IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Krishnan v. Jamieson Laboratories Inc.,* 2021 BCSC 1396

Date: 20210716
Docket: S199401
Registry: Vancouver

Between:

Uttra Kumari Krishnan

Plaintiff

And

Jamieson Laboratories Inc., WN Pharmaceuticals Ltd., Natural Factors Nutritional Products Limited, Vita Health Products Inc., Sisu, Inc., 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

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

Corrected Judgment: Paragraphs 1, 2 and 143 of the judgment was corrected on July 23, 2021

Before: The Honourable Mr. Justice Branch

Reasons for Judgment on Certification

In Chambers

Counsel for the Plaintiff:	D. Jones J. Fung M. Mounteer A. Sunter P. Chiswell Y. Guo
Counsel for the Defendants, Jamieson Laboratories Inc.:	C. Hunter, QC K. Magyar W. O'Hara A. Morrish, AS
Counsel for the Defendants, WN Pharmaceuticals Ltd. and Natural Factors Nutritional Products Limited:	R. Hawkes, QC K. Ervin C. Stokes
Counsel for the Defendants, Vita Health Products Inc. and Sisu Inc.:	M. Eizenga J. Blinick
Place and Date of Trial:	Vancouver, B.C. April 21-23, 2021
Place and Date of Judgment:	Vancouver, B.C. July 16, 2021

Table of Contents

I. INTRODUCTION

[1] Sometimes a consumer will make a purchase, but not receive what they ordered.

[2] The plaintiff complains that she was sold a health product that did not contain what it said on the bottle. She seeks certification under s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] so she can advance a class action against the manufacturers of the product.

II. THE FACTS

A. The Plaintiff

[3] The plaintiff suffered from joint pain. On the recommendation of a pharmacist, she first purchased glucosamine sulphate ("GS") from Shoppers Drug Mart in 2009.

[4] From 2009 to 2019, the plaintiff periodically purchased the same supplement from Shoppers Drug Mart, London Drugs, and possibly other retail outlets. The supplement she purchased was a "Webber Naturals" branded product. It does not say GS on the front of the label. Rather, it says "Glucosamine Chondroitin". However, the listed ingredients include GS.

[5] The plaintiff alleges that the defendant manufacturers, being Jamieson Pharmaceuticals Ltd. ("Jamieson"), WN Pharmaceuticals Ltd. ("WN") and Natural Factors Nutritional Products Limited ("Natural Factors"), (collectively the "Defendant Manufacturers") manufactured supplements labelled as containing GS ("GS Products") when, in reality, the products did not contain GS. The plaintiff admits that she does not know for certain what <u>is</u> in the bottles, but argues that what is important is that it was <u>not</u> GS. The plaintiff says she would not have purchased the supplements if she had known that the bottles contained a product different from that indicated on the label.

[6] The plaintiff is the mother of a non-lawyer employee of one of the proposed class counsel firms, Camp Fiorante Matthews Mogerman. Her daughter performs

administration and accounting services, but the plaintiff confirms that her daughter will not receive any financial benefit from her mother's involvement in this action.

B. The Class

[7] The proposed class is all residents of Canada who, on or after May 6, 2004, purchased a product labelled as containing:

1. "glucosamine sulfate";
2. "glucosamine sulfate potassium chloride";
3. "glucosamine sulfate KCL"; or
4. "glucosamine sulfate ● KCL".

For purposes that were primarily personal, family, or household, that was manufactured by one or more of the Defendant Manufacturers.

[8] To establish that there are at least two persons in the class, the plaintiff also tendered evidence from proposed class member John Bosnyak. Mr. Bosnyak is a resident of Alberta and the plaintiff in a parallel class action in Alberta under Queen's Bench Action Number 1801-18259 (the "Alberta Action"). The Alberta Action is presently subject to a standstill agreement. Mr. Bosnyak intends to advance his claim as part of this British Columbia action if the claim is certified.

[9] Mr. Bosnyak began purchasing a product labelled "Glucosamine Sulfate" in approximately 2008-2010. He predominately purchased the "Kirkland Signature" brand manufactured by WN. Like the plaintiff, he states he would not have purchased the GS Product if he had known that the bottles contained a different product than was indicated on the label.

[10] Neither the plaintiff nor Mr. Bosnyak depose that they purchased any product manufactured by Jamieson.

C. The Defendants

[11] On this application, the plaintiff only seeks to certify the claim against the defendants WN, Natural Factors and Jamieson. The plaintiff has entered into a settlement agreement with Vita Health Products Inc. ("Vita Health") and Sisu Inc. ("Sisu"). I issued an order approving this settlement on June 1, 2021.

[12] The plaintiff also does not seek to certify the case against the defendant pharmacies and retailers (the "Defendant Retailers") at this time, and those claims are also the subject of a standstill agreement.

[13] The plaintiff pleads that the GS Products produced by the Defendant Manufacturers purports to be a stabilized form of GS in the form of a single chemical substance or single molecule. However, the plaintiff alleges that the GS Products' labels are untrue. Rather the GS Products sold do not contain GS and are instead a mixture of separate substances — possibly glucosamine hydrochloride and potassium sulfate.

D. The Regulatory Framework

[14] A manufacturer must obtain a product license to sell a natural health product ("NHP") such as GS: *Natural Health Products Regulations*, SOR/2003-196 [*NHP Regulations*] issued pursuant to the *Food and Drugs Act*, R.S.C. 1985, c. F-27. Under the *NHP Regulations,* Health Canada may approve naturally occurring plants, animal products, or mineral substances, and then grant NHP licences to sell products containing those substances.

[15] Sections 86 and 93 of the *NHP Regulations* provide as follows, in material part:

> 86 (1) No person shall sell a natural health product unless it is labelled and packaged in accordance with these Regulations.
>
> …
>
> 93 (1) Subject to section 94, the inner and outer labels shall show the following information in respect of a natural health product:
>
> …

> (b) on any panel,
>
> …
>
> (iii) the common name of each medicinal ingredient that it contains,
>
> (iv) the proper name of each medicinal ingredient that it contains, but only if the proper name is not the chemical names;

[16] Health Canada prohibits a product from being sold if it fails to meet the product specifications approved when it was licenced. The *NHP Regulations* provide as follows:

> Specifications
>
> 44 (1) Every natural health product available for sale shall comply with the specifications submitted in respect of that natural health product under paragraph 5(i) and with every change to those specifications made by the product licence holder.
>
> (2) The specifications shall contain the following information:
>
> (a) detailed information respecting the purity of the natural health product, including statements indicating its purity tolerances;
>
> (b) for each medicinal ingredient of the natural health product, detailed information respecting its quantity per dosage unit and its identity, including statements indicating its quantity and identity tolerances;
>
> (c) if a representation relating to the potency of a medicinal ingredient is to be shown on a label of the natural health product, detailed information respecting the potency of the medicinal ingredient, including statements indicating its potency tolerances; and
>
> (d) a description of the methods used for testing or examining the natural health product…
>
> [Emphasis added.]

[17] Any product specification must comply with these latter four requirements. The second requires the licensee to attest to the identity of each medicinal ingredient.

[18] Health Canada publishes a monograph for GS (the “Monograph”). It designates that GS’s “Proper Name” is the single compound “2-Amino-2-deoxy-D-glucose sulphate”. The specification section of the Monograph (the “Specifications”) states as follows:

- The finished product specifications must be established in accordance with the described in the Natural and Non-prescription Health Products Directorate (NNHPD) Quality of Natural Health Products Guide (the "Guide").
- The medicinal ingredient must comply with the requirements outlined in the NHPID.

[19] The Guide referenced in the Monograph lists the international standards that "are currently considered acceptable in their entirety by the NNHPD", including the United States Pharmacopeial Convention ("USP") methodology. The Guide states that "[i]t is expected that if a monograph is published in one of these pharmacopoeias, the pharmacopoeial monograph specifications should be considered as minimum specifications used for testing of the medicinal ingredient and finished product."

[20] There is no dispute that the Defendant Manufacturers established testing protocols consistent with the USP, and that the GS Products passed the tests mandated by the USP and Health Canada.

[21] However, the plaintiff notes that there are two separate requirements in the Specifications. Testing alone is insufficient. The second requirement is that the medicinal ingredients comply with the requirements in the Natural Health Products Ingredients Database ("NHPID"). The NHPID in turn describes the Proper Name for GS in the same way as the Monograph.

[22] The Defendant Manufacturers do not dispute that their GS Products must be consistent with the chemical formulation reflected by the Proper Name. This concession is consistent with the language of the Guide which reads:

> Product licence holders are ultimately responsible for ensuring the quality of their licenced NHPs, and for the establishment of the product specifications, as per section 44 of the NHPR.

[23] If a Health Canada licence is obtained for a GS Product, Health Canada says that a manufacturer may then represent that the GS Product "[h]elps to relieve joint pain associated with osteoarthritis and to protect against cartilage deterioration. A factor in maintaining healthy cartilage and joint health".

E. The Distribution and Labelling of GS Products

[24] Since 2004, Jamieson has sold well over a million units of NHPs purporting to contain GS. It is difficult to determine the total number of consumers who have purchased Jamieson's GS Products during the proposed class period because Jamieson sells most of its finished products to distributors or retailers, who then sell to consumers.

[25] Jamieson's GS Products vary with respect to the labelling. Some of their GS Products state the following on the front of the label:

1. Glucosamine Regular Strength 500mg,
2. Glucosamine Chondroitin MSM ULTRA STRENGTH 1,300 mg,
3. Glucosamine Chondroitin EXTRA STRENGTH 900mg, UC-II® Collagen,
4. Glucosamine COMPLEX With Vitamin C & Magnesium, and
5. Glucosamine Turmeric Complex.

[26] Indeed, there is no evidence in the record of any Jamieson GS Products with the words "Glucosamine Sulphate" on the front of the label. Based on the evidence presented on this application, Jamieson's GS Products only show the purported presence of GS in the ingredients section at the back of the label.

[27] As for WN and Natural Factors, they do sell products that state "Glucosamine Sulphate" on the front of the bottle. However, they also sell other products purporting to contain GS as an ingredient that do not state GS on the front of the label.

F. The Testing

[28] The plaintiff alleges that there is evidence of scientific tests demonstrating that the Defendant Manufacturers' GS products do not contain GS.

[29] An academic article raising similar concerns appears to have served as the stimulus for this litigation. It was published on September 10, 2012, and is entitled S.

Sahoo et al., “Glucosamine Salts: Resolving Ambiguities over the Market-Based Compositions” (2012) 12:10 Cryst. Growth Des. 5148 (“Sahoo Article”). In the Sahoo Article, the authors report on their analysis of an unnamed commercial formulation purporting to be GS, as well as certain GS formulations the authors sought to produce themselves. Although the article is highly technical, it is clear that the authors did not obtain the expected results from the commercial GS. The article states:

> Our analysis of a commercial sample of glucosamine sulfate (perhaps obtained following published procedures) revealed that the compound is a physical mixture of glucosamine chloride and potassium sulphate. It is not clear in which form is the supplement provided to consumers, but it is likely that if it is used in the form of “stabilized” sulphate, it also is a mixture of chloride and alkali sulfate(s). …Our attempts to prepare the true mixed compounds by employing reported procedures remained fruitless and in all cases physical mixtures were obtained. It is likely that double or mixed salts of glucosamine sulfate and chloride have never been obtained, and we believe that the related published synthetic procedures should be reinvestigated.

[30] The plaintiff says that the closing comments suggest that it may not even be possible to produce GS in a stable pill form, which may explain why the Defendant Manufacturers, or their upstream suppliers, were motivated to use a different chemical formulation.

[31] In order to test the conclusions of the Sahoo Article, the plaintiff retained the services of Dr. Feng Liu. Dr. Liu is a Research Associate in the Department of Chemistry at the University of British Columbia. Dr. Liu is experienced in the analysis and characterization of chemical compounds. He performed tests on a sample from a factory-sealed bottle labelled "Webber Naturals Glucosamine Sulfate 500 mg Capsules". He describes the scientific procedures he used to identify the molecules, including Fourier-Transform Infrared Spectroscopy (“FTIR”), ElectroSpray Ionization Mass Spectrometry (“ESI-MS”), and Scanning Electron Microscopy with Energy Dispersive X-Ray Spectroscopy (“SEM-EDX”).

[32] Dr. Liu tested the sample using FTIR and ESI-MS and concluded that the sample did not contain GS. The tests performed were different (and the plaintiff says

were more sensitive) than those mandated by Health Canada. Dr. Liu concluded as follows:

> Based on my tests as well as Dr. Chris French's SEM-EDX analysis (which found potassium in sulphate-containing crystals), I can conclude that the substance contained in the Webber Naturals Glucosamine Sulphate 500 mg Capsules was not glucosamine sulphate or so-called "glucosamine sulfate potassium chloride", but could have been glucosamine HCl mixed with potassium sulphate.

[33] Dr. Liu's affidavit appends a report of certain additional work conducted by Dr. Chris French. Dr. French is a chemist at S&N Labs in California. Dr. French purports to have tested four factory-sealed bottles manufactured by the Defendant Manufacturers. Dr. French lists the four product labels as: "Sisu Glucosamine Sulfate", "Joint Ease Glucosamine Chondroitine" (which appears to be a WN product), "Jamieson Glucosamine" and "Nature's Bounty Sulfate de Glucosamine" (which appears to be a Sisu product). Dr. French concludes that the primary composition of all of the samples was glucosamine hydrochloride and potassium sulfate, not GS. Again, there appears to be no dispute that the testing performed by Dr. French was beyond that required by Health Canada.

[34] Dr. French did not swear his own affidavit or prepare his own expert report. Rather, his test results were simply attached to Dr. Liu's affidavit. The record does not include Dr. French's qualifications. Dr. Liu does not suggest that he supervised Dr. French's work.

[35] The plaintiff also tendered an affidavit from Dr. Olivier Bruyere, a professor of clinical epidemiology and geriatric rehabilitation at the University of Liege in Belgium, as well as the CEO of the European Society for Clinical and Economic Aspects of Osteoporosis, Osteoarthritis, and Musculoskeletal Diseases ("ESCEO"). Dr. Bruyere was part of a task force at ESCEO that created an algorithm of recommendations for knee osteoarthritis, as well as being a member of the working committee that revised the algorithm in 2019. Dr. Bruyere's explains that, in formulating these algorithms, the task force unanimously agreed that only GS itself was shown to be effective in

managing osteoarthritis and that, at best, there was only weak evidence that glucosamine hydrochloride, alone or mixed with a sulfate, was an effective therapy.

[36] Beyond the effectiveness, there is also some evidence that products containing GS can be easier to digest than other forms of glucosamine. The websites of some of the Defendant Retailers describe GS as a distinct, and superior, form of glucosamine. The Defendant Retailers Medicine Shoppe's website, for example, states that "Since most studies have been performed on glucosamine sulfate, the efficacy of these other salts has not been established." There was information from the Mayo Clinic stating that the several forms of glucosamine are not considered interchangeable.

[37] The Defendant Manufacturers filed expert evidence from two physicians who confirmed that, at a minimum, Health Canada's testing requirements were met by the Defendant Manufacturers: Dr. John B. Atwater and Dr. Gregory Welch. Dr. Atwater and Dr. Welch contend that the results obtained by Dr. Liu and Dr. French may have been corrupted, flawed by selective sampling, or ought to have been supplemented with additional testing. However, neither provide contradictory test results.

G. The Claims

[38] The plaintiff claims that the Defendant Manufacturers:

1. negligently misrepresented the contents of the GS Products to the class;

2. contravened provisions of the *Business Practices and Consumer Protection Act* [*BPCPA*] and equivalent consumer protection statutes in other provinces (collectively, the "Provincial Consumer Protection Legislation") for deceptive acts and practices such that the class is entitled to restitution or repayment of the purchase price of the GS Products, or alternatively, damages, pursuant to those statutes;

3. contravened the *Competition Act*, R.S.C. 1985, c. C-34 [*Competition Act*] through false or misleading advertising and labeling such that the class is entitled to damages and the costs of investigation; and

4. were unjustly enriched at the class' expense by the receipt of funds for GS which the class did not receive.

III. THE CERTIFICATION TEST

A. Generally

[39] The test for class certification is set out in s. 4 of the *CPA*:

> 4(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[40] The plaintiff bears the onus of satisfying each of these five certification requirements. The plaintiff must show "some basis in fact" for each of the certification requirements, other than the cause of action requirement in s. 4(1)(a), which is decided based on the pleadings alone: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para. 25.

[41] The court has an important gate-keeping role requiring it to screen proposed claims to ensure they are suitable for class action treatment. In *Thorburn v. British Columbia*, 2012 BCSC 1585, appeal dismissed 2013 BCCA 480, the court stated:

> [117] The goal of the *CPA* is to be fair to both plaintiffs and defendants… "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency."

[42] That said, the *CPA* must be construed generously in order to achieve its objectives of access to justice, judicial economy, and behavior modification: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd [2010] S.C.C.A. No. 32 [*Infineon*].

[43] The certification stage does not involve an assessment of the merits of the claim, and is not intended to be a pronouncement on the viability or strength of the action. Rather, it focuses on the form of the action so as to determine whether the action can appropriately go forward as a class proceeding: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Microsoft*] at para. 102. The court should not weigh or seek to resolve conflicting facts and evidence at this stage. As the Supreme Court of Canada held in *AIC Ltd. v. Fischer*, 2013 SCC 69, "the court cannot engage in any detailed weighing of the evidence but should confine itself to

whether there is some basis in the evidence to support the certification requirements" (para. 43).

B. Do the Pleadings Disclose a Cause of Action?

1. Generally

[44] The pleadings test under the *CPA* is akin to that used on an application to strike a proceeding under Rule 9-5(1) of the *Supreme Court Civil Rules*. A court will only refuse to certify the action on this ground if it is plain and obvious that the plaintiff's claim is bound to fail, assuming the facts alleged in the pleadings are true: *Microsoft* at para. 63; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19.

[45] The claim "must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information" and unsettled points of law must be permitted to proceed: *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 at paras. 136-138. Courts are to consider the claims as they are, or as they may be amended: *Sharp v. Royal Mutual Funds Inc.*, 2020 BCSC 1781 at para.22.

2. Unjust Enrichment

[46] The cause of action for unjust enrichment is well established in Canadian law. A claimant has a cause of action in unjust enrichment where there has been (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff, and (3) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 30.

[47] The Amended Notice of Civil Claim[1] alleges that the Defendant Manufacturers were enriched by the receipt of the payments for the GS Products, and that the plaintiff and class members suffered a corresponding deprivation.

[1] Although not yet filed, the motion was argued on the basis of the proposed Amended Notice of Claim that was attached to the plaintiff's materials.

[48] The plaintiff says that given that the payments were received as a result of the Defendant Manufacturers' wrongful acts in distributing a product labelled as GS when it did not contain GS, there can be no juristic reason justifying the Defendant Manufacturers' retention of any benefit. The plaintiff says that the contracts for the sale or purchase of GS cannot provide a juristic reason for retaining money in exchange for the delivery of a product that contains no GS. As Justice Kelleher explained in *Tyk v. Graham*, 2017 BCSC 920, "[w]hile the existence of a contract can be a sufficient juristic reason for enrichment, the benefit obtained must be within the scope of the contract" (para. 101).

[49] Courts have certified claims for unjust enrichment in many cases, including: *Bodnar v. The Cash Store*, 2005 BCSC 1228 at paras. 38-40, aff'd 2006 BCCA 260 at para. 17; *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2006 BCSC 1018 at paras. 49-50; *Bodnar v. Payroll Loans Ltd.*, 2006 BCSC 1132 at paras. 43-44; *Watson v. Bank of America Corporation*, 2015 BCCA 362 at para. 58; *Microsoft* at para. 85-89; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 [*Godfrey* S.C.C.].

[50] In *Bhangu v. Honda Canada Inc.*, 2021 BCSC 794, Justice Iyer held that the claim did not disclose a cause of action in unjust enrichment. The plaintiff in that case alleged misconduct related to a defective Bluetooth system in certain Honda vehicles. Justice Iyer accepted that, as noted in *Microsoft* at para. 87, it is not "plain and obvious that a claim in unjust enrichment will be made out only where the relationship between the plaintiff and defendant is direct". However, she found that there was an inadequate pleading of a relationship between Honda and the dealership from which the vehicles were purchased. Further, the plaintiffs failed to plead that the contracts between Honda and the dealerships or the subsequent sale or lease contracts were illegal or void (paras. 72-73).

[51] In contrast, I find that the plaintiff has pled all the requisite elements for a claim in unjust enrichment here. In the Amended Notice of Civil Claim, the plaintiff pleads that the Defendant Manufacturers produce, distribute, market and sell the GS Products which are those sold by the Defendant Retailers (paras. 12-17). Further,

the plaintiff pleads that all the defendants, collectively, have been enriched by payments from class members (paras. 81, 83B). I find that these statements are sufficient to plead a relationship with the Defendant Retailers and the Defendant Manufacturers who may have received some, or all, of the enrichment indirectly through the Defendant Retailers. The plaintiff also pleads a lack of consideration and that the sales contracts should be treated as repudiated. This is adequate to ground the claim that there is no juristic reason for the alleged enrichment (paras. 93-96, 98, 101).

[52] I do note one deficiency in the Amended Notice of Civil Claim at para. 97, in the "Legal Basis" section. While the plaintiff says that the Defendant Retailers have been enriched by the purchase price, they do not say the same for the Defendant Manufacturers, or even for the "defendants" as a whole. I expect that this was an oversight. Assuming this was the drafting intent, the pleadings should state so expressly so that the plaintiff pleads the legal basis for the connection between the purchase price and enrichment of the Defendant Manufacturers. I would grant the plaintiff leave to amend in order to address this issue.

3. Negligent Misrepresentation

[53] Since *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465 (H.L.) and *Queen v. Cognos Inc.,* [1993] 1 S.C.R. 87, it is well recognized that an action lies for financial loss caused by a negligently made misrepresentation. The cause of action has five general requirements (*Cognos* at 110):

1. there must be a duty of care based on a 'special relationship' between the representor and the representee;

2. the representation in question must be untrue, inaccurate, or misleading;

3. the representor must have acted negligently in making said misrepresentation;

4. the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

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

[54] The Amended Notice of Civil Claim states, at para. 103, that the Defendant Manufacturers owed a duty of care to the class to ensure that their representations regarding the content of the GS Products were accurate. It is recognized that manufacturers owe a duty of care to consumers. When manufacturers place products in the flow of commerce, they create the necessary relationship with consumers: *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634 at 653.

[55] The plaintiff notes that manufacturers of products that are ingested, especially federally regulated NHPs, are held to an even higher standard of care. The plaintiff cites *Hollis* at 655:

> The courts in this country have long recognized that manufacturers of products that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence…

[56] The plaintiff also cites *Brunski v. Dominion Stores Ltd.* (1981), 20 C.C.L.T. 14 at 21 (Ont. H.C.):

> … the care expected of food producers and distributors is higher than that demanded of other manufacturers. … the standard required of food handlers "approximates to and becomes an absolute liability… the degree of care is extremely high."

[57] The claim pleads that the Defendant Manufacturers represented that, through statements on the labels of the GS Products, the products were comprised of and contained GS, and that such representations were untrue (paras. 73-74,104). It is alleged that the Defendant Manufacturers failed to take adequate steps to ensure the accuracy of their representations: Amended Notice of Civil Claim at paras. 74-75, 105.

[58] The plaintiff also alleges that, in deciding to purchase the GS Products, the plaintiff and proposed class members reasonably relied upon the product labels, including the products' names and ingredients, which indicated that the products contained GS: Amended Notice of Civil Claim at paras. 8-10, 77 and 106.

[59] Lastly, the Amended Notice of Civil Claim pleads that the class suffered loss, through the payment of the purchase price for GS which they never in fact received (paras. 78, 107).

[60] In sum, all of the requisite elements for a claim in negligent misrepresentation are properly pled.

[61] As an alternative remedy to damages, the plaintiff also seeks to recover the benefits accrued by the Defendant Manufacturers from their tortious conduct: Amended Notice of Civil Claim at paras. 88, 108-109. The Supreme Court of Canada, in *Atlantic Lottery*, determined that "waiver of tort", is not viable as an independent cause of action. However, the plaintiff notes that the court left open the issue of whether disgorgement may be available as an alternative remedy for negligence in certain circumstances: *Atlantic Lottery*, para. 36. Unlike in *Atlantic Lottery*, the underlying negligence claim has been adequately pled: Amended Notice of Civil Claim at paras. 73-75, 77-78, 103-107. As such, I find it is not plain and obvious that the claim for disgorgement as an alternative remedy for tortious conduct is bound to fail.

4. *Competition Act*

[62] The Amended Notice of Civil Claim alleges that the conduct of the Defendant Manufacturers was contrary to Part VI of the *Competition Act*: Amended Notice of Civil Claim at paras. 110-111.

[63] Section 52(1) of the *Competition Act,* prohibits a person making a false representation to the public for the purpose of promoting the supply of a product:

> 52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or

> recklessly make a representation to the public that is false or misleading in a material respect.

[64] Section 52(1.1) provides that, in order to establish a contravention of s. 52(1), it is not necessary to prove, among other things, that any person was deceived or misled. Section 52(2) deems that a representation, either expressed on an article or its wrapper or container or contained on anything made available to the public, is a representation made to the public for the purposes of s. 52(1). Section 52(4) provides that the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[65] I agree that the Amended Notice of Civil Claim contains a sufficient pleading that the Defendant Manufacturers engaged in conduct contrary to s. 52 of the *Competition Act*.

[66] Section 36(1) of the *Competition Act* permits this Court to award damages for conduct that contravenes Part VI of the *Competition Act*:

> 36(1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI,
>
> …
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct… an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

[67] There is some debate as to whether reliance is necessary under s. 36 to fulfil the requirement that the “loss or damage” is suffered “as a result” of a contravention of Part VI of the *Competition Act*.

[68] In *Gomel v. Live Nation Entertainment, Inc.,* 2021 BCSC 699, Justice Tammen held that the claims under s. 36 of the *Competition Act* did not disclose a cause of action. He found that there were no material facts in support of any reliance on the representations at issue. In that case, the impugned representations were

representations contained in Ticketmaster's “Terms of Use” said to collectively amount to a misrepresentation that all users would be afforded a fair opportunity to purchase tickets in the primary market for their face price (as opposed to having to purchase from resellers at an inflated price). Justice Tammen found that there was only a “bald, conclusory statement, framed in the alternative” that "the Plaintiff and Class relied upon the representations" (at para. 96).

[69] In the present case, the Amended Notice of Civil Claim specifically pleads that the plaintiff purchased the GS Products on the recommendation of a pharmacist and would not have purchased the product “if she had known the bottles contained a product that was different than indicated on the label” (para. 10). Further, the pleadings allege that, in deciding to purchase the GS Products, the class members relied “upon the marketing, advertising, and product labels, including the products’ names and ingredients, which indicated that the product contained glucosamine sulfate” (para. 77). Specifically, in relation to the *Competition Act* claim, the pleadings state that “[a]s a result of the Defendants’ false or misleading representations, the Plaintiff and Class Members suffered loss or damage by paying the purchase price for dietary supplements labelled as containing glucosamine sulfate but never receiving any glucosamine sulfate.” (para. 111). I find that these pleadings are sufficient to plead reliance on the impugned representations and that the loss or damage was suffered as a result of those representations.

[70] In addition to adequately pleading reliance, the plaintiff has also set out a theory of causation that she says does not require the class to establish reliance. The plaintiff argues that “but for the Defendant Manufacturers’ misrepresentations, the Class members would never have been able to purchase the Fake Glucosamine Sulfate Supplements, because the *Natural Health Products Regulations* plainly prohibit the sale of any natural health product that does not accurately display the common and proper name.”

[71] In my view, it is not plain and obvious that this simplified theory of causation will fail. If the GS Products should never have been sold because the labels

represented something other than what was inside (in violation of the *NHP Regulations*), it is at least arguable that the representation caused a loss. Further, despite the ruling in *Gomel,* I find that reliance may not be required to ground a claim under s. 36. I address this in further detail in my discussion of the proposed *Competition Act* common issues below.

[72] In sum, I find that the pleadings are sufficient to disclose a cause of action under ss. 36 and 52 of the *Competition Act*.

5. Breach of the Provincial Consumer Protection Legislation

a) Generally

[73] The *BPCPA* creates a civil cause of action for breaches of its prohibited acts, and provides for a range of remedies: see ss. 4, 5, 8, 9, 171 and 172. The plaintiff also relies on the following additional provincial statutes, given that the proposed class is not limited to B.C. residents:

1. *Consumer Protection Act*, R.S.A. 2000, c. C-26.3;
2. *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2;
3. *The Business Practices Act*, C.C.S.M., c. B120;
4. *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sch. A;
5. *Consumer Protection Act*, C.Q.L.R. c. P-40.1;
6. *Business Practices Act,* R.S.P.E.I. 1988, c. B-7; and
7. *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1.

[74] While the Provincial Consumer Protection Legislation differs to some extent from province to province, each statute generally:

1. creates causes of action against suppliers of consumer goods which are engaged when a supplier commits a prohibited, deceptive, or unfair act or practice in relation to a consumer transaction, such as making a false or misleading representation on a label regarding the product's ingredients; and

2. provides a remedy, entitling a consumer to restitution, compensation, damages, repayment, or the restoration of any money acquired by the supplier or manufacturer because of the deceptive or unfair act or practice.

b) *BPCPA* Claims

[75] In relation to the claim under ss. 171 and 172 of the *BPCPA*, the plaintiff alleges that by manufacturing, advertising, and offering the GS Products with the false representation on the label that the products contained GS, the Defendant Manufacturers committed a “deceptive act or practice” in respect of a “consumer transaction”, within the meaning of s. 4 of the *BPCPA*: Amended Notice of Civil Claim at paras. 113-114. The plaintiff further alleges that, in deciding to purchase, class members relied upon the label indicating that the product contained GS and, as a result, suffered a loss in the form of the payment of the purchase price for GS which they never in fact received: Amended Notice of Civil Claim at para. 78. Assuming those facts to be true, the plaintiff argues that it is not plain and obvious that a claim for compensation for that loss under s. 171, or for a restoration order under s. 172, is bound to fail.

[76] In my view, the Amended Notice of Civil Claim is sufficient to plead a claim for damages under s. 171. Like the discussion in relation to the pleadings under the *Competition Act,* I find that the plaintiff has adequately pleaded that the class suffered damage or loss due to a contravention of the *BPCPA*. The causation element could be established either on the theory that class members relied on the alleged false representations, or on the theory that the GS Products would never have been sold.

[77] The requirements for a restoration order under s. 172(3)(a) of the *BPCPA* are set out in *Ileman v. Rogers Communications Inc*., 2015 BCCA 260 [*Ileman* B.C.C.A] as follows:

> a) The court must make a declaratory or injunctive order under s. 172(1) before it can make an order under s. 172(3) - this requirement is set out in the opening words of s. 172(3);
>
> b) The supplier must have acquired something ("money or other property or thing") because of a contravention of the legislation - this requirement is explicit in s. 172(3)(a);
>
> c) The beneficiary of an order under s. 172(3) must have been the source of money or some other thing acquired by the supplier - this requirement is a necessary implication of the use of the word "restore"; and
>
> d) The beneficiary must have "an interest" in the thing to be restored - this requirement is explicit in s. 172(3)(a).

[78] On the last requirement, while "an interest" need not be a proprietary interest in specific property, it must be an interest recognized by law outside of s. 172(3)(a). A right to recover damages under s.171, would be a sufficient interest to allow recovery under s. 172(3)(a): *Ileman* B.C.C.A at para. 60.

[79] In *Bhangu*, Justice Iyer found that the claim for a restoration order under s. 172(3)(a) was bound to fail because the pleading did not satisfy the second or third requirements. There were no facts pled to show that Honda acquired a benefit because of the contravention of the *BPCPA,* nor were facts pled to show that the proposed class members were the source of the benefit. Justice Iyer also found that, while the pleadings were sufficient to plead damages relating to replacement or repair of the vehicles, they were insufficient to plead damages related to the diminished value of the vehicles: *Bhangu* at paras. 52-57. There were no facts pled that Honda received a benefit from the repair or replacement of the impugned vehicles.

[80] In *Gomel*, Justice Tammen certified certain *BPCPA* issues but refused certification of an issue concerning restoration under s. 172(3)(a). He found that the pleadings there did not suggest “an interest” in the thing to be restored. The plaintiff’s theory in *Gomel* was that the *BPCPA* contraventions caused an

"inflationary effect" in the market. However, under that theory, it could not be said that the defendants received any value from the inflated price, as that value went to other market participants (paras. 86-94).

[81] In contrast, in the present case, the claim alleges that the Defendant Manufacturers themselves were enriched by the receipt of payments. As such, the plaintiff and the class are said to have a right to recover those funds and thus have an "interest" in their restoration, within the meaning of s. 172(3)(a): see Amended Notice of Civil Claim at paras. 71-74, 77-78, 81, 113-115. In this case, in contrast with *Bhangu* and *Gomel,* there is a clearer nexus between the payments made by the class and the funds received by the Defendant Manufacturers, either directly or indirectly, for the sale of GS Products. I find that the claim for restoration under s. 172(3)(a) has been adequately pled.

c) Claims under Other Provincial Consumer Protection Legislation

[82] The Alberta *Consumer Protection Act* creates a statutory cause of action against suppliers, which includes manufacturers of goods, who engage in an unfair practice in relation to a consumer transaction, including anything that might reasonably deceive or mislead a consumer (s. 6(4)(a)), or representing that goods have ingredients that they do not have (s. 6(4)(c)). The statute entitles a consumer who has suffered damage or loss due to an unfair practice to commence an action for relief from that damage or loss against any supplier who engaged in the unfair practice (ss. 13(1), 13(2), 142.1): see, for e.g., *Alberta (Director of Trade Practices) v. Edanver Consulting Ltd*. (1993), 10 Alta. L.R. (3d) 433 [*Edanver Consulting*] at para. 28. This claim is adequately pled: see Amended Notice of Civil Claim at paras. 116-118.

[83] The Saskatchewan *Consumer Protection and Business Practices Act* creates a statutory cause of action against suppliers, which includes manufacturers of goods, who engage in an unfair practice in relation to a consumer transaction made in Saskatchewan, including anything that might reasonably deceive or mislead a

consumer (s. 6(a)), making a false claim (s. 6(b)), or representing that goods have ingredients that they do not have (s. 7(a)). It entitles a consumer to an order of restitution of any money given or furnished by the consumer, or damages for any loss suffered because of the unfair practice or contravention of the statute (ss. 93(1)(a)-(b)). Notably, in *G.C. v. Merck Canada Inc.*, 2019 SKQB 42 at paras. 48-54, the Saskatchewan Court of Queen's Bench found that the Provincial Consumer Protection Legislation are "similar enough in wording and intent" that, having reference to the Saskatchewan *Consumer Protection and Business Practices Act* and B.C. cases certifying similar claims, the provincial consumer protection legislation claims in that case were not bound to fail. I find that this statutory remedy is adequately pled in the Amended Notice of Civil Claim at paras. 119-121.

[84] The Manitoba *Business Practices Act* creates a statutory cause of action against suppliers, which includes manufacturers of goods, who engage in unfair business practices in relation to a consumer transaction, including anything that might reasonably deceive or mislead a consumer (s. 2(1)(a)), making a false claim or representation (s. 2(1)(b)), and which includes a representation that the goods have ingredients that they do not have (s. 2(3)(a)). The statute entitles a consumer to damages for any loss suffered or an order that the supplier repay all or part of any amount paid (s. 23(2)). The pleading of this statute is supported by the Amended Notice of Civil Claim at paras. 122-124.

[85] The Ontario *Consumer Protection Act* prohibits "a person" from making a false, misleading or deceptive representation, which includes a representation that goods have ingredients they do not have (s. 14): *Rebuck v. Ford Motor Company,* 2018 ONSC 7405 at paras. 28-31. The statute further provides consumers the right to rescind any agreement entered into after a person engaged in an unfair practice or to recover damages where rescission is not possible (s. 18(1)). Pursuant to s. 18(12), "[e]ach person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer…". In the Amended Notice of Civil Claim, the plaintiff seeks rescission of the sales agreements between the Defendant Retailers and the class members, pursuant to

the Ontario *Consumer Protection Act*, and repayment of the purchase price paid under those contracts. Most importantly for present purposes, the plaintiff also pleads that, as persons who engaged in unfair practices, the Defendant Manufacturers are jointly and severally liable for the resulting damages: see Amended Notice of Civil Claim at paras. 76, 83C(v), 125-127.

[86] The Ontario *Consumer Protection Act* follows a somewhat different framework from the other Provincial Consumer Protection Legislation, because, as the Divisional Court noted in *Richardson v. Samsung Electronics Canada Inc.*, 2019 ONSC 6845 at para. 11, contractual privity is necessary to advance a claim: see also *Bhangu* at paras. 58-60. Here, the plaintiff has pled the existence of the necessary contracts, and the plaintiff's claim against the Defendant Manufacturers stems from the rescission of those contracts. Further, and in any event, the plaintiff has also alleged that Jamieson sold GS Products directly to consumers as one of the Defendant Retailers, and, in so doing, entered into sales contracts directly with class members: see Amended Notice of Civil Claim at paras. 13, 71, 76. The plaintiff indicated an intention to amend the claim to allege that WN Pharmaceutical also engaged in direct sales to consumers.

[87] An issue arises as a result of s. 18(3) of the Ontario *Consumer Protection Act,* which provides that a "consumer must give notice within one year after entering into the agreement" if seeking rescission or damages under ss. 18(1) or (2). No material facts are pled in this respect. Without pleading these material facts, the claim under the Ontario statute would be bound to fail: *Bhangu* at paras. 59-60. I do note that, under s. 101, the court has the power to waive the notice requirement if it is in the "interest of justice to do so": *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867 at paras. 285-291. However, the plaintiff does not address s. 101 in their claim. That said, given the relatively technical nature of this deficiency and the consistency of the claims with the other theories advanced, I would grant leave to the plaintiff to amend the claim as necessary to address the Ontario notice issue: *Bhangu* at para. 61.

[88] Quebec's *Consumer Protection Act* provides consumers with a right to institute civil proceedings to have the court sanction prohibited practices, within a framework of an absolute presumption of prejudice to the consumer: *Richard v. Time Inc.,* 2012 SCC 8 at paras. 100,112. Prohibited practices explicitly apply to manufacturers and include, among other things, making false or misleading representations to consumers, as well as falsely holding out goods as including certain ingredients: Quebec *Consumer Protection Act*, s. 215, 219, 221(a). This claim is adequately pled: see Amended Notice of Civil Claim at paras. 128-131.

[89] The P.E.I. *Business Practices Act* creates a statutory cause of action against suppliers who engage in unfair practices, including by making a false, misleading or deceptive consumer representation, including a representation that goods have ingredients they do not have (s. 2(a)(i)). The statute entitles a consumer to damages; to rescind any agreement entered into after such an unfair practice and that induced the consumer to enter into an agreement; or to recover the amount paid that exceeds the fair value of the goods received or damages or both (s. 4(1)). This claim is properly pled: see Amended Notice of Civil Claim at paras. 135-137.

[90] The Newfoundland and Labrador *Consumer Protection and Business Practices Act* creates a statutory cause of action against suppliers (including manufacturers of goods), who engage in unfair consumer practices in relation to a consumer transaction, including a representation that has the effect, or might reasonably have the effect, of deceiving or misleading a consumer, including where goods have ingredients that they do not have (s. 7(1)(a). The statute entitles a consumer to damages for loss suffered, rescission of the transaction and the repayment of the amount paid to the supplier (s. 10(2)). This pleading is supported by the Amended Notice of Civil Claim pleading at paras. 138-140.

[91] Aside from the notice requirements of the Ontario *Consumer Protection Act*, I accept that these claims have been properly pled and the defendants did little to suggest otherwise. I would grant the plaintiff leave to amend the pleadings in order to address the *Ontario Consumer Protection Act* issue.

6. Limitations

[92] The plaintiff seeks to certify the class to include all residents of Canada who, on or after May 6, 2004, purchased the GS Products. The plaintiff herself did not begin to purchase any GS Products until 2009. The plaintiff pleads that she only learned that the GS Products did not contain GS in June 2019: Amended Notice of Civil Claim at para. 10. The Defendant Manufacturers argue that the plaintiff's claims are statute-barred, at least under s. 36(4) of the *Competition Act,* as well as under the *Limitation Act*, S.B.C. 2012, c. 13, and equivalent legislation in other Canadian provinces (the "Provincial Limitation Legislation").

[93] The Supreme Court of Canada has confirmed that the common law discoverability principle applies to the *Competition Act*'s statutory limitation period: *Godfrey* S.C.C. at para. 50. The discoverability principle dictates that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Ryan v. Moore*, 2005 SCC 38 at para. 2; *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224. As a result, the limitation period under the *Competition Act* did not begin to run until the class knew or reasonably ought to have discovered the Defendant Manufacturers' alleged misconduct: *Godfrey* S.C.C. at para. 50.

[94] The defendants have not raised any specific provisions of the Provincial Limitation Legislation except for ss. 6 and 21 of the BC *Limitation Act.* Many of the statutes within the Provincial Limitation Legislation appears to import a version of the rule of discoverability for basic limitation periods: *Limitation Act*, S.B.C. 2012, c. 13, ss. 6-8; *Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1); *The Limitations Act*, S.S. 2004, c. L-16.1, ss. 5-6; *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ss. 4-5. Some provincial statutes appear to oust the principle of discoverability for certain causes of action: *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1); *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, s. 2. (1); *Limitations Act,* S.N.L. 1995, c. L-16.1, ss. 5-7.

[95] The B.C. Court of Appeal has held that a limitation period argument can be considered at the certification stage in exceptional circumstances, but generally should not be: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at para. 67 [*Godfrey* B.C.C.A]; also see *McCorquodale v. RBC Global Asset Management Inc.*, 2021 BCSC 144 at paras. 94-97; *Stenzler v. TD Asset Management Inc*., 2020 ONSC 111 at para. 31; *Smith v. Inco Ltd.*, 2011 ONCA 628 at para. 165. Although it may be possible to decide limitation issues on a class-wide basis where there is clear evidence of class-wide commonality, discoverability is usually an individual issue that will require separate adjudication after the common issues are determined: *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 6098 at paras. 12-18.

[96] In the present case, to the extent that discoverability applies, the limitation issue will likely require individual determination. Assuming the facts alleged in the pleadings are true, the plaintiff only learned that the GS Products did not contain GS in June 2019, making the claim fit within the relevant limitation period. Many other class members may be in the same position.

[97] Further, if the defendants wanted to rely on a limitation defence, it should have be pled in its defences: *Stenzler* at para. 31. I find the defendants' pleadings bare in this regard. The defendants have not set out specific provisions in the Provincial Limitation Legislation on which they seek to rely, nor referred to any authorities on the application of that legislation.

[98] Given the defendants' bare pleading and the likelihood of potentially complex and fact-based individual inquiries as to discoverability under the Provincial Limitation Legislation or the *Competition Act*, I find that this stage of the proceeding is not the appropriate time to deal with the limitation issues: see *Godfrey* B.C.C.A. at para. 68. I conclude that it is not plain and obvious that limitation periods prevent the advancement of any of the causes of action pled.

7. Conclusion on the Causes of Action

[99] I find that all four causes of action are adequately pled with the exception of the claim arising from the Ontario *Consumer Protection Act* for which I have granted leave to amend. This first requirement for certification is met.

C. Is there a Proper Class?

[100] Section 4(1)(b) of the *CPA* requires that there be an identifiable class of two or more persons. The Supreme Court of Canada, in *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 [*Dutton*], describes the requirement for an identifiable class as follows:

> [38] … First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.
>
> [Citations omitted]

[101] There can be little doubt that there are more than two people who fit within the proposed class. There is evidence of a plethora of products that fit within those covered by the class definition. I accept that the class definition is objectively defined.

[102] The Defendant Manufacturers did put up some mild resistance to the proposed definition, although it was more in the nature of a "shot across the bow" foreshadowing their more substantive challenges to the common issues and preferred procedure requirements. The Defendant Manufacturers suggested that there is insufficient evidence of class members being dissatisfied with the GS Products. However, there is no requirement to show evidence of complaints or concerns before a class is certified: *Hoy v. Medtronic*, 2003 BCCA 316 at paras. 56-58; *Keatley v.Teranet*, 2015 ONCA 248 at paras.69-72; *Matthews v. La Capitale*

Civil Service Mutual, 2020 BCSC 787 at para. 83; *Harrison v. Afexa Life Sciences Inc*., 2018 BCCA 165 at para. 32 [*Harrison* B.C.C.A], leave to appeal to SCC ref'd [2018] S.C.C.A. No. 264. This is a case where it is clear from the record that a class exists — persons who have clearly purchased GS Products since 2004. That is sufficient for this stage of the certification analysis.

[103] The Defendant Manufacturers rely on *Chartrand v. General Motors Corp*., 2008 BCSC 1781, where the British Columbia Supreme Court denied certification of an action involving claims of negligence and unjust enrichment against a vehicle manufacturer that contained an automatic transmission and a certain type of braking system. The court found that there was an insufficient factual basis to show that the parking brake system was dangerous for the proposed class vehicles (para. 59). The court went on to hold that there was no air of reality to the assertion that there was a relationship between the proposed class and the proposed common issues (para. 68).

[104] I find the present case to be distinguishable. There is sufficient evidence creating a connection between the class and the proposed common issues. The plaintiff asserts in her affidavit that "I would not have purchased the 'Webber Naturals' brand dietary supplement if I had known that the bottles contained a product different from what was indicated on the label." The plaintiff also deposes that she "purchased the dietary supplement on the recommendation of the pharmacist at Shoppers Drug Mart, who indicated it would be effective in relieving my joint pain." I find that this is sufficient to establish the connection between the plaintiff, the class, and the proposed issues, even if the plaintiff's evidence does not say expressly that she was looking for the words "glucosamine sulfate" in the ingredient list when purchasing the product. This is not a summary judgment motion in relation to the plaintiff's claim. The evidence provided is sufficient to create "some basis in fact" for the connection between the class and the issues.

[105] There are two other relatively recent B.C. consumer cases that should be addressed as part of this analysis: *Harrison v. Afexa Life Sciences Inc.*, 2016 BCSC

2123 [*Harrison* B.C.S.C.] aff'd *Harrison* B.C.C.A. and *Clark v. Energy Brands Inc*., 2014 BCSC 1891.

[106] In *Harrison* B.C.S.C., the plaintiff sought certification of a claim raising concerns with the marketing of another NHP called "Cold-Fx". The impugned representation was that the product provided short-term relief from cold and flu symptoms. However, the problem in that case was that the labelling did not always contain the challenged representation. Justice Dillon noted:

> [15] The plaintiff agrees that not all of these products are subject to this action because not all of the products contained labelling or packaging that included the offending words that are the subject of the misrepresentations. There are 27 alleged misrepresentations; however, the plaintiff did not isolate in pleading or generally which particular product, identified through a UPC number, used packaging or labelling containing an offending representation. Both for packaging and for advertising, the plaintiff provided samples of the use of some, but not all, of the offending words. From a review of the evidence, it is apparent that not all of the packaging contained all of the offending words during the relevant time. Rather, some of the packaging contained some of the words for some, but not all, of the relevant time. None of the alleged representations appeared on the front of the label or packaging of any of the products.

[107] Hence, Justice Dillon found that there was an insufficient relationship between the class and the claim being advanced. I find that the present case does not face the same challenges. It involves a more uniform representation about the presence of GS.

[108] In *Clark*, the plaintiff alleged that the labelling and marketing of the beverage Vitaminwater was improper. The plaintiff argued that the labelling and marketing was done in a manner that had the capacity, tendency, or effect of causing a consumer to mistakenly conclude that Vitaminwater is a healthy beverage with a minimal amount of sugar. The court held that the question of whether labelling and marketing of the product had actually misled a consumer was an inherently individualistic and fact-based question. The court observed:

> [122] It may well be that many consumers are somewhat or even highly concerned about their sugar consumption and their health as it relates to consumption of bottled beverages. Others may be relatively indifferent. A consumer may care about sugar on some occasions, but not on other

> occasions. Some may have been misled, others not. […] The circumstances of each and every consumer transaction are endlessly variable.

[109] I do not see the same potential for endless variability in the present case. This is effectively a single representation case: that the bottles each represented that the product contained GS. There is no dispute that the term GS is used either on the front of every implicated bottle or in the ingredient list. There are far fewer scenarios under which someone would buy something with such a specific label or ingredient for reasons other than to procure GS.

[110] The Defendant Manufacturers note that the class definition does not include a condition that there was reliance on the alleged misrepresentation. However, in oral argument they acknowledged that including such a limiting condition in the class definition would be improper because it would render the definition merits based.

[111] Finally, the Defendant Manufacturers raise certain concerns about the length of the class period, while acknowledging that limitation issues are generally left for resolution at the individual issues stage of any class proceeding: *McCorquodale* at paras. 94-97; *Stenzler* at para. 31; *Smith* at para. 165. At this early stage, there is at least some basis in fact to suggest that the discoverability principle may apply and that the limitation periods will not serve as a bar to the claim over the period proposed: *Sun-Rype, Fanshawe, Godfrey* S.C.C.. I note that, while limitation periods under the Provincial Limitation Legislation may differ, it only takes one cause of action to leave the class, as proposed, alive, and hence, for example, the applicability of the discoverability principle to the *Competition Act* is alone sufficient to sustain the class.

D. Are there Common Issues?

1. Generally

[112] To satisfy s. 4(1)(c) of the *CPA*, the plaintiff must show some basis in fact that “the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members".

[113] In *Microsoft*, the Court reaffirmed the principles set out in its earlier decision in *Dutton,* including that "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis". The Court summarized (at para. 108):

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[114] The Court clarified in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 that success for one class member on a common issue need not necessarily mean success for all, but success for one member must not mean failure for another (at para. 45).

[115] The evidence matters in establishing the common issues. The plaintiff must adduce some basis in fact that: (a) the common issue actually exists; and (b) the proposed issue can be answered in common across the class: *Simpson v. Facebook*, 2021 ONSC 968 at para. 43; *Mancinelli v. Royal Bank of Canada,* 2020 ONSC 1646 at para. 120; *Bhangu* at para. 97-99; *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26, at para. 85.

2. The Scope of Disagreement on the Common Issues

[116] The proposed common issues are set out in Schedule A. Before proceeding to an analysis of each issue, the scope of the disagreement should be defined.

[117] Jamieson makes the overarching argument that there is no basis in fact against it in relation to any of the common issues because there is no proper direct evidence tendered suggesting that there is a problem with Jamieson's products.

That said, if the Court finds that this initial threshold is met, Jamieson does not take particular issue with at least some of the proposed common issues.

[118] For its part, WN raises a general argument disputing Issues 4, 5, 6, 8, 9, 10, 11, 17, 21, 23, 25, 27, 29, 31, 32, 34 and 36 on the basis that there is insufficient evidence to establish the existence of some basis in fact for the plaintiff's primary theory that WN's GS Products did not contain GS. WN argues that the analysis from the plaintiff's expert is flawed, and that it is sufficient that WN complied with Health Canada's regulatory framework. WN also raises specific arguments against certain proposed common issues.

3. The Jamieson Evidence Problem

[119] Jamieson highlights that:

1. Neither the plaintiff nor Mr. Bosynk provide evidence that they purchased a Jamieson GS Product; and

2. Dr. Liu did not perform any testing on Jamieson products.

[120] The only material evidence that there may be an issue with Jamieson's GS Products comes from Dr. French's testing (which Dr. Liu purports to adopt).

[121] Jamieson objects to the admission of Dr. French's test results, noting that there is no formal opinion from him, he provided no affidavit, and there is no statement of his qualifications.

[122] The plaintiff responds that Dr. French's work should be treated as akin to an x-ray result in a personal injury physician report. In such cases, the x-ray technician is rarely called upon to give direct evidence, as the physician is generally entitled to rely on the testing results in coming to their own opinion: *Mazur v. Lucas*, 2010 BCCA 473 at para. 40.

[123] Jamieson's objection requires that the Court consider the standards for the admission of expert evidence on an application for certification. In *Mueller v. Nissan Canada Inc.,* 2021 BCSC 338, the court stated:

> [142] On the admissibility of expert reports, I note the comments of the Court in *Cantlie* at paras. 95–96:
>
> > [95] Further, Cullity J. of the Ontario Superior Court of Justice in *Slark (Litigation Guardian of) v. Ontario*, 2010 ONSC 1726, commented at para. 58 that the principles governing the admissibility of evidence should not be disregarded, even for the purpose of satisfying the unusually low standard of proof given the important consequences of certification.
> >
> > [96] I note, however, that where expert opinion evidence is adduced at the certification hearing, as is the case here, "it should not be subjected to the exacting scrutiny required at a trial": *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd [2010] S.C.C.A. No. 32 at para. 66. Certification is a procedural step and it is not appropriate for a court to review the evidence to the same extent as would be done in the trial of the merits on a full evidentiary record.
> >
> > [Emphasis in the original.]

[124] In *Dembrowski v. Bayer Inc*., 2015 SKQB 286, the defendant in a proposed class action sold two brands of birth control pills. The certification motion was supported by an affidavit from an expert who tendered an opinion in pharmacoepidemiology and epidemiology, clinical science, and regulatory affairs. The expert provided an opinion that the product monograph, package inserts and labels failed to properly warn the public about the risks of using the products. As for the proper approach to the expert evidence, the court stated:

> [26] However, any affidavits filed must comply with *The Queen's Bench Rules* and must meet the standard of admissibility of evidence, including that of the use of expert witnesses. In the case of *Brooks v Canada (Attorney General),* 2009 SKQB 509, 347 Sask R 158 [*Brooks*], Zarzeczny J. also dealt with an application to strike affidavits filed by the plaintiff in support of the certification application. In referencing Rule 319 of the former *Queen's Bench Rules* (now Rule 13-30), Zarzeczny J. stated at para. 39:
>
> > 39 Insofar as expert opinion evidence is concerned, the Supreme Court, in the seminal case of *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9 (S.C.C.), outlined the four pre-conditions that must be satisfied before expert opinion evidence can be admitted, namely:
> >
> > (1) That the proffered opinion evidence is relevant;

> (2) That it is necessary to assist the court;
>
> (3) That it is tendered by a properly qualified expert (defined as a person shown to have acquired special or peculiar knowledge through study or experience in respect of the matters which he or she undertakes to testify); and
>
> (4) That it is not subject to an exclusionary rule.
>
> 40 These criterion are as equally applicable to certification proceedings in a class action as they are to any other civil or criminal proceeding (see *Risorto, infra [Risorto v State Farm Mutual Automobile Insurance Co*. (2007), 38 CPC (6th) 373]; *White v. Merck Frosst Canada*, [2004] O.J. No. 623 (S.C.J.)).

[27] Similar statements in respect to the need for the trial judge to exercise a gatekeeper function to carefully assess and identify the scope of the expertise of an expert witness have been expressed in other Saskatchewan cases such as *Vigoren v Nystuen*, 2006 SKCA 47 at para 67, 266 DLR (4th) 634; *Alves v First Choice Canada Inc*., 2010 SKQB 104, [2010] 9 WWR 301; *Field v GlaxoSmithKline Inc*., 2011 SKQB 16, 329 DLR (4th) 290 [*Field*]. However, the authorities have also recognized that a more generous approach as to admissibility may be taken depending on the nature of the issue and the certification being considered. See *Brooks* at para 43.

[28] Each of the affidavits objected to will have to be considered based upon the above-noted criteria.

[Emphasis added.]

[125] In *Brooks v. Canada (Attorney General)*, 2009 SKQB 509, the court stated:

> [43] I have concluded that a generous approach should be taken to the determination of relevance and admissibility issues, particularly where, as is the case presently before the court, the claim of the plaintiff and the application for certification raises complex multi-disciplinary (that is — scientific/medical/biological) factual and causation issues not easily addressed in a preliminary way.
>
> [44] That is not to say that the court need not be aware of the distinction between depositions primarily advanced to demonstrate the merits of the case on the one hand and those directed to the legitimate purpose of establishing the factual basis for the certification requirements (of the *Act*). Nor should the court ignore the long established criterion for the admissibility of expert opinion evidence and the need to identify the qualifications of an individual proffered to give it as laid out in *Mohan, supra*. Both must be considered and the principles applied to assess the objections raised to the admissibility of the affidavits that are challenged.

[126] In *Williamson v. Johnson & Johnson*, 2020 BCSC 1746, the court stated:

> [64] The court concluded that expert opinion pertaining to proposed common issues must survive under the *Mohan* test and *White Burgess*

> restatement of the same. The expert testimony on a certification motion must meet the admissibility test; once it is admissible the quality of the evidence establishing "basis in fact" is less than the balance of probabilities tests for trial evidence.
>
> [65] Overall, it is generally insufficient for experts to arrive at opinions outside their particular fields of expertise based only on the review of literature published by others who possess the expertise on the subject: see *Stout* para. 47.

[127] While I accept that the expert evidence at certification is scrutinized at a lower standard than it will be subject to at trial, there remains a standard that must be met. The court must still be satisfied that "the expert's evidence on the issue is sufficiently reliable that it provides some basis in fact for the existence of the common issue": *Bhangu* at para. 99.

[128] Jamieson's objection also requires that the Court consider the principles of the admissibility of expert reports containing hearsay evidence. In *Mazur,* the B.C. Court of Appeal summarized the law as follows (at para. 40):

- An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises, information from others – this list is not exhaustive. (See Bryant, *The Law of Evidence in Canada*, at 834-835)
- An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.
- The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.
- The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.

[129] While an expert may rely on second-hand evidence (hearsay) in coming to their own opinion, such hearsay evidence is only admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based: *R v. Lavallee,* [1990] 1 S.C.R. 852, at 893.

[130] In *West Moberly First Nations v. British Columbia*, 2018 BCSC 730 at paras. 180-185, the court commented on an expert's adoption of another expert's report:

> [181] In my view, there is difficulty with admitting expert evidence that does nothing more than adopt the opinions expressed in another report, if that report is only admissible as hearsay evidence. Since the two opinions (the expert's and the opinion in the report) are identical, it would be practically impossible to use one opinion to evaluate the other.
>
> [182] The distinction between relying on reports authored by another person for a limited purpose and relying on those reports for the truth of their contents was discussed in *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2008 BCSC 1263. In that action, Microsoft sought to prevent the plaintiff from relying on a number of affidavits in a certification hearing. Some of the affidavits were impugned because they referred to the opinions of experts from similar litigation in the U.S.
>
> [183] In that case, Professor Netz provided evidence that the approach of experts at the U.S. certification hearing was preferable. The Court determined that the appended reports of U.S. experts were tendered for the truth of their contents in order to support that position. These reports were found to be inadmissible. While it is unclear whether Professor Netz "adopted" the opinions embodied in the reports of other experts, I do not believe that this would have changed the finding.
>
> [184] In my opinion, the thrust of the case law supports the proposition that while an expert may rely on other experts' reports for limited purposes (for example, to situate their own opinion within a body of specialized knowledge or to refer to commonly accepted treaties/practices), another expert's report cannot be tendered for the truth of its content. An expert's opinion must be the result of independent analysis. Another expert's opinion cannot simply be adopted. This practice does not allow the opposing party or the trier of fact to adequately assess the opinion.
>
> [Emphasis added.]

[131] I find that the requisite standard was not met here. Dr. French's work is not used to simply situate Dr. Liu's own opinion. Rather, Dr. French's analysis is the foundation upon which the plaintiff's case for certification against Jamieson rests. Absent that evidence, there would be no basis to suggest that there is any issue with Jamieson's GS Products. While experts such as Dr. Liu may rely on hearsay in order

to formulate their own opinion, the plaintiff needs Dr. French's evidence to stand for the truth of its contents in order to support the existence of the common issues against Jamieson.

[132] Had Dr. French performed his tests under Dr. Liu's supervision, that may have led to a different result. Experts are permitted to rely on tests carried out by others under their supervision and to delegate to technicians who do not testify: *R. v. J.-L.J.,* 2000 SCC 51 at para. 50; *Canadian Natural Resources Limited v. Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*, 2018 ABCA 305 at para. 23. In those circumstances, Dr. Liu, as a properly qualified expert, could directly attest to the tests' reliability. However, in this case, the two experts were operating out of separate institutions in separate countries and there is no suggestion that Dr. Liu supervised Dr. French's work.

[133] Alternatively, had Dr. French provided his own affidavit, report, and curriculum vitae establishing his qualifications at issue, Jamieson's argument on this point would likely have been rejected.

[134] Under s. 5(6) of the *CPA*, I have the ability to adjourn the matter to allow for the admission of further evidence. I find that this is an appropriate case to exercise this discretion given that the failing as it relates to Dr. French's report is quite technical. The necessary evidence appears to exist but it simply was not presented with the procedural and evidentiary requirements designed to ensure its reliability. The plaintiff shall have three weeks following the issuance of these reasons to file a proper affidavit from Dr. French himself. If the plaintiff fails to file the affidavit, the certification application as against Jamieson will be rejected, as absent this evidence there is no basis in fact for the common issues sought to be certified against Jamieson. If the affidavit is filed, Jamieson shall confirm, within 14 days, whether it accepts that certification should issue against it consistent with the balance of these reasons. Failing agreement, the parties may set a further one-hour hearing to address any necessary residual argument on this issue.

4. The Admissibility of Dr. Liu's Evidence

[135] This is a convenient point at which to address the Defendant Manufacturers' objection to Dr. Liu's evidence.

[136] The Defendant Manufacturers argue that Dr. Liu lacks sufficient expertise in the regulation of pharmaceuticals or NHPs to support the opinions contained in his affidavit. They note that:

1. Dr. Liu does not state that the tests that he used are approved by Health Canada.

2. Dr. Liu's education and work experience are within the sphere of chemistry and academics, and not in the ambit of regulation or in development of standards related to the appropriateness of monographs.

[137] In *Dembrowski*, the court had to consider whether the proposed evidence of two experts was within the scope of their expertise. The court stated:

> [34] I am satisfied that Bérard does not have sufficient expertise to provide opinion evidence in respect to the adequacy of the product monograph for Yasmin and Yaz. However, she does have experience in pharmacoepidemiology, which is the study of uses and effects of drugs on populations…
>
> …
>
> [36] Accordingly, while I agree that Bérard does not have the expertise to comment upon the product monograph for Yasmin and Yaz, in my opinion, she does have the expertise to review the monographs and provide the court with her analysis from an epidemiology point of view of the risks of usage of these drugs based upon studies done by others and what information is contained in these monographs and whether these monographs warned of the risk of venous thromboembolism [VTE], arterial thromboembolism [ATE], and gallbladder disease. Bérard has no regulatory experience or expertise but her opinion does not speak to whether the monographs meet regulatory requirements...

[138] I find that in the present case, Dr. Liu has stayed within the four corners of his expertise. He has a Ph.D. in bioorganic chemistry. He worked as a post-doctorate fellow at Oxford. I conclude that Dr. Liu does have the expertise to perform the tests conducted, and to opine on the results of those tests. The fact that the tests he did

perform may have been different from those required by Health Canada does not mean that his affidavit is inadmissible. Further, Dr. Liu does not purport to go further to critique the suitability of Health Canada's testing protocols. Rather, his evidence seeks to answer a more basic question: do the GS Products contain GS? I accept the admissibility of Dr. Liu's affidavit for the limited purposes of establishing the factual basis of certification.

[139] With the admissibility of the expert evidence resolved, this allows us to move to the analysis of the proposed common issues.

5. Glucosamine Sulphate

[140] The first three proposed common issues engage the central premise of the claim, namely did the Defendant Manufacturers' GS Products contain GS:

1. Which, if any, of the products manufactured, distributed, produced, marketed, advertised or sold by the Defendant Manufacturers, during the relevant period, were labelled as containing "glucosamine sulfate", "glucosamine sulfate potassium chloride", "glucosamine sulfate KCL", or "glucosamine sulfate • KCL" (the "Defendants' Glucosamine Sulfate Products")?
2. Were the Defendants' Glucosamine Sulfate Products being held out by the Defendant Manufacturers to the Defendant Retailers and class members as containing the chemical substance 2-Amino-2-deoxy-D-glucose sulfate or 2- Amino-2-deoxy-D-glucose sulfate, compd. with potassium chloride ("Glucosamine Sulfate")?
3. Did any of the Defendants' Glucosamine Sulfate Products contain Glucosamine Sulfate?

[141] There is little dispute about the commonality of the first two issues (disregarding Jamieson's overarching evidentiary argument addressed above).

[142] The Defendant Manufacturers argue that Issue 3 will not materially advance the action, as the answer does not have any bearing on the advancement of the resolution of the class' claim, given that what is actually matters is whether they met Health Canada's testing requirements.

[143] I disagree. Even if there was no Health Canada regulatory framework applicable to this product, proposed class members could still bring an action if they were sold something other than what was represented to them. Determining whether a product "is what it says it is" is a material issue, regardless of Health Canada's regulatory framework. Approval of the GS Products by Health Canada does not pre-empt a civil action: *Buchan v. Ortho Pharmaceutical (Canada) Ltd* (1986), 54 O.R. (2d) 92; *Wuttunee v. Merck Frosst Canada*, 2007 SKQB 29; *Brosseau v. Laboratoires Abbott limitee*, 2019 QCCA 801, at paras. 156-160, leave to appeal ref'd [2019] S.C.C.A. No. 286; *Andersen v. St. Jude Medical Inc*., 2012 ONSC 3660, at para. 101.

[144] The Supreme Court of Canada in *Ryan v. Victoria (City),* [1999] 1 S.C.R. 201, held that legislative standards are only relevant to, but not co-extensive with, the common law standard of care (at para. 29):

> ...The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability...

[145] Further, the plaintiff does not concede that the Health Canada requirements were met in any event. In particular, the plaintiff notes that Health Canada requires that the Defendant Manufacturers only sell the chemical formulation represented by the Proper Name. There is an arguable case that this requirement continues to apply even if all testing protocols are met.

[146] Hence, I find that Issues 1-3 materially advance the action and qualify as common issues. Dr. Liu's report is sufficient to create some basis in fact for the issues. Although the expert evidence filed by the Defendant Manufacturers critiques Dr. Liu's approach, the certification hearing is not the time or the place to resolve the battle of the experts.

[147] WN argues that Issues 4, 5, 6, 8, 9, 10, 11, 17, 21, 23, 25, 27, 29, 31, 32, 34 and 36 have no basis in fact, based on their attack on the plaintiff's general assertion that WN's GS Products do not contain GS. On these points, WN argues that their GS Products complied with Health Canada's regulatory framework. For the same reasons set out above, I dismiss this argument.

6. Restitution

[148] Issues 4 through 6 address the claim for restitution and ask whether the Defendant Manufacturers have been unjustly enriched, either directly or indirectly, by the receipt of payments from class members and, if so, what amount of restitution is payable, and whether the amount of restitution can be determined on an aggregate basis.

[149] Similarly worded unjust enrichment issues have been certified as common issues in other consumer class actions: *Bergen v. WestJet Airlines Ltd*., 2021 BCSC 12 at paras. 82-87; *Watson* at paras. 175-183 and App. A; *MacKinnon v. National Money Mart Company*, 2007 BCSC 348 at paras. 50-57, aff'd 2009 BCCA 103 at paras. 89-90; *Bodnar v. The Cash Store Inc.*, 2005 BCSC 1228 at paras. 37-40 and Sched. A [*Bodnar* B.C.S.C.], aff'd 2006 BCCA 260 at paras. 15-18 [*Bodnar* B.C.C.A.].

[150] The class is not seeking to recover damages, or restitution, for any alleged detrimental side effects or foregone health benefits that may have flowed from the consumption of a product that did not contain what was on the label. That limits the individuality of the issues.

[151] The plaintiff argues that the absence of a juristic reason can also be determined on a common basis. The court can determine, on a class basis, whether contracts for the sale or purchase of NHPs labelled as containing GS can provide a juristic reason for the retention of benefits received in exchange for the delivery of a product that does not contain GS.

[152] Further, the plaintiff argues that the amount of the restitution payable, if any, and whether that amount can be determined on an aggregate basis pursuant to s. 29 of the *CPA*, are also matters that can properly be resolved as common issues. The Defendant Manufacturers should have some records indicating the amount of GS Products distributed, and the amounts charged for those sales. Jamieson's witness, Mr. Doherty, was able to estimate the amount of GS-containing units Jamieson has sold since 2004. Section 53 of the *NHP Regulations* requires the Defendant Manufacturers to maintain certain records, including "records containing sufficient information to enable the recall of every lot or batch of the natural health product that has been made available for sale".

[153] The Defendant Manufacturers argue that, in order to assess whether there is an absence of a juristic reason, the court needs to determine the terms of each contract entered into upon the purchase of the relevant product. Specifically, the Defendant Manufacturers say that the court would need to determine what the offeree understood the term of the contract to be, including whether it included the necessity for the presence of a particular compound, such as GS.

[154] However, recall that the plaintiff's theory includes the position that the GS Products should not have been distributed at all because they did not comply with the *NHP Regulations* which prohibit the sale of any NHP that does not accurately display the common and proper name: Amended Notice of Civil Claim at para. 78. As such, on this theory, no class member should have been "out of pocket" for the purchase price irrespective of their intentions, as the GS Products should never have been sold to anyone. I find that this theory is at least arguable. This is sufficient to support the commonality of the proposed restitutionary issues: *Bodnar* B.C.S.C. at paras. 37-40 and *Bodnar* B.C.C.A. at paras. 14-17. As Justice Brown stated in *Bodnar* B.C.S.C., "The plaintiffs may fail on this issue, but I am not satisfied at this point that the issue necessarily cannot be decided without an individual inquiry." (para. 40).

[155] Issue 6 asks whether restitution can be determined on an aggregate basis. Section 29 of the *CPA* governs the availability of such damages:

> 29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) 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.

[156] To be certified as a common issue, the plaintiff must show that there is a reasonable likelihood that the preconditions in s. 29(1) of the *CPA* would be satisfied and an aggregate assessment would be made if the plaintiff is otherwise successful at the common issues trial: *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 44, leave to appeal ref'd [2007] S.C.C.A. No. 346; *Shah v. LG Chem Ltd.*, 2018 ONCA 819 at para. 104, leave to appeal ref'd [2018] S.C.C.A. No. 520. An aggregate assessment of monetary relief may only be certified as a common issue where (a) resolving the other certifiable common issues could be determinative of monetary liability and (b) where the quantum of damages could reasonably be calculated without proof by individual class members: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 139, leave to appeal ref'd [2012] S.C.C.A. No. 326; *Cantlie v. Canadian Heating Products Inc.,* 2017 BCSC 286 at paras. 331-332.

[157] The plaintiff must propose a workable methodology in order to certify an aggregate damages common issue: *Atlantic Lottery* at para. 157. The methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question: *Microsoft* at para. 118. A methodology must be capable of proving "common impact" that is "common to all the members of the class": *Microsoft* at para. 115. While *Microsoft* was brought on behalf of indirect purchasers, the B.C. Court of Appeal, in *Charlton v. Abbott Laboratories Ltd.,* 2015 BCCA 26, held that there is nothing to suggest that the methodological requirement ought only

to be confined to indirect purchaser cases (at paras. 86-92). However, the requirements will vary according to the complexity of a given case. While *Microsoft* suggests that plaintiffs may need to tender expert evidence to establish a methodology in indirect purchaser cases due to their complexity, not every case will require expert economic, medical or scientific methodology: *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 at paras. 31-38.

[158] In the present case, I find that the plaintiff's theory that the defendants should never have released the GS Products to market is sufficient to support the aggregate damages restitutionary common issue. Under this simplifying theory, it is at least arguable that the amount charged for the GS Products should be returned or disgorged, or that, the profit retained by the Defendant Manufacturers should be returned or disgorged.

[159] The plaintiff says that the availability and quantification of an aggregate award is suitable for determination as a common issue because the aggregate amount of GS Product sold, and thus the aggregate amount of loss suffered by the class, should be discernible. Because the plaintiff does not yet have access to the aggregate amount of the GS Products sold, the plaintiff proposes that "the certification and resolution" of the aggregate damages arising from the tort claim should be postponed until the end of the common issues trial. I agree but hold that this same delay should apply to the resolution of the aggregate damages question arising from the restitutionary claim: *Godfrey* S.C.C. at para. 113.

[160] In sum, I certify Issues 4 and 5, but postpone the certification and resolution of Issue 6 until the end of the common issues trial.

7. Tort Issues

[161] Issues 7 through 16 seek to advance the claims in negligent misrepresentation.

[162] I accept that the proposed issues regarding the existence of a duty of care, misrepresentation, and the alleged failure to take adequate steps to ensure the

accuracy of the representations on the labels center on the Defendant Manufacturers' conduct and, as such, can properly be determined on a common basis. GS was a listed ingredient on all the implicated products. The labelling suggests a uniform set of representations in written form. I agree with the plaintiff that whether such labelling resulted in a false representation that the product contained GS can be assessed without the need for any individual evidence from class members: *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 at paras. 19-21, 37; *N&C Transportation Ltd. v. Navistar International Corporation*, 2018 BCCA 312 at paras. 124-143, 150; *Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019 at paras. 100-104.

[163] The Defendant Manufacturers rely on the decision in *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42. In that case, the defendant sunscreen manufacturers allegedly misrepresented that their products provided equal protection against UVA and UVB rays, even though the products mainly provided protection against UVB rays. In concluding that the misrepresentation was not a proper common issue, the court stated:

> [165] It must be kept in mind that each manufacturer produced in the range of sixty different sunscreen products during the class period, that the ingredients of those products differed both between products and over time and that the labelling and marketing and advertising of those products varied over time. Advertising was done in a variety of formats. Some members of the class may have purchased only one type of product whereas others may have purchased several types. The words of the Saskatchewan Court of Appeal in *Merck Frosst Canada Ltd. v. Wuttunee* are applicable to this case, where the proposed common issues were described, at para 162, as:
>
> > … even if a very liberal notion of 'common issue' were adopted, (to admit as a common issue what is in fact a complex array of issues, each common only to a portion of the members of the class as a whole, but none common across the entire class), this very complexity would in this case defeat the requirement that a class action be a fair, efficient and manageable method of advancing the claims of the class members.

[164] In this case, recall that Issue 8, the core representation issue, is constrained as follows:

> Did each of the Defendant Manufacturers falsely represent to Class members that the Defendants' Glucosamine Sulfate Products contained Glucosamine Sulfate?

[165] This question does not break down in the way the proposed common issue did in *Singer*. There is only one ingredient at issue. The plaintiff's claim is limited to products that list that ingredient. The wording of the ingredient did not change over time. There is no evidence that the marketing of this ingredient changed materially over time. I find that Issue 8 is a proper common issue, and that Dr. Liu's evidence is sufficient to create the required evidentiary foundation for the issue.

[166] WN raises an issue with respect to Issue 9 which asks:

> If so, did each of the Defendant Manufacturers fail to take adequate steps to ensure the accuracy of their representations?

[167] WN argues that Issue 9 should be reworded as follows:

> 9(a): Did the Defendant Manufacturers comply with Health Canada's requirements with respect to content and labelling the Defendants' Glucosamine Sulfate Products as containing Glucosamine Sulfate?
>
> 9(b): Does compliance with Health Canada's requirements constitute an adequate step to ensure the accuracy of the Defendant Manufacturers' representations that the Defendants' Glucosamine Sulfate Products contained Glucosamine Sulfate?
>
> 9(c): Did each of the Defendant Manufacturers take adequate steps to ensure the accuracy of their representations that the Defendants' Glucosamine Sulfate Products contained Glucosamine Sulfate?

[168] I find that the plaintiff's formulation of Issue 9 is acceptable. As I have indicated above, Health Canada's approval of the labelling or testing is not determinative of any proposed tort claim.

[169] The most vexing aspect of certifying any claim for negligent misrepresentation is how causation and reliance should be addressed: *0116064 BC Ltd v. Alio Gold Inc.*, 2021 BCSC 540 at para. 54. In this case, the plaintiff suggests that certain questions surrounding the issue of reliance can be advanced as part of the common issues trial. The plaintiff seeks to certify the following questions going to the issue of reliance:

10. Can reliance by the Class members on the misrepresentation be inferred by the purchase of a product named “glucosamine sulfate” on the front of the label and, if so, was the reliance reasonable?

11. Can reliance by the Class members on the misrepresentation be inferred by the purchase of a product, which name includes “glucosamine” on the front of the label, and lists glucosamine sulfate as a primary ingredient and, if so, was the reliance reasonable?

[170] The plaintiff relies on the line of authority suggesting that individual reliance may not be required if there are alternative routes to establish causation. In *Collette v. Great Pacific Management Co*., 2004 BCCA 110, the Court of Appeal certified a negligent misrepresentation claim stating:

> Is Individual Reliance Required?
>
> [33] The respondents submit that the investors cannot succeed without proof of reliance on the misrepresentation by each investor individually, particularly with respect to the claims for negligent misrepresentation. The chambers judge concluded that proof of reliance was required for the claims in tort but not in contract.
>
> [34] The reason for insistence on reliance is to establish causation. If causation can be established otherwise, then reliance is not required: see *Henderson, supra*, per Lord Goff at 776, and *Yorkshire Trust Co. v. Empire Acceptance Corp. Ltd.* (1986), 1985 CanLII 334 (BC SC), 24 D.L.R. (4th) 140 at 145-47, 69 B.C.L.R. 357 at 354-55, 22 E.T.R. 96 (S.C.) per McLachlin J. Here if the mortgage units had not passed the due diligence test they would not have been offered for sale by the respondents to any clients. Causation is therefore established between a breach of due diligence duty and the investors' loss, independently of proof of individual reliance. In my view, proof of reliance does not present an obstacle to the appellant's case as framed. The appellant's case adequately links a breach of duty causally to the investors' losses.
>
> [Emphasis added.]

[171] The plaintiff advances a similar argument here, i.e. that the GS Products should never have been sold in the first place because they did not comply with the terms of the Health Canada license: Amended Notice of Civil Claim at para. 78. Alternatively, the plaintiff argues that it may be possible to infer reliance from the fact of the purchase. In *Kripps v. Touche Ross & Co.*, [1997] B.C.J. No. 968 (C.A.), the Court of Appeal stated, in the context of a non-class proceeding:

> [103] It is sufficient, therefore, for the plaintiff in an action for negligent misrepresentation to prove that the misrepresentation was at least one factor which induced the plaintiff to act to his or her detriment. I am also of the view

> that where the misrepresentation in question is one which was calculated or which would naturally tend to induce the plaintiff to act upon it, the plaintiff's reliance may be inferred. The inference of reliance is one which may be rebutted but the onus of doing so rests on the representor.
>
> [104] Applying the principles derived from the cases referred to above, in my respectful view, the learned trial judge misdirected himself on the law in holding that to succeed the plaintiffs had to prove that the misrepresentation alleged to be relied upon was "fundamental" to their decision, and in holding that affirmative evidence from the plaintiffs was required before actual reliance could be found. In my respectful view, the misrepresentation with respect to the understated loss provision was material, and, because of its effect on retained earnings, borrowing capacity, and interest coverage, was such as would tend to induce the plaintiffs to act in reliance upon it.
>
> [105] Moreover, the non-disclosure of $4.9 million worth of mortgages in arrears and the misrepresentation with respect to the non-performing loans note were decidedly material and misleading. They were misrepresentations in financial statements which the defendant said fairly represented the financial picture of VMCL. They were statements which clearly would tend to induce an investor to purchase VMCL debentures. It was therefore incumbent upon the defendant to rebut the inference that the plaintiffs relied on these misrepresentations, and in my view it failed to do so.

[172] In *Cannon*, the Ontario Superior Court of Justice certified a common issue asking whether the defendants were liable for an alleged misrepresentation to the effect that the investment program would qualify for a tax credit. Justice Strathy concluded that the claim was appropriate for certification because the entire purpose of the investment scheme was to achieve the promised tax deduction. As such, it was the kind of case where it was possible to infer from the circumstances of the purchase that class members relied upon the defendants' representations: paras. 350-351; see also *Eaton v. HMS Financial Inc.,* 2008 ABQB 631 at paras.104-105.

[173] The plaintiff's position is quite compelling, particularly as it relates to those products using the term "Glucosamine Sulphate" on the front of the bottle. It is difficult to argue that one cannot infer reliance on what is on the front of a label when one purchases a product. If a carton says "Milk" it is reasonable to infer that a purchaser relied on that statement in picking the carton off the shelf. Indeed, it is difficult to derive another reason why an individual would reach out their hand for the product other than based on the representation as to the product's contents.

[174] The situation is admittedly somewhat more complicated for those products for which GS is simply listed as an ingredient rather than being on the front of the bottle. For example, for those products simply labelled “Glucosamine”, it is at least possible that the individual might have been seeking “Glucosamine Hydrochloride”, another product that is sold under Health Canada licenses in Canada. Or the customer may have been indifferent as between the different types of glucosamine. Some of the products were also labelled “Glucosamine Chondroitin”. It is at least possible that it will be necessary to determine whether the individual was purchasing the product for its Chondroitin characteristic rather than to obtain GS.

[175] I find that Issue 10 can be certified as a common issue, but not Issue 11. Issue 11, which relies on GS simply being listed as an ingredient, requires at least some level of individual inquiry in order to determine whether listing GS as an ingredient featured in the class member’s decision-making. Although I find that this is not a suitable common issue, the fact that reliance on the ingredient list may need to be deferred to individual hearings is not fatal to certification: *Navistar* at paras. 146-149; *Jones v. Zimmer GMBH*, 2011 BCSC 1198 at paras. 87-88, aff’d 2013 BCCA 21. It simply means that this particular issue should not be certified, such that the causation/reliance analysis for these products will be left to a later stage of the proceeding.

[176] Issues 12 and 13 ask whether class members are entitled to damages for negligent misrepresentation and whether those damages be assessed on an aggregate basis. I have addressed the legal principles regarding the certification of the aggregate damages issues above in the restitutionary context. Issue 12 is a proper common issue. As requested by the plaintiff, the certification and resolution of Issue 13 will also be postponed until the end of the determination of the remaining issues.

[177] Issues 14 to 16 seek to resolve the plaintiff’s alternative of disgorgement of the benefit obtained by the Defendant Manufacturers as a result of their tortious conduct. In *Atlantic Lottery,* the court did not resolve the issue of whether

disgorgement is available as an alternative remedy for tortious conduct (para. 36). Unlike in *Atlantic Lottery*, I find that the underlying negligence claim has been adequately pled here. Hence, Issues 14 and 15 are certified. Issue 16, related to aggregate damages, is also postponed until the end of the common issues trial for the same reasons discussed above regarding Issue 6.

8. Competition Act Issues

[178] Issues 17 to 20 relate to the statutory claim under ss. 36 and 52 of the *Competition Act*.

[179] The question of whether the Defendant Manufacturers engaged in conduct contrary to s. 52 of the *Competition Act*, again, is largely focused upon the conduct of the defendants, and is capable of common determination. In *Navistar*, the Court of Appeal discussed that the plaintiffs relied on more than one written representation, and it was unclear whether individual class members received some or all of those representations. However, the plaintiffs ultimately relied on a single underlying representation to ground their misrepresentation claim, that the vehicles at issue were "durable and fit for use". The Court of Appeal certified a common issue, asking whether these representations violated s. 52 of the *Competition Act* (at paras. 124-143, 147, 150).

[180] In the present case, the allegedly false or misleading representations are not individualized representations; they are representations made to the public through the labelling. Although multiple products are involved, this claim is tightly tied to a uniform representation, i.e. was there GS in every bottle with the GS ingredient listed.

[181] Section 36 of the *Competition Act* provides a remedy in the form of loss or damage “as a result” of a breach of s. 52. The defendants argue that proof of detrimental reliance is required. There is a debate ongoing about the extent to which reliance is required to ground a claim under s. 36. In *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc*., 2014 BCCA 36, the B.C. Court of Appeal stated as follows:

> [91] In terms of the *Competition Act*, this leaves Ms. Wakelam's claim for "damages" suffered "as a result of" the defendants' breach of Part VI (founded on s. 36) as well as for her costs of investigation under s. 36(1). In this regard, I return to and respectfully agree with the Court's statement in *Singer*, which I reproduce again for convenience:
>
> > … [Section] 52(1) does not create a cause of action. The cause of action, or right of action, is created by s. 36. The plain language of that section makes it clear, as the defendants assert, that the plaintiff must show both a breach of s. 52 and loss or damage suffered by him or her as a result of that breach. That can only be done if there is a causal connection between the breach (the materially false or misleading representation to the public) and the damages suffered by the plaintiff. A consumer of sunscreen products cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal to this claim.
> >
> > Section 52(1.1) only removes the requirement of proving reliance for the purpose of establishing the contravention of s. 52(1). The separate cause of action, created by s. 36 in Part IV of the Competition Act, contains its own requirement that the plaintiff must have suffered loss or damage "as a result" of the defendant's conduct contrary to Part VI. It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the misrepresentation caused him to do something - i.e., that he relied on it to his detriment. [At paras. 107-8; emphasis added.]
>
> This reasoning seems consistent with a comment made by the Court at para. 65 of *Pro-Sys v. Microsoft* that s. 36 of the *Competition Act* allows anyone who has suffered loss or damage "as a result of conduct engaged in by any person contrary to Part VI" to "sue for and recover that loss or damage." (My emphasis.)
>
> [92] Since Ms. Wakelam has failed to plead any material facts in support of the required causal connection, we may at this late stage infer that she is unable to do so. Accordingly, her claims under the *Competition Act* must be struck in their entirety.
>
> [Emphasis in original removed and emphasis added.]

[182] In *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, the Court of Appeal stated:

> [45] The final cause of action the judge considered was the alleged breach of s. 52 of the *Competition Act*. He concluded that, as pleaded, it was deficient. In addition to two surmountable deficiencies, he identified a more serious problem with respect to causation:

> [70] What is more problematic is that the plaintiff has not pleaded that he suffered loss or damage as a result of the misrepresentations made to the public. While s. 52(1.1) removes the requirement of proving reliance in order to establish a contravention of s. 52(1), the cause of action created by s. 36 requires the plaintiff to show that he or she suffered damages "as a result" of the defendant's violation: *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 91, leave to appeal to S.C.C. refused [2014] S.C.C.A. No. 125, citing *Singer v. Schering-Plough Canada Inc.,* 2010 ONSC 42 at para. 107.
>
> [71] Unlike the *BPCPA* claim, then, the *Competition Act* claim does require that the plaintiff show reliance on the alleged misrepresentation. The link required by s. 36 is only present if the misrepresentation "caused [the plaintiff] to do something - i.e., that he relied on it to his detriment": *Singer* at para. 108.

…

[72] According to Coast Capital, the judge's (correct) conclusion that s. 36 of the *Competition Act* requires reliance on an alleged misrepresentation to establish causation must also apply to s. 171 of the *BPCPA*. In other words, it says, reliance is a necessary element of the causes of action created under both statutes. It contends that this is so for at least three reasons. First, both sections use similar language in requiring proof of a causal connection between the statutory breach and the loss or damage suffered by the plaintiff. Second, both are directed at potentially misleading conduct in the marketplace. Third, both provide a civil remedy where a person has actually been misled…

…

[82] The objects of the *Competition Act* are similar to those of the *BPCPA* in some respects and distinguishable in others. Importantly, the causal link required between a breach of s. 52 of the *Competition Act* and damages for the cause of action created by s. 36 is well-settled by the jurisprudence. It relates, in part, to the nature of a s. 52 breach, namely, a false or misleading representation made to the public for purposes of promoting a product or business interest. For a private interest plaintiff to bring a claim under s. 36 of the *Competition Act* for a s. 52 breach, damages in the abstract are not sufficient; to establish causation, detrimental reliance is required. As stated in *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 and cited with approval at para. 91 of *Wakelam*:

> … A consumer [of the product at issue] cannot recover damages, in the abstract, simply by proving that the manufacturer made a false and misleading representation to the public. The failure of the plaintiff to plead a causal link is fatal ...
>
> … It is not enough to plead the conclusory statement that the plaintiff suffered damages as a result of the defendant's conduct. The plaintiff must plead a causal connection between the breach of the statute and his damages. In my view, this can only be done by pleading that the

> misrepresentation caused him to do something – i.e. that he relied on it to his detriment.
>
> [83] In my view, the causal link required between a breach of s. 5 of the *BPCPA* and damages for the cause of action created by s. 171 is not equally well-settled. Nor is it equally apparent that reliance will always be necessary for causation purposes given the differing nature of the statutory breach and the potential loss. As this Court noted in *Collette v. Great Pacific Management Co. Ltd.*, 2004 BCCA 110 at para. 34 in the context of a tort claim, reliance may not be required to establish a causal link between a breach of duty and a loss in all misrepresentation cases. The reason for insistence on reliance is to prove causation. They are not independent requirements. Accordingly, if a breach of duty can be adequately linked to a loss by alternate means, individual reliance need not be shown.
>
> [84] Without reliance, a misleading representation made to the public in breach of s. 52 of the *Competition Act* cannot be linked to a loss suffered by a particular individual. However, given the broad definition of a "consumer transaction" and a "deceptive act or practice", the same is not necessarily true of a breach of s. 5 of the *BPCPA* and an individual loss. …

[183] I find that these statements should not be read as having finally determined that reliance is required for every case brought under s. 36. There are four reasons for this conclusion.

[184] First, in their conclusory paragraph above, the Court of Appeal in *Wakelam* returned to the words "the required causal connection" rather than expressly requiring "reliance".

[185] Second, any reliance that the courts in *Wakelam* and *Finkel* placed on the Ontario decision in *Singer* must now be questioned. The finding in the Ontario decision in *Singer* in respect of the need to show reliance is now inconsistent with a subsequent Ontario decision, *Rebuck*. I note that the *Rebuck* decision did not appear to have been put before Justice Tammen in *Gomel*. In *Rebuck*, the court found as follows:

> [33] Although causation has not been dispensed with, reliance in the usual sense of a common law negligent misrepresentation claim is not a necessary ingredient to establish a civil cause of action under s. 36 of the *Competition Act* for breach of s. 52: *Magill v Expedia Canada Corp*, 2010 ONSC 5247, at para 107. For example, in *Pro-Sys* [*Microsoft*], at paras 71, 113, a claim under s. 36 was permitted to proceed and for damages to be calculated on an aggregate rather than an individualized basis. This could not happen under a common law tort claim of negligent misrepresentation with its strict reliance-

> as-inducement rule: *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. [1964] AC 465, 502-4…
>
> …
>
> [35] The Plaintiff need not plead that the misrepresentations induced him to buy his car; that type of detrimental reliance would be a necessary ingredient for a claim based on the common law of negligent misrepresentation. Rather, under s. 36 of the *Competition Act* what the Plaintiff must plead is that the misrepresentations caused him to acquire less value than he expected to acquire – i.e. to spend more on gas than he thought he would spend when he purchased the Vehicle.
>
> [36] Framed in this way, causation is an issue that is common to all purchasers and lessees of the Vehicles. The facts as pleaded match the requirements of the statutory causes of action that are pleaded.

[186] Third, the principles in *Re Hansard Spruce Mills*, [1954] 4 D.L.R. 590 at 592, allow a court to choose not to follow the judgment of another judge of the same court if subsequent decisions have affected the validity of the impugned judgment. That is certainly the case for any decision that relied upon *Singer* and/or did not have the benefit of the decision in *Rebuck*. I find that the reasoning in *Rebuck* is compelling, and indeed is more consistent with the principles underlying causation espoused by the B.C. Court of Appeal in *Collette*.

[187] As it relates to *Finkel*, it must also be noted that any comments made about s. 36 were *obiter* given that the refusal to certify the *Competition Act* claim had not been appealed.

[188] Fourth, it is difficult, if not impossible, to square there being an absolute requirement for reliance under s. 36 with the Supreme Court of Canada's judgment in *Microsoft.* In *Microsoft,* price-fixing claims were certified in circumstances where it would be impossible to conclude that indirect purchasers of the implicated products were relying on any particular statement or conduct on the part of the defendant supplier. There is no evidence that reliance was pled in that case, although ss. 36 and 52 were held to be properly pled (paras. 65-66, 71).

[189] Hence, I conclude that it is open to me to find that there is a sufficient factual and legal basis to argue that reliance may not be necessary to support the s. 36 claim in this case. The plaintiff's causation theory that the GS Products should not

have been distributed at all because they did not comply with the *NHP Regulations* is sufficient to ground this approach to the *Competition Act* claim. Hence, I find that this is an issue that can be decided commonly.

[190] In sum, Issues 17, 18 and 20 are certified. Certification and resolution of Issue 19, concerning aggregate damages, should be postponed until the end of the common issues trial for the reasons discussed above regarding Issue 6.

9. Consumer Protection Act Issues

[191] Issues 21 to 37 address class members' claims under the Provincial Consumer Protection Legislation.

[192] For each piece of Provincial Consumer Protection Legislation, the plaintiff has proposed common issues aimed at determining whether the Defendant Manufacturers' conduct constituted an activity prohibited by the statute: Issues # 21, 23, 25, 27, 29, 31, 32, 34 and 36. As each of these issues focuses upon the conduct of the Defendant Manufacturers, I accept that they are all suitable for common determination, particularly given the framework that has been established for resolution of these issues in each province.

[193] Beginning in the west, the B.C. Supreme Court has concluded that similar issues, regarding whether certain written representations were "deceptive acts or practices", are suitable for determination as common issues: *Seidel v. Telus Communications Inc.*, 2016 BCSC 114 at paras. 151, 155-165; *Finkel* at paras. 47, 95-97. The above statements from *Finkel*, regarding the flexibility of the test for causation under the *BPCPA* further supports the certifiability of these proposed issues.

[194] Alberta courts apply an objective standard conducive to class treatment in determining whether a representation is misleading under to the *Alberta Consumer Protection Act.* The conduct or representation is to be tested against the standard of a reasonable consumer, not any particular consumer: *Edanver Consulting* at para. 21; *R. v. 954355 Alberta Inc. (The Fast Lane),* 2016 ABPC 229 at paras. 14, 18

[*954355 Alberta*]. The focus on the reasonable consumer assists in allowing the court to reach the conclusion that the breach issue is common. Alberta courts have also held that it is irrelevant whether the deceptive act or misrepresentation is inadvertent, unintentional or innocent, further reducing the individuality of the question: *Edanver Consulting* at paras. 22-24; *954355 Alberta* at para. 18; *Robertson v. British Fine Cars Ltd*., 2005 ABPC 327 at para. 27; *Basaraba v. St*. *Alberta Dodge Chrysler Ltd.,* 2000 ABQB 479 at para. 29.

[195] In Saskatchewan, in *G.C.*, the Saskatchewan Court of Queen's Bench certified a similar question (at paras. 86-88). Further, the use of the phrase "might reasonably be deceived" in s. 6 of their statute suggests an objective standard. The Manitoba Court of Queen's Bench applied an objective test under s. 2(1)(a) of Manitoba's *Business Practices Act* in *Arnold v. Gen-West Enterprises Ltd.* (1996), 112 Man R (2d) 306 (Q.B.) at para. 13, further supporting commonality. Ontario courts have held that whether a representation was untrue, inaccurate or misleading under their consumer legislation is an objective question and can be advanced on a class basis: *Rebuck* at paras. 29-31. Under Quebec's *Consumer Protection Act* the "general impression" is analyzed without considering the personal attributes of the consumer: *Richard* at para. 49. Under s. 272, there is also an absolute presumption of prejudice available to the consumer under certain conditions: *Richard* at paras. 112-113, 117-124. Again, this type of presumption facilitates the determination of the breach issue within the structure of a common issues trial.

[196] This court has held that reliance is not required to establish a "deceptive act or practice" under s. 4 of the *BPCPA*: *Cantlie* at paras. 239-246; *Seidel* at para. 92-97; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 157, aff'd 2015 BCCA 252; *Clark* at para. 75; *Gomel* at para. 61. In arguing that reliance is required, the defendants cite *Ileman* B.C.S.C. This decision was upheld in part on appeal, but the Court of Appeal did not consider the issue of reliance under s. 4 of the *BPCPA*. In *Ileman* B.C.S.C., Justice Weatherill distinguished between representations which are of a character that reliance can be assumed and representations where reliance must be shown:

> [67] …
>
> (a) where the composition of the representation is such that a determination can be made as to whether it had the capability, tendency or effect of deceiving or misleading under the provisions of the *BPCPA* without the need for additional facts, the plaintiff need not prove that he or she was actually deceived by it because there is no need for individual inquiry to determine what comprised the representation. This will be the circumstance in most products liability and failure to warn cases. Examples include *Knight* (cigarette packages branded as "light" and "mild") and *Jones* (press release claimed a 99.5 percent success rate with the manufacturer's hip replacement implant);
>
> (b) where the composition of the representation is such that a determination cannot be made as to whether it had the capability, tendency or effect of deceiving or misleading under the provisions of the *BPCPA* without additional facts, the plaintiff must demonstrate that he or she was aware of those additional facts. This was the situation in *Loychuk* (statements on a website that the plaintiffs may or may not have read and may or may not have induced them to act) and *Bryan* (the equipment had been used by the hospital, not by the plaintiff), and there was no allegation that the plaintiff was aware of or relied upon the manufacturers statement.

[197] The defendants argue that the impugned representations in the present case fit into category (b).

[198] I find it at least arguable that the allegedly false representation that the GS Products contain GS "constitutes a deceptive act or practice" under s. 4(3)(i) of the *BPCPA* as a representation by a supplier that goods have ingredients that they do not have. If the representation is deemed as constituting a "deceptive act or practice" under s. 4(3)(i), there is arguably no need to determine whether it has the "capability, tendency or effect of deceiving or misleading a consumer" under s. 4(1). I note that there are similarly worded provisions in the other Provincial Consumer Protection Legislation: Alberta *Consumer Protection Act*, s. 6(4)(c); Saskatchewan C*onsumer Protection and Business Practices Act,* s. 7(a)); Manitoba *Business Practices Act*, s. 2(3)(a); Ontario *Consumer Protection Act,* s. 14(2); Quebec *Consumer Protection Act,* s. 221(a); P.E.I. *Business Practices Act*, s. 2(a)(i); Newfoundland and Labrador *Consumer Protection and Business Practices Act*., s. 7(1)(a).

[199] In the alternative, I find that this case fits best into category (a) set out in *Ileman B.C.S.C.*, in which reliance is not required to establish that a representation

or conduct constitutes a deceptive act or practice. The GS Products were "branded as" GS. One need not necessarily impute additional words or conditions outside of the impugned representation in order to determine whether a wrong occurred: *Ileman* B.C.S.C. at paras. 70-73. In my view, this case is far closer to *Knight v. Imperial Tobacco Canada Ltd,* 2005 BCSC 172, aff'd in part 2006 BCCA 235, where an objective assessment of the offending terms "light" or "mild" could be performed on their face, without more, and where the words were clearly set out on the packaging.

[200] The plaintiff has also proposed statutory claim-based common issues aimed at resolving whether class members are entitled to a remedy: Issues #22, 24, 26, 28, 30, 33, 35 and 37. For B.C., this includes a claim for a restoration order under s. 172(3). Applying the following reasoning from the Court of Appeal in *Ileman* B.C.C.A.*,* I find that there is at least "some basis in fact" supporting the proposed restoration aspect of the common issue:

> [59] In my view, the proper interpretation of s. 172(3)(a) begins with the understanding that a restoration order is merely ancillary to a declaration or injunction. The purpose of s. 172(3)(a) is not to create a new legal right, but rather to allow existing private rights to be recognized within the context of public interest litigation.
>
> [60] While "an interest" need not be a proprietary interest in specific property, then, it must be an interest recognized by law outside of s. 172(3)(a). A right to recover damages under s. 171, for instance, would be a sufficient interest to allow recovery under s. 172(3)(a).
>
> [61] The difficulty in the case before us is the same as the difficulty that the plaintiffs faced in *Wakelam*. The plaintiffs cannot establish a constructive trust, nor can they demonstrate that they have personally suffered any loss or damage cognizable in law.
>
> [62] In my view, the chambers judge interpreted s. 172(3)(a) too narrowly by importing a "proprietary nexus" requirement into it. He was correct, however, in his conclusion that the plaintiff does not have "an interest" in any money in the hands of the defendants as that phrase is used in s. 172(3)(a). The plaintiff's claim fails for the same reason as a similar claim failed in *Wakelam*. I would add that I am not persuaded that there is any reason for this Court to reconsider *Wakelam*.
>
> [Emphasis added.]

[201] The defendants argue that reliance is also required in order to be entitled to a statutory remedy: *Sandoff v. Loblaw Companies Limited*, 2015 SKQB 345 at paras. 50-53, *Clark* at para. 126. However, as discussed above, in B.C. and several of the other provinces, it is at least arguable that individual detrimental reliance is not the only way to establish the necessary causal link between the deceptive act or practice and the consumer's loss: *Finkel*, paras. 71-87, *Rebuck*, at para. 29; *Gomel* at paras. 80-85. I note that to be entitled to a remedy under s. 4(1) of the P.E.I. *Business Practices Act*, a representation must have "induced" the consumer into entering the agreement. It is not clear whether this means "reliance" or something short of that. Given the lack of clarity in the jurisprudence, I find that is an issue that could be argued at trial. Further, I find that the plaintiff's theory that the GS Products should simply never have been distributed creates at least a reasonable prospect that the court could find that the class as a whole is entitled to a remedy under the Provincial Consumer Protection Legislation at the common issues trial.

[202] Three further issues arise with respect to remedies under Ontario's *Consumer Protection Act.*

[203] First, the plaintiff accepts as an issue the question of privity. Courts have held that the remedy of rescission under s. 18 of the Ontario *Consumer Protection Act*, or alternatively damages, can only be available as between a consumer and the "supplier" with whom he or she contracted: *Singer* at para. 87. But as noted, the plaintiff intends to argue that the Defendant Manufacturers should be viewed as jointly and severally liable with the retailers. Section 18(2) provides that: "Each person who engaged in an unfair practice is liable jointly and severally with the person who entered into the agreement with the consumer". The plaintiff argues that their claim against the Defendant Manufacturers is supported by the rescission of any sales contracts between the Defendant Retailers and the class members. I accept that it is not plain and obvious that this theory must fail, and hence there is enough of a factual underpinning for this issue so as to sustain it as a common issue.

[204] Second, the Defendant Manufacturers argue that, to the extent the plaintiff claims the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer under s. 18(2), the plaintiff has not provided any basis in fact for a difference in value. The defendants say that such a question will require an individualized analysis. However, the plaintiff's overarching theory is the product could not legally be sold, such that it would be inappropriate to ascribe any value to GS Products that did not contain GS. Again, it is not plain and obvious that this theory must fail, and there is an adequate factual substratum for the argument to support it at this preliminary stage of the proceeding.

[205] Third, as noted above, s. 18(3) of the Ontario *Consumer Protection Act* provides that a consumer must give notice within one year of entering the agreement if seeking rescission or damages under ss. 18(1) or (2). Because no material facts have been pled in that respect, I would decline to certify the Ontario *Consumer Protection Act* issues at this time. Again, after any amendments, the plaintiff may consider applying to certify a common issue in relation to s. 101, which gives the court the power to waive the notice requirement if it is in the "interest of justice to do so".

[206] In sum, Issues 21-28 and 31-37 are certified. Issues 29 and 30 are not certified at this juncture, but I am prepared to reconsider certification of these issues after the plaintiff has had an opportunity to amend the pleadings.

10. Punitive or Exemplary Damages

[207] Issue 38 asks if the Defendant Manufacturers are liable to pay punitive or exemplary damages and, if so, in what amount. Entitlement to punitive damages is an issue that focuses solely on the Defendant Manufacturers' conduct and, in particular, whether it was sufficiently reprehensible or high-handed to warrant punishment. As such, the entitlement to punitive damages is frequently certified as a common issue in class proceedings: *Rumley v. British Columbia*, 2011 SCC 69 at para. 34; *Cloud v. Canada (Attorney General),* [2004] OJ no. 4924 (C.A.) at para. 72;

Boulanger v. Johnson & Johnson Corp., [2007] O.J. No. 179 (S.C.J.) at para. 48, leave to appeal ref'd [2007] O.J. No. 1991 (S.C.J.); *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at paras. 25-35; *Matthews v. La Capitale Civil Service Mutual*, 2020 BCSC 787 at paras. 140-143, 149.

[208] The plaintiff alleges that the Defendant Manufacturers, knowingly or recklessly, falsely labelled all of the bottles in their entire GS Product line as containing GS. The plaintiff seeks punitive damages on the grounds that the Defendant Manufacturers' conduct was, among other things, high-handed, outrageous, reckless, and entirely in disregard of the rights of the class: Amended Notice of Civil Claim at paras. 80, 89, 141. This pleading is quite bald in my view.

[209] Furthermore, from an evidentiary perspective, the factual basis supporting the existence of a punitive damages common issue is also thin. In particular, the plaintiff herself acknowledged in oral argument that the Defendant Manufacturers may simply have themselves been "duped" by upstream material suppliers. Furthermore, the mere existence of the 2012 Sahoo article gives little support for a punitive damages claim, particularly given that the potentially offending manufacturer is never identified. Nor does a June 2019 filing of a U.S. class action making similar allegations against Walmart Inc. (reported at *Diamos v. Walmart Inc*., 2020 U.S. Dist. LEXIS 73972) add much to this analysis.

[210] On the present record, I find that there is a no basis to certify the punitive damages question set out in Issue 38: *Singer* at para. 195; *Bhangu* at para. 137; *Stewart v. Demme*, 2020 ONSC 83 at para. 104. That is not to say that the plaintiff may not be in a position at a later date to apply for certification of such an issue on a more complete factual record.

11. Conclusion on Common Issues

[211] For the reasons expressed above, I find that the plaintiff has proposed an acceptable list of common issues, save that:

1. Issue 11 is not certified;

2. Certification and resolution of Issues 6, 13, 16 and 19 will await the resolution of the other common issues;

3. Certification of Issues 29 and 30 will be postponed until after the plaintiff has had an opportunity to amend her pleadings to plead how the notice requirements of the Ontario *Consumer Protection Act* are met; and

4. Issue 38 is not certified.

E. Is a Class Proceeding the Preferable Procedure

1. Generally

[212] The plaintiff bears the burden of establishing that certifying this action as a class proceeding is the preferable method of resolving the claims. As the Supreme Court of Canada stated in *AIC*:

> [48] The party seeking certification of a class bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. In the context of the preferability requirement, this requires the representative plaintiff to show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick*, at paras. 28 and 31…

[213] I begin my analysis of preferability by reviewing the mandatory factors set out in s. 4(2) of the *CPA*. I will then turn to a broader examination as to whether the proposed proceeding advances the purposes of class proceedings: *Bhangu* at para. 149-150.

2. (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members

[214] There is a substantial common core question that would materially advance the claim of each class member: Did the Defendant Manufacturers GS Products actually have GS in the bottles? If the answer is "no", all four of the plaintiff's causes of actions will be advanced. This is the "heart of the litigation", making any concerns

about the relative weight of individual issues much less troubling: *Reid v. Ford Motor Company*, 2003 BCSC 1632 at para. 83.

[215] In terms of the individual issues, the plaintiff has certain theories that could avoid the need for each class member to establish reliance on a particular representation. Alternatively, the plaintiff intends to show that the class members are at least deserving of an inference of reliance, in which case there may be no need for an individual inquiry unless the Defendant Manufacturers seek to press the issue for a particular class member.

[216] Even if each class member is required to prove reliance, the reliance inquiry would necessarily be quite constrained. Posing the single question "Why did you buy the GS Product?" would take the individual issues evaluation a long way.

[217] When one considers:

1. the considerable power the court has to constrain and control the procedure required to resolve any residual issues through s. 27 of the *CPA*; and

2. the considerable tolerance our courts have shown to cases that would have required much more involved individual issues assessments (see the certified abuse class actions *Rumley*, *Cloud*, *Griffiths v. HMTQ*, 2003 BCCA 367, and *Richard v. HMTQ*, 2005 BCSC 372 *inter alia*);

the Court concludes that the weight of this factor heavily favours certification.

3. (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions

[218] There is no evidence that any putative class members wish to pursue these claims on an individual basis. This factor supports certification.

4. (c) whether the class proceeding would involve claims that are or have been the subject of any other proceeding

[219] There is no evidence of any other individual or class proceedings in Canada involving these issues.

5. (d) whether other means of resolving the claims are less practical or less efficient

6. (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means

[220] The Defendant Manufacturers suggest that, to the extent that the plaintiff believes that the GS Products' labels are inaccurate or misleading, she could direct her complaints to the regulators under the *NHP Regulations*, the *Food and Drugs Act*, the *Competition Act*, and/or the Consumer Protection Legislation.

[221] In particular, the Defendant Manufacturers argue that a complaint to Health Canada would be preferable to a class proceeding, as Health Canada has the power to suspend product licenses to prevent further non-compliance, and to review approved testing methods for insufficiencies under the *NHP Regulations*.

[222] The problem with this suggestion is clear, Health Canada does not have the power to award damages or restitution. If the plaintiff's primary purpose is to get her money back, there is nothing Health Canada can do for her. In *Reid*, the court rejected a suggestion that a Transport Canada complaint was the preferable procedure for a product defect complaint. The court stated:

> [95] There is evidence that complaints have been made to Transport Canada regarding stalling problems in the proposed class vehicles and Ford Canada was made aware of these complaints, as copies of the complaints are routinely sent to Ford Canada. The defendants' claim that they are not aware of such complaints is a clear indication that complaining to Transport Canada is not an effective means to resolve these types of claims. The evidence is that Transport Canada has not engaged in any prosecutions for the last ten years. A determination by Transport Canada is not binding or governing in any civil proceeding nor does it have the power to award damages. Hence, it is not an appropriate alternative to the proposed class proceedings.

[223] While it is true that there appears to have been no complaints to Health Canada here, the point still stands that a determination by Health Canada “is not binding in any civil proceeding nor does it have the power to award damages”.

[224] I have considered as well the decision of the B.C. Court of Appeal in *Nanaimo Immigrant Settlement Society v. British Columbia*, 2001 BCCA 75, where the province argued that the pursuit of a declaration by a single class member was preferable. The court rejected that argument stating:

> [20] But…the question is not whether the class action is necessary - i.e., whether there are other alternatives - but whether it is the "preferable procedure" for resolving the plaintiffs' claims. Section 4(2) of the *Act* states that that question involves a consideration of "all relevant matters" - a phrase that includes the practical realities of this method of resolving the claims in comparison to other methods. In the plaintiffs' submission, what makes a class action preferable in this case are the practical advantages provided by the *Act* for the actual litigation process. Some of these advantages accrue only to the plaintiffs: as Mr. Branch noted, if the claims are aggregated, contingency fee arrangements are likely to be available for the plaintiffs. The claims can be pursued by one counsel or a few counsel rather than by many. A formal notification procedure is available. Generally, it is more likely that those charities that have paid provincial licence fees in connection with bingo and casino games can pursue the matter to completion - something very few individual charities could do on their own. Other advantages arising under the *Act* are beneficial to both parties - the assignment to the action of one case-management judge, and the attendant elimination of lengthy Chambers proceedings before different judges. From the Province's point of view, none of these considerations prejudices its ability to defend the action fully, except to the extent that financial constraints on the plaintiffs are eased. Those constraints are not an "advantage" the Province should wish to preserve.
>
> [21] In my view, these factors militate strongly in favour of certification, and are obviously consistent with the stated objectives of the *Act*. The fact that the threshold questions include matters of constitutional law that could be resolved in a shorter declaratory action should not, in my view, overshadow these realities. As Mr. Branch said, the obtaining of a declaration is not the plaintiffs' primary objective; the repayment of their fees is. Nor should the fact that restitution is being sought by individual plaintiffs outweigh the fact that a class action will move the proceedings forward to a considerable extent.
>
> [Emphasis in the original]

7. The Purposes of Class Proceedings

[225] Finally, in evaluating preferability, the court may also consider the extent to which the proceeding is likely to enhance the three purposes of class actions, being

(1) access to justice, (2) judicial economy, and (3) behaviour modification: *Finkel* at paras. 50 and 104.

[226] In terms of access to justice, an individual proceeding would clearly be cost-prohibitive. It is only by aggregating their claims that class members will realistically be able to encourage counsel to act on their behalf. Absent the power of aggregation, each individual class member would likely have to incur fees and disbursements that will be many multiples of their individual claim.

[227] In terms of judicial economy, there are at least two persons interested in advancing the same claim, and likely more. Aggregating the claims will improve judicial economy by having a single judge manage all these claims.

[228] In terms of behaviour modification, I accept the Defendant Manufacturers' submission that this factor carries less weight in this case. Their behaviour is already carefully regulated by Health Canada, a sophisticated regulatory body mandated by an act of Parliament with a carefully designed regulatory scheme that determines what representations can be made about each GS Product: *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352 (S.C.J.) at para. 173; *Hollick* at paras. 34-35. That said, a central feature of the plaintiff's claim is that Health Canada's testing protocols are insufficient to ensure that a GS Product contains GS. If that is so, then the behaviour of both the Defendant Manufacturers and Health Canada may be the subject of change if the case is successful.

8. Conclusion on Preferability

[229] The factors relevant to preferability generally favour certification. A class proceeding is likely to be a fair, efficient and manageable structure.

F. Is there an Adequate Representative Plaintiff with a Proper Litigation Plan?

1. Adequacy of the Plaintiff

[230] A representative plaintiff need not be "typical" of the class, nor the "best" possible representative: *Dutton* at para. 41. The test for the adequacy of a proposed

representative plaintiff is whether he or she will vigorously prosecute the action: *Campbell* at paras. 75-76.

[231] WN does not take issue with the proposed representative plaintiff.

[232] Jamieson suggests that the proposed representative plaintiff appears to be a token plaintiff contrived by class counsel. Jamieson does not directly attack the family relationship per se, but rather raises a concern that she did not complain until advised of the alleged problem by her daughter's employer.

[233] I find that the family relationship is not a bar to the plaintiff acting in the role of representative. Applying the principles set out in *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879 at para. 202:

1. Ms. Krishnan is not a lawyer working on the case.

2. Ms. Krishnan is not a lawyer at one of the class counsel firms.

3. Ms. Krishnan is only the mother of a non-lawyer employee of the Camp Fiorante firm.

4. Ms. Krishnan's daughter will not receive any benefit from the litigation;

5. Although any conflict is active, as Ms. Krishnan's daughter remains employed by the Camp Fiorante firm, the fact that there are three other firms acting as class counsel mitigates any concern, since any recommendations will presumably require a consensus across the firms.

6. The plaintiff is otherwise appropriate to fulfill the role and there is no other evidence that the plaintiff is a mere puppet of class counsel.

7. The plaintiff disclosed the relationship well in advance of the certification hearing.

[234] Applying the relevant factors, I accept the plaintiff as a suitable representative.

[235] It is true that the bottle that the plaintiff says she purchased did not state GS on the front of the label, but rather simply listed GS as an ingredient. However, this concern goes more to "typicality" than "suitability". She may have a more difficult challenge ahead of her than would someone who purchased a product with GS on the front of the label, but this arguably only increases her motivation to ensure that all class members succeed.

2. Litigation Plan

[236] Jamieson does not take issue with the litigation plan, but WN argues that it is insufficient.

[237] Justice Winkler stated as follows in *Caputo v. Imperial Tobacco Ltd.* (2004), 44 C.P.C. (5th) 350 (Ont. S.C.J.):

> [75] The *Act* mandates that the representative plaintiffs produce a "plan" that sets out a "workable method of advancing the proceeding on behalf of the class…". McLachlin C.J. held in *Hollick* that the preferability analysis must be conducted through a consideration of the common issues in the context of the claims as a whole. (para. 30) In this context, the litigation plan is often an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of "preferability" as it pertains to manageability, efficiency and fairness.

[238] The plaintiff's plan is somewhat thin in terms of wrestling with the potential for individual issues hearings. However, I find that it is adequate at this stage of the proceeding.

IV. CONCLUSION

[239] The case is not certified against Jamieson at this time given the absence of admissible evidence relating to Jamieson from either of the two proposed class members, as well as the absence of any proper expert opinion providing some basis in fact for the certification of any common issues against Jamieson. However, the plaintiff is given leave to file a further affidavit and expert opinion from Dr. French relating to his testing of Jamieson's GS Product, on the terms set out above.

[240] The case is certified as a class proceeding as against WN and Natural Factors.

[241] The common issues proposed by the plaintiff are approved, subject to the following:

1. Issue 11 is not certified.

2. Certification and resolution of Issues 6, 13, 16 and 19 will await the resolution of the other common issues.

3. Certification of Issues 29 and 30 will be postponed until after the plaintiff has had an opportunity to consider whether it wishes to amend the pleadings in order to plead how the notice requirements of the Ontario *Consumer Protection Act* have been met.

4. Issue 38 is not certified.

[242] The parties will arrange for a further hearing at which the parties may present a notice program for approval.

[243] I also give leave to the Plaintiff to file an amended Notice of Civil Claim consistent with these reasons.

"Branch J."

V. SCHEDULE A - PROPOSED COMMON ISSUES

Glucosamine Sulfate

1. Which, if any, of the products manufactured, distributed, produced, marketed, advertised or sold by the Defendant Manufacturers, during the relevant period, were labelled as containing “glucosamine sulfate”, “glucosamine sulfate potassium chloride”, “glucosamine sulfate KCL”, or “glucosamine sulfate • KCL” (the “Defendants’ Glucosamine Sulfate Products”)?

2. Were the Defendants’ Glucosamine Sulfate Products being held out by the Defendant Manufacturers to the Defendant Retailers and Class members as containing the chemical substance 2-Amino-2-deoxy-D-glucose sulfate or 2-Amino-2-deoxy-D-glucose sulfate, compd. with potassium chloride (“Glucosamine Sulfate”)?

3. Did any of the Defendants’ Glucosamine Sulfate Products contain Glucosamine Sulfate?

Restitution

4. If not, have the Defendant Manufacturers been unjustly enriched by the receipt, either directly or indirectly, of payments from the Class members for the Glucosamine Sulfate that Class members did not receive when they purchased the Defendants’ Glucosamine Sulfate Products?

5. If so, what amount of restitution, if any, is payable by the Defendant Manufacturers to the Class members?

6. Can the amount of restitution be determined on an aggregate basis and, if so, in what amount?

Tort

7. Do each of the Defendant Manufacturers owe a duty of care to Class members to ensure that the representations on the labels of the Defendants’ Glucosamine Sulfate Products are accurate as to the content of those products?

8. Did each of the Defendant Manufacturers falsely represent to Class members that the Defendants’ Glucosamine Sulfate Products contained Glucosamine Sulfate?

9. If so, did each of the Defendant Manufacturers fail to take adequate steps to ensure the accuracy of their representations?

10. Can reliance by the Class members on the misrepresentation be inferred by the purchase of a product named “glucosamine sulfate” on the front of the

label and, if so, was the reliance reasonable?

11. Can reliance by the Class members on the misrepresentation be inferred by the purchase of a product, which name includes “glucosamine” on the front of the label, and lists glucosamine sulfate as a primary ingredient and, if so, was the reliance reasonable?

12. Are Class members entitled to damages for negligent misrepresentation and, if so, in what amount?

13. If so, can the amount of damages be determined on an aggregate basis and, if so, in what amount?

14. Are Class members entitled, in the alternative, to disgorgement of the benefit obtained by the Defendant Manufacturers as a result of their tortious conduct?

15. If so, what restitution, if any, is payable by the Defendant Manufacturers, or any of them?

16. Can the amount of restitution be determined on aggregate basis and, if so, in what amount?

Competition Act

17. Did the Defendant Manufacturers, or any of them, engage in conduct contrary to s. 52 of the *Competition Act*, RSC 1985, c. C-34?

18. If so, what damages, if any, are payable by the Defendant Manufacturers to the Class members pursuant to s. 36 of the Competition Act?

19. Can the damages be determined on an aggregate basis and, if so, in what amount?

20. Should the Defendant Manufacturers, or any of them, pay the full costs of the investigation into this matter, pursuant to s. 36 of the *Competition Act*?

Consumer Protection Statutes

<u>British Columbia</u>

21. Did the Defendant Manufacturers, or any of them, commit a “deceptive act or practice” within the meaning of s. 4 of the B.C. Business Practices and Consumer Protection Act, SBC 2004, c. 2 (the “BPCPA”)?

22. If so, are some or all of the Class members entitled to restoration of the purchase price acquired from them, pursuant to s. 172 of the BPCPA or, alternatively, to damages for the losses they suffered, pursuant to s. 171 of the BPCPA?

Alberta

23. Did the Defendant Manufacturers, or any of them, engage in an "unfair practice", within the meaning of s. 6 of the Alberta *Consumer Protection Act*, RSA 2000, c. C-26.3?

24. If so, are some or all of the Class members entitled to restitution of the purchase price they paid for the Defendants' Glucosamine Sulfate Products or, in the alternative, damages pursuant to s. 13(2) or s. 142(2) of the Alberta *Consumer Protection Act*?

Saskatchewan

25. Did the Defendant Manufacturers, or any of them, engage in an "unfair practice", within the meaning of s. 6 and s. 7(a) of the Saskatchewan *Consumer Protection and Business Practices Act,* SS 2014, c. C-30.2?

26. If so, are some or all of the Class members entitled to restitution of the purchase price they paid for the Defendants' Glucosamine Sulfate Products or, in the alternative, damages pursuant to s. 93(1) of the Saskatchewan *Consumer Protection and Business Practices Act*?

Manitoba

27. Did the Defendant Manufacturers, or any of them, engage in an "unfair business practice", within the meaning of s. 2(1) or s. 2(3)(a) of the Manitoba *Business Practices Act,* CCSM, c.B120?

28. If so, are some or all of the Class members entitled to repayment of the purchase price paid for the Defendants' Glucosamine Sulfate Products, or, in the alternative damages, pursuant to s. 23(2) of the Manitoba *Business Practices Act*?

Ontario

29. Did the Defendant Manufacturers, or any of them, engage in an "unfair practice", within the meaning of s. 14 of the Ontario *Consumer Protection Act, 2002,* SO 2002, c. 30, Sch. A?

30. If so, are some or all of the Class members entitled to repayment of the purchase price paid for the Defendants' Glucosamine Sulfate Products or, in the alternative, damages for the losses they suffered, pursuant to s. 18 of the Ontario *Consumer Protection Act, 2002*?

Quebec

31. Did the Defendant Manufacturers, or any of them, breach either:

    a. die statutory warranty, prescribed by s. 40 of the Quebec *Consumer Protection Act*, CQLR c. P-40.1, that goods must

conform to the description made of them in the contract; or

b. the requirement, pursuant to s. 41 of the Quebec *Consumer Protection Act*, that goods must conform to the advertisements regarding them made by the merchant or manufacturer?

32. Did the Defendant Manufacturers, or any of them, engage in a "prohibited practice" within the meaning of s. 215, s. 219 or s. 221(a) of the Quebec *Consumer Protection Act*?

33. If the Defendant Manufacturers, or any of them, did breach the Quebec Consumer *Protection Act* in any of the above ways, are some or all of the Class members entitled to repayment of the purchase price they paid for the Defendants' Glucosamine Sulfate Products as compensatory damages pursuant to s. 272 of the Quebec *Consumer Protection Act*?

Prince Edward Island

34. Did the Defendant Manufacturers, or any of them, engage in an "unfair practice" within the meaning of s. 2(a) of the Prince Edward Island *Business Practices Act,* RSPEI 1988, c. B-7?

35. If so, are some or all of the Class members entitled to rescind the sales contracts and recover the purchase price paid or, in the alternative, to receive damages for their loss, pursuant to s. 4(1) of the Prince Edward Island *Business Practices Act.*

Newfoundland and Labrador

36. Did the Defendant Manufacturers, or any of them, engage in an "unfair business practice" within the meaning of s. 7(1) of the Newfoundland and Labrador Consumer Protection and Business Practices Act, SNL 2009, c. C-31.1?

37. If so, are some or all of the Class members entitled to a refund of the purchase price or, in the alternative, damages for their loss, pursuant to s. 10 of the Newfoundland and Labrador *Consumer Protection and Business Practices Act?*

Punitive Damages

38. Are the Defendant Manufacturers, or any of them, liable to pay punitive or exemplary damages having regard to the nature of their conduct and, if so, in what amount?