practices in-line with existing operating procedures at Tweed and Tweed Farms [Canopy]. This has already resulted in numerous process and personnel changes, and will be followed by infrastructure modifications. ...We are confident that bringing in proven best practices will ensure that all our products meet the highest standards to ensure patient safety and product quality.";*

d. *"Restoring confidence in Mettrum requires more than just changes going forward. It requires openness and transparency starting today, to ensure patients understand the recent Mettrum recall"; and,*

e. *"The application of pest control products not registered for use on cannabis at Mettrum was* ***inexcusable****."* ***[emphasis added]***

Claim at para. 23
Markovic Affidavit at para. 12 & Exhibit K

36. In an email to Class Members dated February 23, 2017, Mr. Linton made several further statements, including among other things:

a. two pest control products not registered for use on cannabis had been applied to products, one of which, myclobutanil, was detected in Mettrum's dried cannabis and cannabis oil products;

b. *"I'm writing to you today...to present a plan to improve operations at Mettrum"*

c. that product reliability and open communication were hallmarks of Mettrum's business; and,

d. *"You choose Mettrum because you want quality products from a source you can trust...I commit to bringing the most rigorous standards of quality control to Mettrum products..."*..

The foregoing acknowledgement by Canopy/Mettrum that customers chose them because they were wanted quality products from a trusted source is an admission that Mettrum knew that Class Members were relying on it to provide lawful medical marijuana. The foregoing admission establishes a basis in fact, as discussed below, that the Class Members' reliance may be naturally inferred in this case.

Supplemental Affidavit of Tamara Markovic, Exhibit A.

37. In the same email, Mr. Linton of Canopy stated that "*if you are ever unsatisfied with your products, for any reason, let me know. I will do my best to make it right.*" Despite this promise and demands for reimbursement, Canopy refused to reimburse its customers for the products that were recalled – medical marijuana that Canopy was not entitled to sell.

See for example, February 2, 2017 Email, Markovic Affidavit, Exhibit L1, page 221.

38. Canopy/Mettrum has acknowledged in Mr. Henderson's affidavit that it has implemented new procedures and/or protocols following the Recalls. Some of the steps it has instituted after the recall include but not limited to: "*It reinstated a mandatory broad-spectrum pesticide residue testing on all products before their release to the public*", implemented new Materials Compliance operating procedures, implemented new Materials Safety standard operating procedures, and instituted monthly audits of video footage. These new procedures and various comments from Canopy as cited herein may assist at trial in establishing that the earlier procedures at Mettrum were not appropriate to ensure the safe growing of the plants. Among other things, at trial, one may query at trial why broad-spectrum pesticide residue testing was stopped previously at Mettrum. At trial, one may also query why the plants in question were not immediately and specifically tested for

myclobutanil after the whistle-blower employee reported that that chemical had been applied on plants to eradicate mildew in October 2014. One may wonder why the videos that the company was required to retain (for 2 years) was not immediately reviewed for the specific day (October 15, 2014) that myclobutanil was reported as being applied to plants. Tellingly, Mr. Henderson indicated in cross-examination that he didn't know if anyone reviewed those videos at the time of the whistle-blower report (in or about October 2014) but he did indicate to his knowledge that no one at Canopy/Mettrum had reviewed them subsequently. Any of the foregoing suggested and reasonable steps should have detected the myclobutanil, resulted in plants (and potentially soil) being destroyed or discarded, and thus would have prevented the end-user medical marijuana products - which were obviously being made available to Class Members for underlying medication conditions – from containing unauthorized pesticides.

Henderson Affidavit at para 80(a)
Henderson Cross. q.. 327-335

Health Canada Designation

39. Mettrum and Canopy have acknowledged that they were satisfied with each of the recalls in question being designated as a Type III recall, defined as "*a situation in which the use of, or exposure to, a product is not likely to cause any adverse health consequences.*" In other words, the recall product was not categorized by Health Canada as presenting no risk of adverse health consequences but rather that such consequences were not likely. In fact, a subsequent March 9, 2017 release from Health Canada expressly stated "*the risk of serious health consequences resulting from the inhalation of combusted myclobutanil in the recalled cannabis products was determined by Health Canada to be low...the risk of harm to Canadians was low in these recent cases.*" Health Canada thus indicated that

there was a risk – admittedly a low risk of "serious" health consequences as determined by Health Canada – but not no risk.

March 7, 2017 Canopy Release, Exhibit B to Suppl Markovic.
March 9, 2017 Health Canada Release, Exhibit C to Suppl Markovic.

40. The Defendant's own witness (Mr. Henderson) effectively acknowledged that the marijuana products in question were not determined to be safe. During his cross-examination, Mr Henderson corrected, without prompting in the question from examining Plaintiff's counsel, a statement in an email from one of its customer support representatives to a customer which indicated that Health Canada had stated that it was absolutely safe for customers to continue using the product. He testified that the representatives statement was not accurate and that Health Canada "*never stated it was absolutely safe for customers.*" Moreover, Health Canada itself had expressly advised, as noted above, that the products should not be consumed. Health Canada had also advised that it had received 10 adverse reaction reports itself.

Henderson Cross, q. 360-363
February 2, 2017 Email to Customer, Markovic Affidavit, Exhibit L2, p. 221.

PART III: ISSUES & THE LAW

41. The single issue on this motion is whether the Plaintiff has met the test for certification under section 5(1) of the CPA.

General Principles & Evidentiary Standard

42. The CPA is remedial legislation. In *Hollick v. Toronto (City)*, Chief Justice McLachlin directed courts to interpret it in a way that gives full effect to the benefits foreseen by the drafters and not to take an overly restrictive approach to the legislation.

[2001] S.C.J. No. 67 (S.C.C.) ("*Hollick*") at paras. 15-16.

Griffin v. Dell Canada Inc., [2009] O.J. No. 418 (S.C.J.) ("*Griffin*"), at para. 43.

43. Section 5(1) of the CPA sets out the test for certification. The language of section 5(1) is mandatory. The court shall certify a class proceeding if:

    a. the pleadings disclose a cause of action;
    b. there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
    c. the claims or defences of the class members raise common issues;
    d. a class proceeding would be the preferable procedure for the resolution of the common issues; and,
    e. there is a representative plaintiff who:
        i. will fairly and adequately represent the interests of the class;
        ii. has drafted a reasonable litigation plan; and,
        iii. does not have conflict of interest with the class.

44. Pursuant to section 6 of the CPA, the following issues are expressly <u>not</u> a bar to certification:

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

45. While the cause of action requirement is considered in an evidentiary vacuum, the balance of the certification must be supported by evidence. The representative plaintiff is required to adduce evidence that establishes "some basis in fact" that subsections 5(1)(b) through (e) have been met. In many cases, that basis in fact may be inherent from the nature of the

claims of the class members. *In this case, the grounds for certification may be self-evident - Metturm sold products that it was not lawfully permitted to sell because unauthorized pesticides had been used - the underlying facts turn on what the Defendant did or should not have done.* A certification motion is a procedural motion, and not an inquiry (or preliminary inquiry) into the merits of the plaintiff's allegations. Evidence on the certification motion should be confined to the certification criteria and not the merits of the claims.

> *Hollick* at para. 25, 28-29.
> *Taub v. Manufacturers Life* (1998) 40 O.R. (3d) 379 (Gen. Div.).
> *Pro-Sys Consulting Ltd. v. Microsoft Corp.*, 2013 SCC 57 (CanLII) at para 99-105

46. In the recent decision of *Kalra v. Mercedes Benz Canada Inc.* Justice Belobaba emphasized that the "some basis in fact" test is a one-step process to determine if there is some evidence that proposed common issue applies class-wide. According to Justice Belobaba at paragraph 45:

> "In other words, I have come to understand that the Supreme Court's reminder, set out below, that the "some basis in fact" test in the context of the common issues is only a one-step process is a reminder that should be taken literally:
>
> > In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether [the common issues] are common to all the class members.
>
> I am persuaded that it is time to retire the two-step approach and focus only on class-wide commonality. The plaintiff only has to show some evidence of commonality – that is some evidence that the proposed common issue applies class-wide. The plaintiff's personal evidence about the existence of the alleged defect is not needed."
>
> *Kalra v Mercedes Benz*, 2017 ONSC 3795 (CanLII)

47. There are a number of problems with the nature and quality of evidence filed by the Defendant to resist the Plaintiff's certification motion. Among other things, and as noted above, Canopy's primary affiant, Mr. Henderson, is the Defendant's Associate General

Counsel and Vice President of International, Business and Legal Affairs. The majority of Mr. Henderson's evidence relates to technical, scientific and/or medical issues. Mr. Henderson is a lawyer who generally worked out of the defendant's Toronto headquarters and not at its growing operations. Mr. Henderson admits that he is "not a scientist" and was not involved in the growing operations, and further admits to having no professional training in medicine, chemistry, toxicology, or agriculture. Large sections of Mr. Henderson's affidavit could only be based on information and belief contrary to Rule 39.01(4), requiring an affiant to set out the source of information in an affidavit. With one or two limited exceptions, Mr. Henderson does not state a source for what is obviously not his first-hand knowledge or expertise. For those reasons alone, Mr. Henderson's evidence should be struck or rejected on that basis alone. Moreover, the Plaintiff's allegations extend back to 2014 and Mr. Henderson only joined the defendant in May 2016 and so even if he had first hand knowledge of technical or scientific issues (which he does not) he could certainly have no knowledge of any events before May 2016.

Henderson affidavit at para. 1
Henderson Cross at q. 5-14, 44- 52 & 174

48. In addition to issues with Mr. Henderson's affidavit, it is unclear why the Defendant filed the affidavit of Dr. Keith Solomon, an entomologist. Leaving aside various other issues[4], there is a fundamental problem with the admissibility of Dr. Solomon's reports. His reports are premised and based upon purported test results to which he did not conduct and to

[4] For example: Dr. Solomon never studied marijuana, myclobutanil, the potential health effects of myclobutanil and products that are smoked –and Dr. Solomon's acknowledgment that Health Canada likely had access to studies about the effects of inhalation of products exposed to myclobutanil to which he had no access.

which no one has attested. Dr. Solomon acknowledged that he "was relying on the data from other testing labs".[5] That lack of attestation alone makes Dr. Solomon's reports inadmissible. An expert report is only admissible if the factual inputs into that report are proven in evidence.

Solomon Cross, q. 6-7, 23-27, 86, 101-103

49. Importantly, as Dr. Solomon acknowledged, his reports address the merits of the potential health effects of consuming the contaminated products. The merits are not an issue for certification. Moreover, as set out above, the Plaintiff is not seeking to certify any common issues regarding personal injury or damages arising from personal injury.

Solomon Cross at q. 44

5(1)(a) - Cause of Action

50. The first requirement for certification is that the plaintiff's statement of claim discloses a cause of action. It is trite law that the test under section 5(1)(a) is the same as the "plain and obvious test" on a motion to strike under Rule 21.01(b).

Hodge v. Neinstein, 2017 ONCA 494 (CanLII) at para. 51

51. In determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.

Pro-Sys supra at para. 63
Bernstein v. Peoples Trust Co., [2017] O.J. No. 545 (SCJ) at para. 48
176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd. (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19

[5] It should also be noted that Dr. Solomon also stated that the test results would themselves depend on "who does the analysis and where the analysis was done" and the "equipment used" – one may get different test results depending on those factors. See Solomon Cross, q. 56-59.

52. The Plaintiff's Claim discloses the following causes of action, all of which have been found to have satisfied the 5(1)(a) requirement in other cases.

Breach of Contract

53. To establish a claim for breach of contract, the plaintiff must allege the existence of the contract, the material terms and whether they are express or implied, the conduct of the defendant alleged to constitute a breach of the term and the damages alleged to have been suffered.

Wellman and Corless v. TELUS and Bell, 2014 ONSC 3318 (CanLII) at para. 23

54. The Class Members' breach of contract claim is particularized at paragraph 37 of the Claim. Briefly stated, the Plaintiff alleges that it was an express or implied term of the Class Members contracts with Mettrum that the recalled products were safe and complied with all relevant Health Canada regulations. Mettrum is alleged to have breached it contracts by treating the Recalled Products with unauthorized pest control products, effectively selling an unlawful product (a product that it was not lawfully entitled to sell), and failing to refund the Class Members the purchase price of the Recalled Products.

Breach of the Sale of Goods Act

55. Section 15 of the Sale of Goods Act reads as follows:

> 1. Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description that it is in the course of the seller's business to supply (whether the seller is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.
>
> 2. Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods,

there is no implied condition as regards defects that such examination ought to have revealed.[emphasis added]

56. The Class Members' *Sale of Goods Act* claim is particularized at paragraphs 38 to 43 of the Claim. The Plaintiff alleges that Mettrum warranted that the Recalled Products were reasonably fit or safe for human consumption and they complied with or exceeded the relevant Health Canada regulations regarding the production, testing and sale of medical marijuana. The Plaintiff further pleads that the Class Members relied on the Defendant's skill and judgment to produce medical marijuana products that were safe and complied with all relevant regulations and requirements. The Plaintiff also alleges that the Recalled Products were not of merchantable or acceptable quality.

57. Courts have held that products which contained chemicals or substances in excess of the published maximum levels (and thus not permitted to be sold) are not of merchantable quality and not fit for their intended purpose, and thus breach the implied contractual terms of sale in question.

58. For example, in *Clarence Kloosterhof's Farm Services Ltd. v. Longley* [2000] N.S.J. No 260 Justice MacAdam found at paragraphs:5 and 34:

> "The pig feed, and in particular the feed tested with amounts of vomitoxin in excess of the recommended levels published by Agriculture Canada, was clearly not of merchantable quality...
>
> The defendant [purchaser] is entitled to be reimbursed for the cost of feed already paid and shown to have contained excessive levels of vomitoxin."

See also: *Wild Rose Mills Ltd v. Ellison Milling Co.* [1985] B.C.J. No. 489, at paragraphs 4, 5 & 25-29; *Griffin v Dell Griffin v. Dell Canada Inc.*, 2009 CanLII 3557 (ON SC); B*ennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853 (CanLII) at paras. 17, 32, 33 and 52

Misrepresentation

59. The elements of the tort of negligent misrepresentation are as follows:

    a. a duty of care based on a "special relationship" must exist between the representor and the representee;

    b. the representation(s) in question must be untrue, inaccurate, or misleading;

    c. the representor must have acted negligently in making the misrepresentation/s;

    d. the representee must have relied, in a reasonable manner, on the negligent misrepresentation/s; and,

    e. the reliance must have been detrimental to the representee in the sense that damages resulted.

    Queen v. Cognos Inc., [1993] S.C.J. No. 3 (S.C.C.) at para. 33

60. The Class Members' common law misrepresentation claim is particularized at paragraphs 44 through 50 of the Claim, and properly sets out the requisite elements of the tort. The Defendant's Representations (as defined at paragraph 44, of the Claim and as set out above) are the basis, with necessary modification, of the Plaintiffs common law misrepresentation, *Consumer Protection Act* and *Competition Act* claims. As discussed further below, the Defendant's representations can be distilled down to the core representation that Mettrum complied with Health Canada regulations regarding the production of medical marijuana, that the product was safe, and that it was legally able to sell medical marijuana.

Breach of the Consumer Protection Act

61. The Class Members' consumer protection act claim is particularized at paragraphs 55 through 62 of the Claim. In short, the Plaintiff alleges that Mettrum's misrepresentations, as discussed above, constitute unfair or unconscionable practices under *Ontario's*

Consumer Protection Act and equivalent legislation in BC, Alberta, Saskatchewan, Manitoba, Quebec, PEI, Nova Scotia and Newfoundland and Labrador.

62. Sections 14 and 15 of the *Consumer Protection Act* provide, respectively, that it is an unfair practice for a person to make a "false, misleading or deceptive representation" or an "unconscionable representation". The Plaintiff pleads that Mettrum engaged in several unfair and/or unconscionable practices contrary to the *Consumer Protection Act*. Paragraph 57 of the Plaintiff's Claim particularizes those unfair practices including:

    a. misrepresenting the quality of the Recalled Products;
    b. using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact regarding the Recalled Products;
    c. not allowing the Class Members to receive a substantial benefit from the subject-matter of Mettrum's Representation; and,
    d. misleading the Class Members through statements of opinion.

63. Sections 18(1) and (2) of the *Consumer Protection Act* provide a right to rescission to a consumer who entered into a contract after or while an unfair practice took place and, if rescission is not possible, entitle the consumer to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both.

64. Section 18(3) of the *Consumer Protection Act* provides that a consumer must give notice within one year of entering into the consumer agreement if the consumer seeks a remedy under that Act. Pursuant to section 18(15), a court may disregard the requirement to give the notice if it is in the interests of justice to do so.

65. Pursuant to section 18 of the *Consumer Protection Act,* the Plaintiff seeks rescission of the Class Members contracts with the Defendant or damages if rescission is not available.

Kalra supra at para 31-33
Ramdath v. George Brown College, 2010 ONSC 2019 (CanLII) at para. 46

Breach of the Competition Act

66. The Class Members' competition act claim is particularized and appropriately pleaded at paragraphs 53 and 54 of the Claim. Section 36(1) of the *Competition Act* provides a civil right of action for damages to any person who has suffered loss or damage as a result of a breach of section 52 of that act. Section 52(1) of the *Competition Act* provides that, "No person shall, for the purpose of promoting, directly or indirectly ... any business interest, by any means whatever, knowingly or recklessly make, or permit to be made, a representation to the public that is false or misleading in a material respect."

Magill v. Expedia Canada Corp., 2010 ONSC 5247, [2010] O.J. No. 4051 (S.C.J.)
Singer v. Schering-Plough Canada Inc., 2010 ONSC 42, [2010] O.J. No. 113 (S.C.J.)

Negligence

67. The Class Members' negligence claim is particularized at paragraphs 51(a)-(g) through 52 of the Claim.

68. The Plaintiff's negligence claim is subject to the *Anns* test (as any negligence claim is) as restated by, among others, the Supreme *Court in Cooper v. Hobart.*

Cooper v. Hobart, [2001] SCJ No 76 (SCC) at para 30
Edwards v. Law Society of Upper Canada, SCJ No 77 (SCC) at paras 8-10
Mustapha v. Culligan of Canada Ltd., SCJ No 27 (SCC) ["Mustapha"] at para 4

69. The Supreme Court of Canada made it clear in *Cooper* (2001) and *Mustapha* (2008) that a full-fledged *Anns* analysis is not required where the relationship between the plaintiff and defendant falls within, or is closely analogous to, a category of relationship already recognized as giving rise to a duty of care. In such cases, all that need be shown is that the

claim in question falls into, or is analogous to, a recognized category. The purpose of the categorical approach is to avoid needless duplication of analysis. As the Supreme Court stated in *Mustapha*:

> "In many cases, the relationship between the plaintiff and the defendant is of a type which has already been judicially recognized as giving rise to a duty of care. In such cases, precedent determines the question of duty of care and it is unnecessary to undertake a full-fledged duty of care analysis. As stated by A. M. Linden and B. Feldthusen, categories of relationships that have been recognized and relationships analogous to such pre-established categories need not be tested by the Anns formula: Canadian Tort Law (8th ed. 2006), at p. 302; *Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 S.C.R. 537, 2001 SCC 79, at paras. 35-36.
>
> *Mustapha, supra* at para 5. See also para 4
> *Cooper,* supra at para 36
> *Brown v. Canada (Attorney General),* [2013] OJ No 4381 (SCJ) at para 54

70. In *Cooper,* the Supreme Court summarized the then existing categories of negligence as follows:

> "What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. This has been extended to nervous shock (see, for example, Alcock v. Chief Constable of the South Yorkshire Police, [1991] 4 All E.R. 907 (H.L.)). Yet other categories are liability for negligent misstatement: Hedley Byrne & Co. v. Heller & Partners Ltd., [1963] 2 All E.R. 575 (H.L.), and misfeasance in public office. A duty to warn of the risk of danger has been recognized: Rivtow Marine Ltd. v. Washington Iron Works, 1973 CanLII 6 (SCC), [1974] S.C.R. 1189. Again, a municipality has been held to owe a duty to prospective purchasers of real estate to inspect housing developments without negligence: Anns, supra; Kamloops, supra.
>
> Similarly, governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner: Just v. British Columbia, 1989 CanLII 16 (SCC), [1989] 2 S.C.R. 1228, Swinamer v. Nova Scotia (Attorney General), 1994 CanLII 122 (SCC), [1994] 1 S.C.R. 445, etc. Relational economic loss (related to a contract's performance) may give rise to a tort duty of care in certain situations, as where the claimant has a possessory or proprietary interest in the property, the general average cases, and cases where the relationship between the claimant and the property owner constitutes a joint venture: Norsk, supra; Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., 1997 CanLII 307 (SCC), [1997] 3 S.C.R. 1210. When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a prima facie duty of care may be posited."
>
> *Cooper supra* at para. 36

71. In this case a full *Anns* analysis is not necessary. The Plaintiff's claim falls into or is analogous to the first category of negligence identified in *Cooper,* namely cases where the defendant's conduct causes harm to a person or their property. Alternatively, the plaintiff's claim falls into the category of cases, or is analogous to cases, allowing recovery for dangerous defective goods (or for goods that expose someone to a risk of harm).

> See: *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 2002 CanLII 45051 (ON CA)
> *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, 1992 CanLII 105 (SCC)
> *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, 1995 CanLII 146 (SCC)

72. In addition to the foregoing, the Plaintiff alleges that the Defendant breached a duty to warn Class Members. As set out above, the Plaintiff alleges that the Defendant was warned by an employee regarding its use of unlawful pesticides in October 2014. If that warning had been heeded, the Class Members may never have been exposed to the Recalled Products and the Recall may not have been necessary.

> *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210, 1997 CanLII 307 (SCC) at paras. 22-23, 38-39 & 61

73. The duty to warn issue in this case is similar to the duty to warn issue in *1688782 Ontario Inc. v Maple Leaf Foods Inc.,* 2016 ONSC 4233 (CanLII), a class action arising from sandwich meats tainted with listeriosis. In finding the duty to warn issue met the 5(1)(a) requirement Justice Leitch stated:

> In relation to the related duty to warn when a manufacturer is aware that its product has become dangerous, while the defendants acknowledge a manufacturer has a duty to warn consumers of dangers inherent in the use of its product (see *Hollis v. Dow Corning Corp.*, 1995 CanLII 55 (SCC), [1995] 4 S.C.R. 634), it asserts the plaintiff was not a consumer, the RTE meats were not inherently dangerous and imposing a duty to warn would have little, if any, impact on the harm suffered by the plaintiff and the class it represents.
>
> [...]

> In my view it is not plain and obvious that these circumstances are not analogous to those before the court in *Rivtow*. On the other hand, I note also that these circumstances are distinct from those in *Sauer v. Canada (Attorney General)*, 2007 ONCA 454 (CanLII) where the Court of Appeal upheld the dismissal of the plaintiff's claim for breach of duty to warn on the basis that the plaintiff was not a purchaser nor a user of the defendant's product and therefore, a warning would not have had an impact on the plaintiff's conduct. As the plaintiff suggests, early warnings could have avoided the listeriosis outbreak and the harm suffered by the plaintiff and the class it represents. The recall might not have been necessary and alternate suppliers could have been accessed while the defendants investigated and remediated the issue at their plant.
>
> *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2016 ONSC 4233 (CanLII) at para. 41.

Unjust Enrichment

74. The Supreme Court set out the essential elements to establish a claim for unjust enrichment in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (CanLII) at paragraph 30. The plaintiff must show that:

    a. the defendant was enriched;

    b. there was a corresponding deprivation to the plaintiff; and

    c. there was no juristic reason for the enrichment.

> See also: *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (CanLII) at para. 257
> *Pro-Sys supra* at paras. 85-89
> *Kalra* at para 20.

75. The Class Members' claim for unjust enrichment is particularized and properly pleaded at paragraph 66 of the Claim. In short, the Plaintiff alleges that Mettrum was enriched by receiving payment from the Class Members, that the Class Members suffered a corresponding deprivation and that there was no juristic reason for Mettrum's enrichment.

5(1)(b) - Class Definition & Class Size

76. The class definition serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify

those persons bound by the result of the action; and (3) it describes who is entitled to notice.

Additional requirements of, and principles applicable to, the class definition include:

a. The class must be bounded in the sense that it is not unlimited;

b. The class definition must be objective and not merits-based;

c. The class must not be unnecessarily broad nor arbitrarily under-inclusive; and,

d. Class members need not have identical claims and it need not be shown that each class member would be successful in establishing a claim for one or more remedies.

> *Bennett* supra at para. 53;
> *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
> *Hollick* at para. 17.
> *Cloud v. Canada* (2004), 73 O.R. (3d) 401 (C.A.), leave S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.) ("Cloud"), para.45.
> *1291079 Ontario Ltd.* at para.38.
> *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.), para.13.

77. The proposed class definition fits the requirements set out above. As set out above, the proposed class includes anyone who purchased the Recalled Products between September 2014 and November 2016. The Defendant has information on all Class Members.

> Claim at para. 31

5(1)(c) - Common Issues

78. The Plaintiff has established a basis in fact that her Claim discloses common issues that will materially and significantly advance the claims of the Class Members.

79. As held by the Court of Appeal in *Cloud*, the common issue criterion presents a "low bar". An issue can be a common issue, even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class.

Cloud at para.52.
1291079 Ontario Ltd. at paras.45(b & f), and 47.
Dean at para.80.

80. The answer to a question raised by a common issue must be capable of extrapolation, in the same manner, to each member of the class. Whether an issue is common to a class does not depend on whether it falls on the plaintiffs' or the defendants' "side of the forensic ledger", but rather on whether it would involve findings of fact (or law) that can be generalized across the class or extrapolated from one class member to the others.

O'Brien v. Bard Canada, 2015 ONSC 2470 at para.131.
1291079 Ontario Ltd. at para.45(g).

81. The Plaintiff discusses her proposed common issues in turn below. For the sake of simplicity, the following analysis of the common issues is grouped thematically as opposed to the order in which the issues appear in the Plaintiff's Notice of Motion.

Breach of Contract

82. Common Issue 1 "Breach of Contract" reads as follows:

a. *What are the terms (express or implied or otherwise) of the Class Members' contracts regarding their purchase of the Recalled Products from the Defendant?*

b. *Did the Defendant breach any of the contractual terms? If so, how?*

83. Claims alleging a breach of a common or uniform contract are among the most straight-forward to certify. Common Issue 1 enquires into the relevant terms of the Class Members' contracts with Mettrum and ask whether and how those contracts were breached by the Defendant. Common issues that turn on the interpretation of standard form contractual provisions are well suited to certification and are consistently certified.

Fairview Donut Inc. v. The TDL Group Corp., [2012] O.J. No. 834 (S.C.J.)
at paras. 237 and 239

Wright v. United Parcel Service Canada Ltd., [2011] O.J. No. 3936 (S.C.J.), leave to appeal granted [2012] O.J. No. 2705 (Div. Ct.),
Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd., [2011] O.J. No. 3746 (S.C.J.), leave to appeal ref'd [2012] O.J. No. 143 (Div. Ct.)
Wilkins v. Rogers Communications Inc., [2008] O.J. No. 4381 (S.C.J.),
Hickey-Button v. Loyalist College of Applied Arts & Technology, [2006] O.J. No. 2393 (C.A.)
1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada, [2002] O.J. No. 4781 (S.C.J.), aff'd at [2004] O.J. No. 865 (Div. Ct.)
Despault v. King West Village Lofts Ltd., [2001] O.J. No. 2933 (S.C.J.)
Lau v. Bayview Landmark Inc., [1999] O.J. No. 4060 (S.C.J.)

84. In *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.*, an action which turned on the interpretation of provisions contained in 70 standard form franchise agreements, Winkler J. (as he then was) held:

> "This is a contract interpretation case. There is a core of commonality to the claims in that they all stem from the interpretation and effect to be given to para. 11 of the Franchise Agreements."

*1176560 Ontario Ltd. v. Great Atlantic (*S.C.J.), supra at para. 51

85. Likewise, in *Lau v. Bayview Landmark Inc.*, Winkler J. (as he then was) certified a class action arising out of a dispute as to the proper interpretation of an agreement of purchase and sale, finding that the proper interpretation of the disputed terms would "apply to all of the proposed class" and that this "would in and of itself materially advance [the] litigation."

Lau v. Bayview Landmark, supra at para. 49

86. The Plaintiff has provided a factual basis that all of the Class Members are subject to uniform contracts with the Defendant. All of the Class Members filled out the same application and order forms when purchasing their products from the Defendant. The Defendant has acknowledged, as should be obvious, that each Class Member had a contract with Mettrum. The question whether the contracts included a term that the Products were

produced in accordance with the law (ie. the statutes/regulations relating to pesticides) and were legally available for sale is clearly common to all Class Members. Cast on a more general level, questions regarding the potential illegality of the contracts arising from the Defendant's use of unlawful pesticides are common to all Class Members. There is little doubt that determining the relevant contractual terms and determining whether the Defendant breached those terms would significantly advance the claims of the Class Members.

Christiansen Affidavit at para. 5 & Exhibit B
Henderson Cross at q. 56

Sale of Goods Act

87. Common Issue 2 "Breach of the Sale of Goods Act & Equivalent Sale of Goods Statutes" reads as follows:

    a. *Pursuant to section 15 of the Sale of Goods Act (and the Equivalent Sale of Goods Statutes) did the Defendant (expressly or by implication) warrant to the Class Members that the Recalled Products were reasonably fit or safe for human consumption and the Recalled Products complied with or exceeded the relevant Health Canada regulations regarding the production, testing and sale of medical marijuana, and that the Recalled Products were of merchantable and/or acceptable quality?*

    b. *Did the Defendant breach the foregoing warranty(ies)? If so, how?*

88. The Plaintiff has established a basis in fact for the proposed *Sale of Goods Act* Common issue. By definition, the Class only includes person who purchased recalled marijuana from Mettrum. Class Members are "buyers" and Mettrum is a "seller" within the meaning of the Act. As set out above, Mettrum made a number of claims to the effect that its products met all relevant Health Canada Regulations and were safe.

Sale of Goods Act R.S.O. 1991, c.S, section 1.
Christiansen Affidavit at para. 7

Wicklund Affidavit at para. 5

89. A number of Courts have certified similar *Sale of Goods Act* common issues regarding alleged breaches of an implied warranty of fitness for use.

Bennett v. Lenovo (Canada) Inc., 2017 ONSC 5853 (CanLII) at paras 76 & 83

Negligent Misrepresentation

90. Common Issue 3 "Negligent Misrepresentation" reads as follows:

a. *Is the Defendant in a special relationship with the Class Members?*

b. *Did the Defendant make the Representations (expressly, impliedly, by omission or otherwise) regarding the safety, regulatory compliance, or its ability to lawfully sell the Recalled Products?*

c. *Were any of the Representations false or otherwise misleading?*

d. *Did the Defendant act negligently in making any of the foregoing Representations?*

e. *In the circumstances of this case, can the reliance of the Class Members on the Representations be inferred?*

91. Issues (a), (b), (c) and (d) focus on the Defendant and will not involve individual or non-common issues for each Class Member. Issue (e) above focusses on the nature of the Products, the relevant regulations, the Defendant's acknowledgement and knowledge that people relied on it for safe/legal products, and what is surely natural in the circumstances – it is not directed at canvassing individual Class members. The resolution of all of those issues will fundamentally advance the case.

92. The Class Members' claims for negligent misrepresentation are based on the uniform representations described above or based on the common omission by the Defendant to state that the Products were not legally produced or legally available for sale. Courts have often certified, as is the case here, claims for misrepresentation arising from a single

representation, a uniform set of representations, or a number of separate representations "all having had a common import".

> *Fantl v. Transamerica Life*, 2016 ONCA 633 (CanLII) at paras. 19-21 & 37-42
> *Cannon v. Funds for Canada*, [2012] O.J. No. 168 (S.C.J.), paras. 340 & 350-351
> *Ramdath v. George Brown College*, [2010] O.J. No. 1411 (S.C.J.) at para. 103
> *Carom v. Bre-X Minerals Ltd.*, [2000] O.J. No. 4014 (C.A.), leave to appeal dismissed [2000] S.C.C.A. No. 660 (S.C.C.)
> *CIBC v. Deloitte & Touche*, [2003] O.J. No. 2069 (Div. Ct.)
> *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 (S.C.J.), supplementary reasons provided at [2006] O.J. No. 1061 (S.C.J.)
> *Hickey-Button*, supra,
> *Murphy v. BDO Dunwoody*, [2006] O.J. No. 2729 (S.C.J.)
> *Ottawa Police Association v. Ottawa Police Services Board*, 2011 ONSC 7214 (CanLII)at paras. 45-47 & 61-65

93. In such cases, courts have held that the need to prove individual reliance is not a bar to certification because resolution of the commonly determinable issues will significantly advance the litigation.

> *Hickey-Button, supra* at paras. 42-45 and 53
> *Carom v. Bre-X Minerals Ltd.*, supra at paras. 42 and 49
> *Lewis v. Cantertrot Investments Ltd.*, supra at para. 20

94. Moreover, courts have further held that in some cases it may be, as the Plaintiff submits is the case here, possible to infer the Class Members' reliance based on the fundamental nature of the representation. In *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (CanLII), Justice Strathy J. concluded that in a negligent misrepresentation case, it is possible to infer individual reliance from the surrounding circumstances. According to Justice Strathy in *Cannon* at paragraph 341:

> "This is also a case in which it may be possible to infer that each donor relied on the representation. The entire purpose of the elaborate structure was to achieve the ramped-up tax deduction. It can reasonably be inferred that taxpayers did not participate in the Gift Program only because they wanted to make a gift to the underlying charity. They did so due to the representation that they would receive an enhanced tax deduction."

See also: *Silver v. Imax Corp.*, [2009] O.J. No. 5585 at para. 190
Dugal v. Manulife Financial Corp., [2013] O.J. No. 3455, at para. 93
Green v. CIBC, 2014 ONCA 90 (CanLII), [2014] O.J. No. 419, at para. 100

95. In this case, the Plaintiff submits that the Defendant's representations can be boiled down to a core representation by Mettrum that it was offering legal and safe medical marijuana that met or exceeded the regulatory safety requirements. That representation was fundamental to Mettrum's business and permeated its communications and interactions with the Class Members. As set out above, the Defendant's CEO, Bruce Linton, has already admitted that the Class Members' reliance on a Mettrum as a trustworthy source for quality products, as follows:

> "You [i.e. Class Members] chose Mettrum because you want quality products from a source you can trust."
>
> Supplemental Markovic Affidavit at para. 2 & Ex. A

96. The issue of inferred reliance was accepted as a common issue in *Kalra*. In that case, Justice Belobaba found it beyond dispute that consumers minimally expected a defendant's product (automobile in that case) to comply with relevant laws even if each Class member did not actually see such a representation. According to Justice Belobaba at paragraph 59:

> The duty and breach sub-questions can obviously be answered on a class-wide basis. So can the inferred reliance sub-question. It cannot be disputed that every BlueTEC purchaser reasonably expected, at a minimum, that the vehicle complied with federal emission standards and could lawfully be driven on Canadian roads regardless of the air temperature. There is therefore some basis in fact for inferring reliance on a class-wide basis even without having evidence that the very same representation in the Express Warranty was seen and read by every class member.
>
> See also: *Hercules Managements Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC) at para. 42

97. The Plaintiff submits that the fundamental importance that the Defendant's core Representations puts this case in the category of actions where the Class Members' reliance

can be inferred. There is certainly some basis in fact that such a question is an appropriate common issue.

98. It should also be noted that Class Members do not need to prove that a particular representation was the sole representation or animating factor that induced them to purchase the Recalled Products.

> *NBD Bank, Canada v Dofasco Inc*, [1999] OJ No. 4749 (CA) (citing the BCCA decision in *Kripps v Touche Ross & Co*); leave to appeal to the Supreme Court of Canada refused [2000] SCCA No. 96, at para 78.
> *Fiorillo et al. v Krispy Kreme Doughnuts, Inc et al.*, [2009] 98 O.R. (3d) 103 at 121 (SC).

99. Whether framed as common law misrepresentation or under the statutes discussed below (Consumer Protection Acts and Competition Act), determining whether the Defendant did in fact make misrepresentations or misleading statements (or make consistent omissions) will fundamentally advance the Class Members' claims in this action.

Breach of the Consumer Protection Act

100. Common Issue 6 "Consumer Protection Act & Equivalent Consumer Protection Act Breaches" reads as follows:

    a. *Did the Defendant breach part III of the Consumer Protection Act (or any of the Equivalent Consumer Protection Statutes) in relation its marketing and sale of the Recalled Products?*

    b. *If "yes", what remedy, if any, are the Class Members entitled to under the Consumer Protection Act (including, but not limited to, the statutory remedy of rescission)?*

    c. *Does the Class, or any portion thereof, require, and is it entitled to, a declaration waiving the notice provisions of section 18 of the Consumer Protection Act?*

101. As set out above, the *Consumer Protection Act, 2002* prohibits "unfair practices", which include making false, misleading or deceptive representations. *The Consumer Protection*

Act provides that any agreement entered into by a consumer after a person has engaged in an unfair practice may be rescinded and the consumer is entitled to damages. Where rescission is not possible, the consumer is entitled to recover the amount by which the consumer's costs of the goods or services exceeds the value of the goods or services to the consumer as well as damages. The Court may award exemplary or punitive damages in addition to any other remedy.

Consumer Protection Act, 2002 SO, 2002, c. 30 s. 14, 15, 17 & 18

102. The determination of whether a representation is false, misleading or deceptive can be made on an objective basis. Moreover, as confirmed by the Court of Appeal, a consumer invoking section 18 of the *Consumer Protection Act, 2002* does not have to establish that he or she relied on the representation or was induced to enter the contract based on the representation.

Ramdath v. George Brown College of Applied Arts and Technology, 2013 ONCA 468 (CanLII), at para 15

103. The proposed *Consumer Protection Act* common issues proposed in this case are substantially similar to issues certified by Justice Hoy (as she then was) in *Matoni v. C.B.S.*, by Justice Strathy as (he then was) in *Ramdath.* As in those cases, the *Consumer Protection Act* common issue, asking whether the Defendant breached the statute by engaging in unfair practices, raises common issues of fact and law. Interestingly, the trial decision and the appeal therefrom in *Ramdath* demonstrate how such an issue can be resolved effectively subsequently on the merits at trial.

Matoni v. C.B.S. Interactive Multimedia Inc. (Canadian Business College), 2008 CanLII 1539 (ON SC)at paras. 143-15

Ramdath v. George Brown College, 2010 ONSC 2019 (CanLII) at paras. 109 & 110- and see trial decision appeal 2013 ONCA 468 (CanLII)

104. As to damages under the *Consumer Protection Act,* it is noteworthy that there was or should have been no real market value or residual market value to the Recalled Products. The marijuana in question could not lawfully have been sold, there is no market for or value to unlawful and/or contaminated marijuana, and the Class Members in particular would not have paid for contaminated marijuana. If Class Members had known the truth, they could and would have purchased lawful, non-contaminated marijuana from other suppliers (who would purchase a medical product treated with unlawful pesticides?. Mettrum itself destroyed the contaminated product it still had in its possession (it had no market or salvage value). If the use of the unauthorized pesticide was discovered before the sale of the products in question, all of the products would have been destroyed and Mettrum would not have received any payments from consumers for those products. The Class Members should be entitled to be reimbursed for the costs associated with acquiring the Recalled Products.

105. As set out above, the Plaintiff seeks to certify the Consumer Protection Act common issue for Class Members outside of Ontario that are subject to effectively equivalent consumer protection legislation. National classes have been approved for consumer protection claims in a number of cases where the liability of the defendant will have to be determined under the consumer protection legislation of the province in which the class member resides.

Cannon v. Funds for Canada Foundation, 2012 ONSC 399 (CanLII) at para. 334;
Barwin v. IKO Industries Ltd., 2013 ONSC 3054 (CanLII) at para. 52.
Wellman and Corless v. TELUS and Bell, 2014 ONSC 3318 (CanLII) at para. 44

Breach of the Competition Act

106. Common Issue 5 "Breach of the Competition Act" reads as follows:

a. *Did the Defendant breach section 52 of the Competition Act in the course of advertising, marketing or promoting the Recalled Products to the Class Members?*

b. *If "yes" what remedy or remedies or damages, if any, are the Class Members entitled to under the Competition Act?*

107. As set out above, the Plaintiff's *Competition Act* claim (a false or misleading representation) is similar to her common law misrepresentation claim. The Plaintiff relies on the same basis in fact for both claims. As such, it is appropriate to certify the proposed *Competition Act* common issue as well as common law misrepresentation.

Kalra supra at para. 55
Bondy v. Toshiba of Canada Limited, 2007 CanLII 6238 (ON SC) at para 47

Negligence

108. Common Issue 4 "Negligence" reads as follows:

a. *Did the Defendant owe the Class Members a duty of care regarding the cultivation, production, testing, processing, manufacture, distribution, advertising, marketing, promotion and sale of the Recalled Products? Did the Defendant owe the Class Members a duty to warn?*

b. *If "yes", what is the content of the duty of care?*

c. *Did the Defendant breach the foregoing standard of care? If so, how?*

109. The proposed negligence common issue enquires into whether the Defendant owed the Class Members a duty of care as well as whether and how that duty of care was breached. Negligence has been certified in numerous cases where the common issues analysis was considerably more complex than the facts of this case.

Cloud v. Canada (Attorney General), 2004 CanLII 45444 (ON CA) at paras 69-70

110. The fact-finding and legal analysis involved in resolving the negligence common issue can be extrapolated across the class. In this case, the inquiry will be into the conduct and processes of the Defendant at a limited number of facilities over a fixed period of time.

111. Although not necessary to demonstrate evidence of breach on this procedural motion, it is interesting to recall that the Defendant seems to have admitted that its processes were in need of improvement (as noted above). There will also likely be evidence that the purported use of myclobutanil was reported as early as 2014 and that steps could (and should) have been taken at that time to investigate and test the plants/soil at that time to avoid the Recalls. In the same vein, Mettrum has already admitted to breaching the pesticide regulations under the ACMPR. As found by the Supreme Court in *Saskatchewan Wheat Pool*, while breach of a statutory duty does not constitute negligence *per se*, proof of a statutory breach may be evidence of negligence and the statutory formulation of the duty may afford a specific and useful standard of reasonable conduct.

> *The Queen (Can.) v. Saskatchewan Wheat Pool,* 1983 CanLII 21 (SCC) at pg. 227

Unjust Enrichment

112. Common Issue 7 "Unjust Enrichment" reads as follows:

    a. *Was the Defendant enriched by, among other things, failing to pay refunds to Class Members in respect of the Recalled Products?*

    b. *If the answer to common issue 7(a) is "yes":*

    c. *Did the Class suffer a corresponding deprivation?*

    d. *Was there no juristic reason for the enrichment?*

113. Common issue 7 enquires into whether Mettrum was unjustly enriched by not refunding the Class Members' money for products it was not legally permitted to sell. Unjust enrichment focuses on the conduct of the defendant and not of the class members. As such, it is often clearly found to satisfy the 5(1)(c) requirement – as it should in this case. According to then Chief Justice Winkler in *Fulawka* at paragraph 106:

> "The proposed common issue concerning whether Scotiabank was unjustly enriched by failing to appropriately compensate class members for all hours worked raises issues of fact and law that relate to all members of the class. As pointed [page377] out by the courts below, there is ample authority establishing that unjust enrichment can constitute a common issue: see Smith v. National Money Mart Co., [2007] O.J. No. 46, 37 C.P.C. (6th) 171 (S.C.J.), leave to appeal refused [2007] O.J. No. 2160, 30 E.T.R. (3d) 163 (Div. Ct.); McCutcheon v. The Cash Store Inc. (2006), 2006 CanLII 15754 (ON SC), 80 O.R. (3d) 644, [2006] O.J. No. 1860 (S.C.J.)."

Remedies

114. Common Issue 8 "Remedies" reads as follows:

a. *Subject to further order of the Common Issues Trial Judge, if the answer to any of common issues 1-7 is "yes", and the Defendant's liability (or potential liability) to the Class Members (or any part of the Class) is established, what remedies are the Class Members (or any part of the Class) entitled to?*

b. *If the Class Members are entitled to an award of monetary damages:*

   i. *Can damages (or a common minimum portion thereof) be assessed on an aggregate basis for all or part of the Class?*
   ii. *What is the quantum of aggregate damages owed to Class Members or any part thereof?*
   iii. *What is the appropriate method or procedure for distributing the aggregate damages award to Class Members?*

c. *Is the Class entitled to an award of aggravated, exemplary or punitive damages based upon the Defendant's conduct? If "yes",*
   i. *Can these damages awards be determined on an aggregate basis?*
   ii. *What is the appropriate method or procedure for distributing any aggregate aggravated, exemplary or punitive damages to Class Members?*

115. Common Issue 8 asks what remedies the Class Members are entitled to if the common issues are answered in their favour. That common issue would, among other things, implicitly ask the trial judge to consider the remedies of waiver of tort, an accounting and other restitutionary remedy for disgorgement as pleaded in paragraphs 67 and 68 of the Claim. If necessary, common issue 8 could be clarified to expressly ask if the Class

Members are entitled to any remedy in waiver of tort, an accounting or other restitutionary remedy for disgorgement.

Aggregate Assessment

116. To certify a common issue about aggregate damages, a plaintiff must show that it is reasonably likely that the pre-conditions in s. 23 (1) of the CPA can be satisfied. Section 24 (1)(c) sets out the condition that the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

> *Fulawka v. Bank of Nova Scotia,* [2012] ONCA 443 at paras. 111 and 141;
> *Bernstein* supra at paras. 110-115

117. If the common issues trial or summary judgment judge finds that in favour of the class members, the total quantum of damages can be readily determined by the defendant by simply reviewing its corporate records and determining the price paid by the Class Members (and then adding the relevant taxes and average shipping charges). There is no need for any proof by individual class members as to the value of their claims and an aggregate assessment seems likely.

118. Even if there was some residual value to the Recalled Products (which is denied – how can an illegal product that cannot be sold or consumed have any residual value?), our courts have determined such a value commonly and deducted such from Class Member overall damages. The onus of establishing any such residual value will fall at the feet of the Defendant. In that regard, Justice McEwen stated as follows in in *PCM Technologies Inc. v. O'Toole*, 2012 ONSC 2534 (CanLII):

> "Residual value may be considered where defective goods are delivered in breach of warranty. Generally, the *prima facie* measure of damages is the difference between the value the goods would have had if they were in accordance with the warranty, and their actual value. The supplier of the goods, however, may demonstrate that there is residual value in the goods such that damages should equal the purchase price minus any residual value. **The onus is on the defendant to prove what, if any, is the residual value of the defective goods**: *Massey-Harris Co. Ltd. v. Skelding*, 1934 CanLII 34 (SCC), [1934] S.C.R. 431; *Ford Motor Co. of Canada Ltd. v. Haley*, 1967 CanLII 72 (SCC), [1967] S.C.R. 437; *Evanchuk Transport Ltd. v. Canadian Trailmobile Ltd.*, [1971] A.J. No. 132 (C.A.); *Wojakowski v. Pembina Dodge Chrysler Ltd.*, [1976] 5 W.W.R. 97 (Man. Q.B.)"
> [Emphasis added]"

119. As noted above, in *Ramdath v. George Brown College,* the trial judge was able to make an aggregate assessment of damages in a class action against a college by determining the costs of the defective program paid by the Class Members (plus amounts for loss of income and delay of entry into the workforce) and then subtracting the residual value of the program.

> *Ramdath v George Brown College*, 2014 ONSC 3066 (CanLII), 15-20 & 24-27, 45-49 & 89 as affirmed by the Court of Appeal for Ontario in: *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 (CanLII) at para. 116

120. The Plaintiff's pleading of waiver of tort, an accounting and restitutionary remedies for disgorgement of revenues similarly justifies certifying a common issue in aggregate assessment. If the Defendant is found liable, these remedies will (on the same basis noted above) focus on the revenues that the Defendant received from the Class Members for Products that it was not lawfully entitled to sell and for which it then should never have received any revenues.

Punitive Damages

121. The Plaintiff seeks to a certify an issue as to whether the Defendant's conduct gives rise to a punitive damages award. It is appropriate to certify punitive damages as a common issue where the court will be in a position to consider the class members' entitlement to punitive damages by assessing the knowledge and conduct of the defendant as it relates to the class. In this instance, the Plaintiff has established a basis in fact for the proposed punitive damages issue. As set out above, there is some indication that:

    a. Mettrum's use of illegal pesticides was intentional;
    b. Mettrum ignored its employee's warnings in 2014 regarding the use of unlawful pesticides, or Mettrum failed to reasonably investigate (using video or otherwise) and test plants at the time; and,
    c. that it profited through its use of the unlawful pesticides.

    Rumley v. British Columbia, [2001] 3 SCR 184, 2001 SCC 69 (CanLII) at para. 34
    Hodge v. Neinstein, 2017 ONCA 494 (CanLII) at para 204

5(1)(d) - Preferability

122. A class proceeding is a preferable procedure where it presents a fair, efficient and manageable method of determining the common issues that arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of behaviour of wrongdoers.

    Pro-Sys supra at para. 137
    Hickey-Button v. Loyalist College of Applied Arts & Technology, 2006 CanLII 20079 (ON CA) at para. 54.
    Carom v. Bre-X Minerals Ltd., (1999), 44 O.R. (3d) 173 (S.C.J.), per Winkler J, at page 51.

123. The onus lies on a defendant to demonstrate that there is a better way to resolve the common issues then by way of a class proceeding. Where, as here, the Defendant leads no evidence of any alternate dispute resolution mechanism available other than the courts, arguments that no litigation is preferable to a class proceeding cannot be given effect.

> *1176560 Ontario Limited et al. v. the Great Atlantic and Pacific Company of Canada Limited*, (2002) 62 O.R. (3d) 535 (S.C.J.) per Winkler J., at para. 45, aff'd (2004) 70 O.R. (3d) 182 (Div. Ct.).

124. In *Fischer,* the Supreme Court emphasized that at its core, a certification motion is a comparative analysis between the proposed class proceeding and the alternative proceeding (if any) offered by the defendant.

> *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949 ("*Fischer*") at paras. 22-26.

125. In its earlier decision in *Hollick,* the Supreme Court held that a class action advances the goal of access to justice if (1) there are access to justice concerns that the class action could address, and (2) these concerns would remain were class members to advance their claims or interests via the available alternative procedures under consideration. In *Fischer*, the Court set out five analytical questions for conducting the foregoing two-part "access to justice" analysis: Those five overlapping questions are:

a. what are the barriers to access to justice?
b. what is the potential of the class proceeding to address those barriers
c. what are the alternatives to a class proceeding?
d. to what extent do the alternatives address the relevant barriers?
e. how do the two proceedings compare?

> *Fischer,* at paras. 27-38.

126. A proposed alternative preferable procedure must be a "serious" alternative to be considered by the Court. Vague assertions of proceeding through the joinder of claims or test case are insufficient to establish a genuinely preferable procedure to a class action. In

the unreported decision of *McCrea* v *The Attorney General of Canada,* Justice Kane held that:

> "If the defendant had a serious proposal it would have been preferable to have advanced it earlier and with specific details, rather than alluding to an alternative approach at the last minute. The proposal is too vague for the Court to consider the defendant's suggestion to stay the current action and allow a test case to proceed to the SST."
>
> *McCrea v. the Attorney General of Canada et al.*, T-210-12, May 7, 2015.

127. As set out above, there are several barriers preventing Class Members from accessing court system in this case. Certifying this action as class proceeding will overcome both the economic and non-economic barriers that limit the Class Members access to the court system as follows:

a. ***Access to Justice*** - Certifying this action will enhance access to justice on behalf of the class. The cost for a trial in this action could be as much as $500,000 or more. Without a class proceeding no individual Class Members should be expected to have the resources to prosecute an action of this size and complexity. In any event, and even if the cost of prosecuting a claim was less than $500,000 the cost of such an action against the Defendant would swamp the value of any individual claim.

> Christiansen Affidavit at para. 33
> Markovic Affidavit at para. 15

b. ***Judicial Economy*** – Certifying this action will enhance judicial economy. The only alternative to a class proceeding would be for each of the class members to launch individual proceedings. 20,000 individual proceedings are clearly less efficient than a single class proceeding.

c. ***Behaviour Modification*** - Certifying this action will advance the goal of behaviour modification by sending a message to this Defendant and to Canada's

rapidly developing marijuana industry that rules regarding safe production of marijuana must be followed and the rights of consumers respected.

Adequate Representative Plaintiff & Litigation Plan

128. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.

> *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853 (CanLII) at para. 94 & 96;
> *Drady v. Canada (Minister of Health)*, 2007 CanLII 27970 (ON SC), [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45
> *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).
> *Western Canadian Shopping Centres Inc. v. Dutton, supra* at para. 41.

129. Ms. Christiansen is an appropriate representative plaintiff who understands the duties of representative plaintiff and has no conflicts of interest with the other members of the class. Ms. Christiansen was motivated to bring this action by, among other things, her disappointment in the Defendant's use of illegal pesticides and its treatment of the Class Members. Ms. Christiansen does not understand how Mettrum can keep money to which it has admitted it was not entitled. Class Counsel have the necessary experience and resources to prosecute this action on behalf of the Class.

> Christiansen Affidavit at paras. 23-28, 37 & 38

130. Class Counsel have prepared a litigation plan for this proceeding setting out, among other things, procedures for the resolution of the common issues as well as any residual non-common and/or individual issues.

Christiansen Affidavit at para. 29
Christiansen Affidavit Exhibit J

131. There is no basis for the Defendant to challenge the adequacy of Ms. Christiansen to serve as representative plaintiff. Ms. Christiansen was not cross-examined.

PART IV: ORDER SOUGHT

132. The Plaintiff seeks an order certifying this action as a class proceeding with the costs of the motion fixed and made payable to the Plaintiff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 28, 2018

David F. O'Connor

J. Adam Dewar

Schedule "A" – Authorities

1. *1176560 Ontario Limited et al. v. the Great Atlantic and Pacific Company of Canada Limited*, (2002) 62 O.R. (3d) 535 (S.C.J.)
2. *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2016 ONSC 4233 (CanLII)
3. *AIC Limited v. Fischer*, [2013] 3 S.C.R. 949 (SCC)
4. *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.)
5. *Barwin v. IKO Industries Ltd.*, 2013 ONSC 3054 (CanLII)
6. *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853 (CanLII)
7. *Bernstein v. Peoples Trust Co.*, [2017] O.J. No. 545 (SCJ)
8. *Bondy v. Toshiba of Canada Limited*, 2007 CanLII 6238 (ON SC)
9. *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (CanLII)
10. *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 SCR 1210, 1997 CanLII 307 (SCC)
11. *Brown v. Canada (Attorney General)*, [2013] OJ No 4381 (SCJ)
12. *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
13. *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, 1992 CanLII 105 (SCC)
14. *Cannon v. Funds for Canada*, [2012] O.J. No. 168 (S.C.J.)
15. *Carom v. Bre-X Minerals Ltd.*, (1999), 44 O.R. (3d) 173 (S.C.J.)
16. *Carom v. Bre-X Minerals Ltd.*, [2000] O.J. No. 4014 (C.A.),
17. *CIBC v. Deloitte & Touche*, [2003] O.J. No. 2069 (Div. Ct.)
18. *Clarence Kloosterhof's Farm Services Ltd. v. Longley* [2000] N.S.J. No 260
19. *Cloud v. Canada (Attorney General)*, 2004 CanLII 45444 (ON CA)
20. *Cooper v. Hobart*, [2001] SCJ No 76 (SCC)
21. *Despault v. King West Village Lofts Ltd.*, [2001] O.J. No. 2933 (S.C.J.)

22. *Drady v. Canada (Minister of Health)*, 2007 CanLII 27970 (ON SC), [2007] O.J. No. 2812 (S.C.J.)

23. *Dugal v. Manulife Financial Corp.*, [2013] O.J. No. 3455 (ONSC)

24. *Fiorillo et al. v Krispy Kreme Doughnuts, Inc et al.*, [2009] 98 O.R. (3d) 103 (SC).

25. *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.)

26. *Edwards v. Law Society of Upper Canada*, SCJ No 77 (SCC)

27. *Fairview Donut Inc. v. The TDL Group Corp.*, [2012] O.J. No. 834 (S.C.J.)

28. *Fantl v. Transamerica Life*, 2016 ONCA 633 (CanLII)

29. *Fulawka v. Bank of Nova Scotia*, [2012] ONCA 443 (C.A.)

30. *Garland v. Consumers' Gas Co.*, 2004 SCC 25 (CanLII)

31. *Green v. CIBC*, 2014 ONCA 90 (CanLII), [2014] O.J. No. 419 (CA)

32. *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (S.C.J.)

33. *Hercules Managements Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC)

34. *Hickey-Button v. Loyalist College of Applied Arts & Technology*, 2006 CanLII 20079 (ON CA)

35. *Hodge v. Neinstein*, 2017 ONCA 494 (CanLII)

36. *Matoni v. C.B.S. Interactive Multimedia Inc.* (Canadian Business College), 2008 CanLII 1539 (ON SC)

37. *Hollick v. Toronto (City)* [2001] S.C.J. No. 67 (S.C.C.)

38. *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 2002 CanLII 45051 (ON CA)

39. *Kalra v Mercedes Benz*, 2017 ONSC 3795 (CanLII)

40. *Lau v. Bayview Landmark Inc.*, [1999] O.J. No. 4060 (S.C.J.)

41. *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 (S.C.J.)

42. *Magill v. Expedia Canada Corp.*, 2010 ONSC 5247, [2010] O.J. No. 4051 (S.C.J.)

43. *McCrea v. the Attorney General of Canada et al.*, T-210-12, May 7, 2015.

44. *Murphy v. BDO Dunwoody*, [2006] O.J. No. 2729 (S.C.J.)

45. *Mustapha v. Culligan of Canada Ltd.*, SCJ No 27 (SCC)

46. *NBD Bank, Canada v Dofasco Inc*, [1999] OJ No. 4749 (CA)

47. *O'Brien v. Bard Canada*, 2015 ONSC 2470 (SCJ)

48. *Ottawa Police Association v. Ottawa Police Services Board*, 2011 ONSC 7214 (CanLII)

49. *PCM Technologies Inc. v. O'Toole*, 2012 ONSC 2534 (CanLII)

50. *Pro-Sys Consulting Ltd. v. Microsoft Corp.*, 2013 SCC 57 (CanLII)

51. *Queen v. Cognos Inc.*, [1993] S.C.J. No. 3 (S.C.C.)

52. *The Queen (Can.) v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC)

53. *Ramdath v. George Brown College*, 2010 ONSC 2019 (CanLII)

54. *Ramdath v. George Brown College of Applied Arts and Technology*, 2013 ONCA 468 (CanLII)

55. *Ramdath v George Brown College*, 2014 ONSC 3066 (CanLII),

56. *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 (CanLII)

57. *Rumley v. British Columbia*, [2001] 3 SCR 184, 2001 SCC 69 (CanLII)

58. *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (ONSC)

59. *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, [2010] O.J. No. 113 (S.C.J.)

60. *Taub v. Manufacturers Life* (1998) 40 O.R. (3d) 379 (Gen. Div.).

61. *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*, [2011] O.J. No. 3746 (S.C.J.)

62. *Wellman and Corless* v. TELUS and Bell, 2014 ONSC 3318 (CanLII)

63. *Western Canadian Shopping Centres Inc. v. Dutton, supra*.

64. *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, 1995 CanLII 146 (SCC)

65. *Wild Rose Mills Ltd v. Ellison Milling Co.* [1985] B.C.J. No. 489

66. *Wright v. United Parcel Service Canada Ltd.*, [2011] O.J. No. 3936 (S.C.J.),

67. *Wilkins v. Rogers Communications Inc.*, [2008] O.J. No. 4381 (S.C.J.)

ERIN DAWN CHRISTIANSEN

Plaintiff/Moving Party

-and-

METTRUM LTD.

Defendant/Responding Party

Court File No. 820/17

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Oshawa

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