Further amended pursuant to Rule 6-1(5) and by consent pursuant to Rule 6-1(2)(ii)
Amended pursuant to the Order of Mr. Justice Branch dated October 24, 2023
Original filed February 28, 2020

No. S-199401
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

UTTRA KUMARI KRISHNAN

PLAINTIFF

AND:

JAMIESON LABORATORIES LTD., WN PHARMACEUTICALS LTD., NATURAL FACTORS NUTRITIONAL PRODUCTS LIMITED, SOBEYS CAPITAL INCORPORATED, REXALL/PHARMA PLUS PHARMACIES LTD., REXALL/PHARMA PLUS PHARMACIES (BC) LTD., REXALL PHARMACY GROUP LTD., MEDICINE SHOPPE CANADA INC., LOBLAW COMPANIES LIMITED, LOBLAWS INC., T&T SUPERMARKET INC., SHOPPERS DRUG MART CORPORATION, SHOPPERS DRUG MART INC., GEORGIA MAIN FOOD GROUP LTD., LONDON DRUGS LIMITED, BUY-LOW FOODS LIMITED PARTNERSHIP, BUY-LOW FOODS LTD., CHOICES MARKET LTD., SAVE-ON-FOODS LIMITED PARTNERSHIP, SAVE-ON-FOODS LTD., QUALITY FOODS LTD., PURE INTEGRATIVE PHARMACY, PHARMASAVE DRUGS LTD., PHARMASAVE DRUGS (NATIONAL) LTD., PHARMASAVE DRUGS (PACIFIC) LTD., PHARMACHOICE CANADA INC., COSTCO WHOLESALE CANADA LTD., AND WAL-MART CANADA CORP.

DEFENDANTS

RESPONSE TO ~~FURTHER~~ THIRD AMENDED NOTICE OF CIVIL CLAIM

Filed by: The Defendant, Jamieson Laboratories Ltd. ("Jamieson")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 - Defendant's Response to Facts

1. The facts alleged in paragraphs 1-5, 13-15, ~~11-13~~, 22, ~~20~~, 27, ~~25~~, ~~28-31,~~ 30-33, ~~34-36,~~ 36-38, ~~38-39,~~ 40-41, 43, ~~41~~, ~~44-45~~, 46-47, ~~48-50~~, 50-52, ~~54-56~~, 56-58, ~~58,~~ 60, 62, 64, 66, and 68-80 ~~66-78~~ of Part 1 of the ~~Further~~ Third Amended Notice of Civil Claim are denied.

2. The facts alleged in paragraphs 6-12~~10~~, ~~14-19,~~ 16-21, ~~21-24,~~ 23-26, ~~26-27,~~ 28-29, ~~32-33,~~ 34-35, 39, ~~37~~, 42, ~~40~~, ~~42-43,~~ 44-45, ~~46-47~~, 48-49, ~~51-53~~, 53-55, ~~57~~, 59, 61, 63, ~~and~~ 65, and

67 of Part 1 of the ~~Further~~ Third Amended Notice of Civil Claim are outside the knowledge of Jamieson.

Division 2 - Defendant's Version of Facts

Background about Jamieson

3. Jamieson is a corporation incorporated pursuant to the laws of Ontario with its registered head office located in Toronto, Ontario and is extra-provincially registered in British Columbia. Jamieson is principally engaged in the manufacturing, development, distribution, sales and marketing of branded and customer branded health products for humans including natural health products ("**NHPs**").

4. Jamieson products are sold primarily through various retailers.

5. Jamieson is one of Canada's most well-known and trusted brands of NHPs and has been dedicated to improving the health and wellness of Canadians since 1922 with an emphasis on product purity and commitment to quality.

6. Jamieson holds all required Health Canada site licenses, Canadian Food Inspection Agency certifications, and import licenses for all of its manufacturing and distribution centres.

7. Jamieson helped establish the Natural and Non-Prescription Health Products Directorate, the regulating authority for NHPs in Canada, and representatives from Jamieson continue to work closely with the Directorate on the development of policies to ensure Canadian NHPs are safe, effective, and of high quality.

8. Jamieson maintains a Scientific Advisory Board, with a mandate focused on innovation. Board members are experts or researchers in fields of science correlated to key product areas. The Board works with Jamieson's innovation team to generate proprietary ideas and provide insights on emerging products and areas for R&D, based on the latest scientific developments.

9. Jamieson has received numerous awards, most recently including Brandspark International's "Best New Product" awards in 2015, 2017, 2018, and 2019 and "Most Trusted by Canadians, Joint Care Supplements" in 2018.

10. Jamieson sells NHPs to many retailers and distributors in Canada, including several of the co-defendant retailers.

11. Jamieson and its affiliates also manufacture NHPs for other brands, offering comprehensive manufacturing and product development services on a contract manufacturing basis to select blue-chip consumer health companies and retailers worldwide.

Regulation of Natural Health Products

12. All NHPs sold in Canada, including Jamieson's products, are subject to the Natural Health Products Regulations (the "**NHP Regulations**"), SOR/2003-196, issued pursuant to the Food and Drugs Act, R.S.C., 1985, c. F-27.

13. Under the NHP Regulations, all NHPs sold in Canada must have a product licence.

14. To obtain a product license, applicants must give detailed information about the product to Health Canada, including the product's proposed medicinal ingredients.

15. For each medicinal ingredient used in the product, the licencing application must specify its proper name and common name, the quantity per dosage unit, its potency, a description of the source material, and whether or not the ingredient is synthetically manufactured.

16. Once Health Canada has assessed a product for safety, efficacy and quality, it issues a product license along with a Natural Product Number ("**NPN**") which Health Canada stipulates must appear on the label.

17. Jamieson's NHPs sold in Canada contain NPNs, signifying that Health Canada has approved the formulas and come to the conclusion that, under the specified conditions of use, the products are safe, effective, and comply with all applicable quality standards.

18. All NHPs must also meet specific labelling requirements mandated by Health Canada under the NHP Regulations, including compliance with monographs published by Health Canada which describe dosages and indications for NHPs.

18.1 Section 93 of the NHP Regulations requires that the labels for all NHPs include the "common name" for each medicinal ingredient that it contains. Pursuant to s. 10(2) of the *Food and Drugs Act*, "no person shall label, package, sell or advertise any substance in such a manner that it is likely to be mistaken for [a] drug, unless the substance complies" with a standard for the drug contained in Schedule B to the *Act*, including the U.S. Pharmacopoeia ("**USP**").

18.2 The USP sets quality, purity, strength, and identity standards for NHPs and other products through publication of documentary standards in the form of monographs, and develops reference standards for testing used by manufacturers, such as Jamieson, to test their products against USP's standards to ensure they meet published specifications. The USP referenced and adopted by Health Canada sets an internationally recognized standard for describing pharmacological ingredients.

18.3 The cumulative purpose of s. 93 of the NHP Regulations and s. 10(2) of the *Food and Drugs Act* is to permit a licensee to rely on internationally recognized standards, including USP, in labelling the medicinal ingredients in its NHPs.

19. The NHP Regulations also provide that every NHP shall be manufactured, packaged, labelled, imported, distributed and stored in accordance with Good Manufacturing Practices **("GMP")** requirements.

20. In 2015, Health Canada selected a variety of random NHP brands for testing in order to, among other things, verify that they were labelled and packaged properly and contained ingredients they were supposed to contain. As published on Health Canada's website, the Jamieson product selected for testing was found to be fully compliant with Health Canada's requirements.

Jamieson's Glucosamine Sulfate Products

21. Jamieson's NHPs include products that contain the medicinal ingredient known as "glucosamine sulfate," which is the common name for 2-amino-2-deoxy-D-glucose sulfate. At all material times, these products complied with the applicable USP reference standard for glucosamine sulfate. Pursuant to s. s. 93 of the NHP Regulations and s. 10(2) of the *Food and Drugs Act*, Jamieson is required, or alternatively permitted, to include "glucosamine sulfate" or alternatively "glucosamine sulfate potassium chloride" as the common name on its labels for products containing these medicinal ingredients.

22. Glucosamine sulfate is specifically approved by Health Canada as an NHP.

23. According to Health Canada's monograph with respect to glucosamine sulfate:

    (a) the ingredient's acceptable dosage forms include capsules, tablets, and powders;

    (b) specifications with respect to manufacturing the ingredient "may comply with the specifications outlined in the Glucosamine Tablets, Glucosamine Sulfate Potassium Chloride and Glucosamine Sulfate Sodium Chloride monographs published in the U.S. Pharmacopoeia"; and

    (c) permissible statements with respect to the ingredient's uses and purposes may include:

        (i) "helps protect against the deterioration of cartilage and relieve joint pain associated with osteoarthritis";

        (ii) "helps to relieve joint pain associated with osteoarthritis";

        (iii) "helps to relieve pain associated with osteoarthritis of the knee";

        (iv) "helps to protect against the deterioration of cartilage"; and

        (v) "a factor in maintaining good cartilage and/or joint health."

~~24. The U.S. Pharmacopoeia ("**USP**") referenced in Health Canada's monograph sets quality, purity, strength, and identity standards for NHPs and other products through publication of documentary standards in the form of monographs, and develops reference standards for testing used by manufacturers, such as Jamieson, to test their products against USP's standards to ensure they meet published specifications. The USP referenced and adopted by Health Canada sets an internationally recognized standard for describing pharmacological ingredients.~~

24. In formulating and manufacturing glucosamine sulfate-containing products, Jamieson:

(a) includes "glucosamine sulfate" as a specific ingredient in the products' formulas;

(b) sets out specifications for the ingredient;

(c) appropriately tests incoming "glucosamine sulfate" raw material to confirm it is glucosamine sulfate;

(d) appropriately tests incoming "glucosamine sulfate" raw material to confirm it meets Jamieson's specifications;

(e) utilizes the raw material to manufacture the finished products;

(f) appropriately tests the finished products to confirm the presence of "glucosamine sulfate";

(g) appropriately retains samples of finished products; and

(h) regularly has an independent third party audit its manufacturing processes.

25. At all material times, the manufacturing processes for Jamieson's products containing glucosamine sulfate were compliant with Health Canada's monograph with respect to that ingredient. This includes compliance with the USP specifications.

26. At all material times, the manufacturing processes for Jamieson's products containing glucosamine sulfate were compliant with Health Canada's GMP requirements, which specifically refer to the USP as an acceptable standard in ingredient identity testing.

27. At all material times, the labels for Jamieson's NHPs sold in Canada have been in compliance with all applicable Health Canada labelling requirements and have been true and accurate.

28. In specific response to paragraphs 2-5 of the Third Amended Notice of Civil Claim:

    (a) Health Canada requires, or alternatively permits, "glucosamine hydrochloride mixed with potassium sulfate" to be labelled as "glucosamine sulfate" if it complies with the applicable USP specifications for glucosamine sulfate";

    (b) there is no material difference in the pharmacological or physiological effect of "glucosamine sulfate bonded with potassium chloride or sodium chloride" in NHPs as compared with the effect of "glucosamine hydrochloride mixed with potassium sulfate", and thus "glucosamine hydrochloride mixed with potassium sulfate" is not "less effective" than "glucosamine sulfate bonded with potassium chloride or sodium chloride"; and

    (c) "glucosamine sulfate bonded with potassium chloride or sodium chloride" is not necessarily more expensive than "glucosamine hydrochloride mixed with potassium sulfate".

Division 3 - Additional Facts

29. On or about September 10, 2012, Subash Chandra Sahoo and others published an article in the journal *Crystal Growth & Design* entitled "Glucosamine Salts: Resolving Ambiguities over the Market-Based Compositions" (the "**Sahoo Article**"). The Sahoo Article revealed:

    (a) The authors were unsuccessful in repeated attempts to yield "true glucosamine sulfate" using published procedures. Their repeated attempts only yielded physical mixtures of glucosamine chloride and potassium sulfate;

(b) The authors' analysis of a commercially available sample of glucosamine sulfate, which they assumed was prepared following published procedures, also showed that it was a mixture of glucosamine chloride and potassium sulfate, not "glucosamine sulfate;

(c) The authors concluded that the "alleged 'stabilization' of glucosamine sulfate by formation of double/mixed salts is (in the chemical sense) misleading", and that those compounds have probably never been obtained and published procedures should be reinvestigated; and

(d) The authors predicted it was likely that the form of supplement provided to consumers was a mixture of glucosamine chloride and potassium sulfate.

30. Prior to August 2017, multiple proposed class actions were commenced in the United States alleging misrepresentation in the marketing and sale of glucosamine products, including glucosamine sulfate products.

31. By September 10, 2012, or in the alternative by no later than August 22, 2017, the Plaintiff, class members and or/counsel for the Plaintiff knew or reasonably ought to have known of all the material facts on which this claim is founded.

Part 2: RESPONSE TO RELIEF SOUGHT

32. Jamieson opposes the granting of the relief sought in paragraphs ~~79-90~~ 81-92 of Part 2 of the ~~Further~~ Third Amended Notice of Civil Claim.

33. Jamieson takes no position on the granting of relief sought in paragraph ~~91~~ 93 of Part 2 of the ~~Further~~ Third Amended Notice of Civil Claim, but denies that the Plaintiff or any member of the proposed class is entitled to any relief.

Part 3: LEGAL BASIS

34. The purported bases for the Plaintiff's legal claims are meritless for the following reasons, without limitation:

(a) Jamieson's products that are labeled as containing glucosamine sulfate do actually contain glucosamine sulfate, particularly as they are manufactured and labeled in compliance with Health Canada's monograph for the ingredient, including testing pursuant to USP specifications;

(b) Jamieson tested its products labeled as containing glucosamine sulfate in accordance with industry standards, including GMP requirements;

(c) in any event, the Plaintiff cannot show that Jamieson's products labeled as containing glucosamine sulfate actually contain "glucosamine hydrochloride mixed with potassium sulfate" and not glucosamine sulfate (*see, e.g.*, paragraph 5 of the ~~Further~~ Third Amended Notice of Civil Claim), including through any "Fourier-transform infrared spectroscopy" testing (*see, e.g.*, paragraph ~~69~~ 71 of the ~~Further~~ Third Amended Notice of Civil Claim); and

(d) even if Jamieson's products that are labeled as containing glucosamine sulfate actually contain "glucosamine hydrochloride mixed with potassium sulfate" rather than glucosamine sulfate, which is expressly denied:

~~(i) the nomenclature of the terms "glucosamine hydrochloride mixed with potassium sulfate" and "glucosamine sulfate" are generally recognized as interchangeable with respect to NHPs;~~

(i) ~~there is no material difference in the pharmacological or physiological effect of "glucosamine sulfate" in NHPs as compared with the effect of "glucosamine hydrochloride mixed with potassium sulfate", and thus "glucosamine sulfate" is not "less effective" than "glucosamine hydrochloride mixed with potassium sulfate", such that~~ the Plaintiff has not suffered any damage (*see, e.g.*, paragraph ~~69~~ 77 of the ~~Further~~ Third Amended Notice of Civil Claim); and

(ii) ~~"glucosamine sulfate" is not necessarily more expensive than "glucosamine hydrochloride mixed with potassium sulfate," and thus~~ the Plaintiff and any

purported members of the proposed class have not been harmed, and Jamieson has not been enriched.

Response to Plaintiff's Restitutionary and Breach of Contract Claims (Paragraphs ~~92-101~~ 94-103 of the ~~Further~~ Third Amended Notice of Civil Claim)

35. Jamieson denies that it entered into a sales contract with the Plaintiff, each member of the proposed class, or any of them, as alleged or at all. Jamieson does not have any contractual relationship with the Plaintiff or any member of the proposed class.

36. In the alternative, if Jamieson did enter into a contract with the Plaintiff, each member of the proposed class, or any of them, which is denied, Jamieson did not breach any such contract.

37. In the further alternative, if Jamieson did breach any contract with the Plaintiff, each member of the proposed class, or any of them, which is denied, the Plaintiff and the members of the proposed class have suffered no damages or deprivation as a result of the alleged breach.

Response to Plaintiff's Tort and Tort-Related Claims (Paragraphs ~~102-108~~ 104-110 of the ~~Further~~ Third Amended Notice of Civil Claim)

38. Jamieson did not owe a duty of care to the Plaintiff, members of the proposed class, or any of them, as alleged or at all.

39. In the alternative, if Jamieson did owe a duty of care to the Plaintiff, members of the proposed class, or any of them, which is denied, Jamieson did not breach that duty of care.

40. In the further alternative, if Jamieson did breach any duty of care owed to the Plaintiff, members of the proposed class, or any of them, which is denied, the Plaintiff and the members of the proposed class have suffered no reasonably foreseeable damage.

41. As Jamieson did not owe a duty of care to the Plaintiff, members of the proposed class, or any of them, as alleged or at all, there is no tortious conduct on the basis of which the

Plaintiff and the members of the proposed class could elect to waive the tort and seek to recover the benefits allegedly accrued by Jamieson.

42. In the alternative, if Jamieson did owe a duty of care to the Plaintiff, members of the proposed class, or any of them, which is denied, Jamieson did not breach that duty of care and, as such, there is no tortious conduct on the basis of which the Plaintiff and the members of the proposed class could elect to waive the tort and seek to recover the benefits allegedly accrued by Jamieson.

43. In the further alternative, if Jamieson did breach any duty of care owed to the Plaintiff, members of the proposed class, or any of them, which is denied, the Plaintiff and the members of the proposed class have suffered no foreseeable damage such that the Plaintiff, members of the proposed class, or any of them could elect to waive the tort and seek to recover the benefits allegedly accrued by Jamieson.

Response to Plaintiff's Statutory Claims (Paragraphs ~~109-138~~ 111-140 of the ~~Further~~ Third Amended Notice of Civil Claim)

44. Jamieson denies liability under sections 36 and 52 of the *Competition Act*.

45. Jamieson denies having knowingly or recklessly made a representation to the public, the Plaintiff and members of the proposed class that was false or misleading in a material respect, as alleged or at all.

46. In the alternative, the Plaintiff and members of the proposed class have not suffered any damage or loss that could be recoverable under s. 36 of the *Competition Act*, including because the Plaintiff and members of the proposed class did not rely on Jamieson's representation that its products contain "glucosamine sulfate" as referenced in the Notice of Civil Claim.

47. Jamieson denies the applicability of the statutes relied on by the Plaintiff in paragraphs ~~113~~ 114 through 140 of the Notice of Civil Claim. To the extent any such statutes are applicable, Jamieson denies liability under the statutes, and denies that the Plaintiff and

any members of the proposed class have suffered any damage or loss that could be recoverable.

47.1 In the alternative, the provincial statutes relied on by the Plaintiff in paragraphs 114 through 140 are inoperable due to an operational conflict or, in the alternative or the cumulative, because they frustrate the federal purpose of the applicable labelling provisions of the *Food and Drugs Act* and regulations enabled thereunder. The relevant federal statues require, or in the alternative or the cumulative expressly permit, Jamieson to label its products that comply with the relevant USP standard for glucosamine sulfate as containing "glucosamine sulfate" or alternatively "glucosamine sulfate potassium chloride". Pursuant to the doctrine of paramountcy those provincial statutes are inoperable to the extent they are inconsistent with the *Food and Drugs Act* and related regulations.

Response to Plaintiff's Claims for Aggravated and Punitive Damages (Paragraph ~~139~~ 141 of the ~~Further~~ Third Amended Notice of Civil Claim)

48. Jamieson denies that the Plaintiff or the proposed class have sustained any damages at all.

49. In the alternative, if the Plaintiff or the members of the proposed class have sustained any damages, which Jamieson denies, they do not rise to the level of entitlement to aggravated and punitive damages.

No Basis for Class Proceeding Under Class Proceedings Act, RSBC 1996, c 50

50. The claims of the Plaintiff and members of the proposed class do not in any event meet the conditions for certification under the *Class Proceedings Act*.

Claims are Barred by the Statutes of Limitations

51. The claims of the Plaintiff and members of the class were discoverable by September 10, 2012 or alternatively by August 22, 2017.

52. The claims of the Plaintiff and/or members of the proposed class, or portions thereof, are barred by the *Limitations Act*, S.B.C. 2012, c. 13 and equivalent statutes in other provinces. In particular:

(a) Tort and consumer protection claims of the Plaintiff and class members in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Nova Scotia which arose prior to August 23, 2017 are statute-barred pursuant to the *Limitation Act*, SBC 2012, c 13, s 6; *Limitations Act*, RSA 2000, c L-12, s 3; *Limitations Act*, SS 2004, c L-16.1, s 5; *Limitation Act*, CCSM, c L150, s 6; *Limitations Act*, SO 2002, c 24, s 4; *Limitation of Actions Act*, SNB 2009, c L-8.5, s 5; *Limitations Act*, SNL 1995, c L-16.1, s 5; and *Limitation of Actions Act*, SNS 2014, c 35, s 8(1)(a);

(b) Tort claims of class members in Prince Edward Island, the Yukon, the Northwest Territories and Nunavut which arose prior to August 23, 2013 are statute-barred pursuant to the *Statute of Limitations*, RSPEI, c S-7, s 2(g); *Limitation of Actions Act*, RSY 2002, c 139, s 2(j); *Limitation of Actions Act*, RSNWT 1988, c L-8, s 2(j); and *Limitation of Actions Act*, RSNWT (Nu) 1988, c L-8, s 2(j);

(c) Consumer protection claims of class members in Prince Edward Island, the Yukon, the Northwest Territories and Nunavut which arose prior to August 23, 2017 are statute-barred pursuant to the *Statute of Limitations*, RSPEI, c S-7, s 2(b); *Limitation of Actions Act*, RSY 2002, c 139, s 2(b); *Limitation of Actions Act*, RSNWT 1988, c L-8, s 2(b); and *Limitation of Actions Act*, RSNWT (Nu) 1988, c L-8, s 2(b); and

(d) Tort and consumer protection claims of class members in Quebec which arose prior to August 23, 2016 are statute-barred pursuant to the *Civil Code of Québec*, CQLR, c CCQ-1991, s 2925.

53. The claims of the Plaintiff and class members under the *Competition Act* which arose prior to August 23, 2017 are statute-barred under section 36(4) of the *Competition Act*.

Further amended pursuant to Rule 6-1(5) and by consent pursuant to Rule 6-1(2)(ii)
Amended pursuant to the Order of Mr. Justice Branch dated October 24, 2023
Original filed February 28, 2020

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Dated: ~~October 27, 2023~~ March 12, 2025

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Hunter Litigation Chambers
(Per: Claire E. Hunter, Q.C.)

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.