Federal Court Cour fédérale

Date: 20260220

Docket: T-607-20

Citation: 2026 FC 239

Ottawa, Ontario, February 20, 2026

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

KATHRYN EATON

Plaintiff

and

TEVA CANADA LIMITED, TEVA PHARMACEUTICALS USA, INC., ACTAVIS HOLDCO U.S., INC., ACTAVIS ELIZABETH LLC, ACTAVIS PHARMA, INC., ACTAVIS PHARMA COMPANY, BARR PHARMACEUTICALS, LLC, AKORN, INC., AKORN SALES, INC., HI-TECH PHARMACAL CO., INC., AMNEAL PHARMACEUTICALS, INC., IMPAX LABORATORIES, INC., APOTEX INC., APOTEX CORP., AUROBINDO PHARMA USA, INC., AURO PHARMA INC., AVET PHARMACEUTICALS INC., MARCAN PHARMACEUTICALS INC., BRECKENRIDGE PHARMACEUTICAL, INC., DR. REDDY'S LABORATORIES, INC., DR. REDDY'S LABORATORIES CANADA INC., GLENMARK PHARMACEUTICALS INC., USA, GLENMARK PHARMACEUTICALS CANADA INC., LANNETT COMPANY, INC., LUPIN PHARMACEUTICALS, INC., LUPIN PHARMA CANADA LTD., MAYNE PHARMA INC., MYLAN N.V., MYLAN PHARMACEUTICALS ULC, MYLAN INC., MYLAN PHARMACEUTICALS INC., MYLAN INSTITUTIONAL INC., DAVA PHARMACEUTICALS, LLC, GENERICS BIDCO I, LLC, PAR PHARMACEUTICAL COMPANIES, INC., PAR PHARMACEUTICAL, INC., PERRIGO INTERNATIONAL INC., PERRIGO NEW YORK, INC., PFIZER INC., PFIZER CANADA ULC/PFIZER CANADA SRI, GREENSTONE LLC, SANDOZ INC., SANDOZ CANADA INC., FOUGERA PHARMACEUTICALS INC., SUN PHARMACEUTICAL INDUSTRIES, INC., SUN PHARMA CANADA INC., TARO PHARMACEUTICALS INC., TARO PHARMACEUTICALS

U.S.A., INC., TELIGENT, INC., TELIGENT CANADA INC., UPSHER-SMITH LABORATORIES, LLC, WOCKHARDT USA LLC, MORTON GROVE PHARMACEUTICALS, INC., ZYDUS PHARMACEUTICALS (USA), INC., BAUSCH HEALTH AMERICAS, INC., BAUSCH HEALTH, CANADA INC., BAUSCH HEALTH COMPANIES INC., SANTÉ BAUSCH A.K.A. BAUSCH HEALTH, BAUSCH HEALTH US, LLC, 0909657 B.C. LTD., VALEANT CANADA GP LIMITED, VALEANT CANADA LIMITED, VALEANT CANADA S.E.C., V-BAC HOLDING CORP., 9079-8851 QUÉBEC INC., G&W LABORATORIES, INC., G&W PA LABORATORIES, LLC, MALLINCKRODT PUBLIC LIMITED COMPANY, MALLINCKRODT INC., MALLINCKRODT US LLC, MALLINCKRODT LLC, MALLINCKRODT CANADA ULC, AA PHARMA, PHARMASCIENCE INC., PENDOPHARM INC., JODDES LIMITED, VALEANT CANADA LP/VALEANT CANADA S.E.C., NOVARTIS PHARMACEUTICALS CANADA INC., PALADIN LABS INC., UPJOHN CANADA ULC, MYLAN PHARMACEUTICALS ULC., VIATRIS INC., BGP PHARMA ULC, HERITAGE PHARMACEUTICALS INC., AND INTERNATIONAL PHARMACEUTICAL GENERICS LTD.

Defendants

ORDER AND REASONS

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I. Overview

[1] The Plaintiff Kathryn Eaton requests certification of a proposed class proceeding on behalf of the class of persons defined as follows [Class]:

> All persons or entities in Canada who, from January 1, 2012 through the present (the "Class Period"), purchased generic drugs out-of-pocket or through private drug plans. Excluded from the Class are the defendants and their parent companies, subsidiaries, and affiliates.

[2] The Plaintiff alleges that the Defendants conspired to allocate the market and fix the prices of generic drugs throughout the Class Period, contrary to ss 45 and 46 of the *Competition Act*, RSC, 1985, c C-34. Pursuant to s 36 of the *Competition Act*, she seeks $5,000,000,000 in damages for the Class.

[3] For the reasons that follow, the Plaintiff has not satisfied four of the five criteria necessary to certify the proceeding as a class action, namely: (a) the Statement of Claim

discloses reasonable causes of action against the Defendants; (b) there are common issues of law or fact; (c) a class proceeding is the preferable procedure for determining the claims of Class members; and (d) there is a suitable Class representative.

[4] The Plaintiff has failed to demonstrate any basis in fact for the alleged conspiracy under the *Competition Act*, and accordingly the motion to certify the proceeding as a class action will be dismissed without leave to amend.

II. Background

A. *The Parties*

[5] The Plaintiff claims that she purchased various generic drugs out-of-pocket or through private drug plans throughout the Class Period. She has not specified which drugs she purchased, or which of the Defendants manufactured the drugs.

[6] The proposed Class comprises individual consumers who purchased generic drugs at pharmacies; prescription drug plan holders or sponsors including individuals, employers, businesses, and governments; insurance companies that purchase or provide reimbursement for generic drugs; and corporate and other entities that purchase or provide reimbursement for generic drugs in the private sector. The Class excludes the Defendants and their parent companies, subsidiaries, and affiliates, as well as distributors, wholesalers, and pharmacies.

[7] The Plaintiff alleges an industry-wide conspiracy across North America. As Defendants she has named a very large number of generic drug companies encompassing several distinct corporate groups.

B. *The Alleged Conspiracy*

[8] The Plaintiff alleges that the Defendants conspired to fix prices and allocate the market for generic drugs in Canada and the United States of America [USA]. According to the Plaintiff, the conspiracy was investigated by American law enforcement and regulatory agencies. Some of the parent companies of the Defendants, for example Apotex Corp, Heritage Pharmaceuticals Inc, Sandoz Inc, and Taro Pharmaceuticals USA, Inc, entered into deferred prosecution agreements [DPAs] in the USA, in which they admitted to anti-competitive price fixing and market allocation in that country. None of the DPAs mention Canada.

[9] The Plaintiff asserts that the Defendants have conspired to fix drug prices in Canada at the maximum formulary price. A formulary is a list of drugs covered by an insurance plan, and typically specifies the maximum list price the insurer will pay.

[10] The Plaintiff maintains that the conspiracy was facilitated through off-invoice discounts, which she describes as illegal and anti-competitive “kickbacks”, to pharmacies and wholesalers. She also claims that the Defendants conspired to limit the number of sellers of generic drugs: some Defendants agreed not to sell a particular drug in exchange for a larger market share of another drug, or to sell fewer pharmaceutical products in Canada in exchange for a larger market

share in the USA. According to the Plaintiff, the conspiracy had the effect of inflating the prices of generic drugs throughout Canada.

[11] The Plaintiff claims that the agreements to conspire were made and sustained through two-way communication between the Defendants, with the cooperation of pharmacies and wholesalers. She says the agreements were oral and not reduced to writing. She notes that executives and employees of the Defendants regularly attended conferences, dinners, and golf outings, which provided opportunities for agreements to be reached and maintained. She says the Defendants refer to the conspiracy by various names, including "playing nice in the sandbox", the "rules of engagement", and "fair share". She asserts that the conspiracy encompasses all generic drugs, and its full scope will be revealed in the course of discovery.

C. *The Plaintiff's Evidence*

[12] The Plaintiff's evidence consists of her own affidavit, the affidavits of Laurie Graham and Alexander Mulligan, and the expert reports of Dr. Michael Law and Dr. Ariel Pakes.

Affidavit of Kathryn Eaton

[13] The Plaintiff's affidavit is brief. She states that she lives in Toronto, Ontario, where she works as a director of operations and human resources for a digital marketing company. She says that she purchased various generic drugs throughout the Class Period, from January 1, 2012 to the present. She received prescriptions for medications from a physician or other healthcare professional, and took these prescriptions to a pharmacy to be dispensed. The drugs she received

were often generic drugs. She paid for the generic drugs both out of pocket and through an insurance plan.

[14] The Plaintiff provides a general overview of the proposed class action, and says she is willing to act as the representative for the Class. She says she has retained Orr Taylor LLP to pursue this action on a contingency basis, and she does not have any experience that would allow her to evaluate the litigation plan submitted in support of the certification motion.

Affidavits of Laurie Graham and Alexander Mulligan

[15] Ms. Graham is a lawyer with the Plaintiff's law firm. Her affidavit appends as exhibits copies of documents filed in legal proceedings in the USA, including informations and indictments, plea agreements, DPAs, press releases and news articles describing the US proceedings, as well as articles and publicly-available information concerning the generic drug industry in Canada. She also provides the results of searches of the Government of Canada's Drug Product Database and Notice of Compliance [NOC] Database regarding pharmaceutical products manufactured by certain Defendants.

[16] Mr. Mulligan is a lawyer with the Plaintiff's law firm. His affidavit appends as exhibits copies of documents filed in legal proceedings in Canada and the USA, including DPAs, copies of news articles and other published reports, and publicly-available information concerning some of the Defendants. He also provides the results of searches of the Government of Canada's Drug Product Database regarding pharmaceutical products manufactured by certain Defendants.

Expert Evidence of Dr. Michael Law

[17] Dr. Law is a Professor at the Centre for Health Services and Policy Research, School of Population and Public Health, University of British Columbia. Dr. Law summarizes the opinions contained in his first report as follows:

> Despite the fact that there are many manufacturers operating in Canada, the overall market for generic drugs is concentrated among a few large companies.
>
> There are significant regulatory and market barriers that generic drug manufacturers face when entering the Canadian market. This includes both regulatory barriers for the approval of a new drug, cost and time barriers to achieve listing on public drug plans, and marketplace barriers to having drugs stocked by pharmacies.
>
> Relatively infrequent changes in the ceiling prices set by the pan-Canadian Pharmaceutical Alliance (pCPA) suggest that the number of companies marketing any particular generic drug product is relatively stable over time.
>
> List prices for generic drugs tend to be set at the maximum allowable ceiling, despite the ability of manufacturers to set their prices lower.
>
> Pricing at the maximum allowable ceiling persists in Ontario despite there being a potential to capture additional market share with a lower list price.

[18] In his second report, Dr. Law summarizes his opinions as follows:

> The claim that the generic drug market is dynamic is countered by the better treatment of the generic drug market as a whole rather than on a product-by-product basis, the presence of basket negotiations that support this treatment of the generic drug market, and first-mover advantages. There are important barriers to market entry in Canada that impact smaller manufacturers more than larger ones. These features are consistent with the high level of concentrations observed in the Canadian generic drug marketplace that I noted in my initial report.

> The presence of insurance coverage for many Canadians does not fully insulate them from high list prices. This is true for many people with both public and private insurance. In addition, the evidence suggests that many Canadians are forgoing prescription drugs at costs that would be consistent with the prices they would be required to pay for many generic drugs.
>
> Most Canadians have access to several community pharmacies in their local area.

Expert Evidence of Dr. Ariel Pakes

[19] Dr. Pakes is a Professor of Economics at Harvard University. In his first expert report, he summarizes the allegations in the Statement of Claim and observes that similar lawsuits alleging collusion and price fixing among generic drug manufacturers have been commenced in the USA:

> For example, on May 10, 2019, 44 state attorneys general filed a joint complaint in the U.S. alleging many of the same defendants named in the [Statement of Claim] participated in a "conspiracy to allocate markets and fix prices for multiple generic drugs." On June 10, 2020, state attorneys general filed an additional complaint that claims the defendants colluded on over 80 topical generic drugs. In addition, the U.S. Department of Justice opened a criminal grand jury investigation regarding generic drug pricing. At the time of the filing of the [Statement of Claim], the following Defendants had agreed to pay criminal penalties or civil damages related to the U.S. Department of Justice's allegations:
>
> a. Taro Pharmaceuticals U.S.A., Inc. (approximately USD $419 million);
>
> b. Sandoz Inc. (approximately USD $382 million);
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> c. Apotex Corp. (USD $73.1 million);
>
> d. Heritage Pharmaceuticals Inc. (USD $7.1 million); and
>
> e. Teva Pharmaceuticals USA Inc. (USD $24.1 million).
>
> In addition to criminal penalties or civil damages paid in settlements, five companies have so far admitted guilt to fixing prices of generic drugs and agreed to cooperate in the U.S.

> Department of Justice's ongoing investigations in deferred prosecution agreements. Teva Pharmaceuticals USA Inc., Taro Pharmaceuticals U.S.A., Inc., Sandoz Inc., and Heritage Pharmaceuticals Inc. admitted guilt and were charged with conspiring to "fix prices", "rig bids", and "allocate customers," for generic drugs. Apotex Corp. admitted to and was charged with "fixing the price of the generic drug pravastatin," along with other drug companies. Further, Defendants Taro Pharmaceuticals U.S.A., Inc. and Sandoz Inc. each admitted that its "sales affected by the charged conspiracies exceeded USD $500 million." Likewise, Rising Pharmaceuticals (an unnamed co-conspirator) admitted to and was charged with participating "in a criminal antitrust conspiracy" to "fix prices" and "allocate customers" for Benazepril HCTZ, and Glenmark Pharmaceuticals Inc., USA was similarly charged with "conspiring to fix prices for generic drugs."
>
> [Citations omitted]

[20] According to Dr. Pakes, the generic drug market in Canada is conducive to collusion. There are few to no substitutes for each category of generic drug, the demand curve for generic drugs produces inelastic pricing, and there is little to no differentiation in quality or features across manufacturers, leaving price as the main route to product differentiation. Dr. Pakes concludes that quantity is the only facet the collusive parties need to manipulate.

[21] Dr. Pakes asserts that drug manufacturers have the ability to monitor quantity and the resulting prices, as there is extensive information on both prices and quantities available through third party organizations. It is therefore relatively easy to detect whether any participant has deviated from the alleged conspiracy.

[22] Dr. Pakes relies on evidence from publicly-available sources to demonstrate that the market prices for generic prices in Canada exceed prices in comparable countries. He says this outcome is consistent with collusion. Moreover, there is evidence of mechanisms that limit the

entry of competitors in generic markets and ensure that the quantity of generic products sold in those markets remains low, leading to prices above competitive levels.

[23] Dr. Pakes acknowledges that he does not have the necessary information to measure damages, but he says this is available from the Defendants or third party organizations. He also offers his opinion on the modelling that can be used to demonstrate the harm suffered by Class members due to the alleged conspiracy, and to estimate damages on an aggregate basis.

[24] Dr. Pakes mentions "rebates" (*i.e.*, off-invoice discounts) paid by generic drug manufacturers to pharmacies only once in his first expert report (at para 50):

> One facet of costs I have not discussed is rebates that are paid by the [generic pharmaceutical] firm to the pharmacies. Though there is no publicly available information on rebates, the firms will have records on them. I intend to requisition those records. Rebates are a component of costs and will be treated analogously.

[25] In his expert report dated November 15, 2024, Dr. Pakes responds to the expert reports submitted on behalf of the Defendants by Dr. James Levinsohn, Dr. Gregory Bell and Dr. Aidan Hollis. He says that nothing in the Defendants' expert evidence has caused him to change the opinions he expressed in his first expert report.

[26] According to Dr. Pakes, absent collusion, pharmacies have an incentive to compete on generic drug prices to attract consumers. He states that many consumers do not have insurance coverage for prescription drugs, and insured consumers are sensitive to the "out of pocket" portion of the price of drugs for which they are responsible. Insurers that are responsible for the remaining portion of the drug prices seek to maximize their profits, and therefore have incentives

to reduce the costs of generic drugs. Absent collusion, pharmacies have both an incentive to compete on prices and to seek the lowest cost inputs. If the price that affects pharmacy profits is net of discounts and there is no collusion, the discounts will be competitive and passed on to the consumer through the normal competitive pricing process.

[27] Dr. Pakes maintains that, absent collusion, manufacturers have an incentive to compete on generic drug prices, driving prices down very close to marginal costs. This is because the different generic alternatives for a given brand-name drug are highly substitutable, making payors sensitive to price differences. Moreover, manufacturers spend much less on research and development for generics than for branded products, and so can recoup entry costs for generic drugs relatively quickly.

[28] Even accounting for rebates, Dr. Pakes expresses the view that, absent collusion, manufacturers have an incentive to compete on list prices. If the price that is relevant to pharmacy profits is net of discounts and there is no collusion, the discounts will be competitive and passed on to the consumer through the normal competitive pricing process. If, in contrast, there is collusion, the discounts can be used to induce the pharmacies to accept the collusive prices in return for a share of the collusive profits.

[29] Dr. Pakes reiterates that the characteristics and mechanisms of the generic drug market facilitate collusion among manufacturers by making it easier to control entry, fix prices, and allocate the submarkets. Generic pharmaceutical firms are free to compete for market share by lowering prices. However, the alleged conspiracy ties many of the maximum prices to the number of entrants. The fact that these maximum prices are public information, prices have often

decreased with the number of entrants, and many of the firms have the ability to compete with each other in submarkets for the generic substitutes of different branded drugs, has made it easy to establish a mechanism to set and enforce collusive prices. Further, rebates and NOCs facilitate collusion by incentivizing pharmacies to abide by the alleged conspiracy, and provide another effective enforcement tool.

[30] In his further expert report dated May 23, 2025, Dr. Pakes responds to the reply expert reports submitted on behalf of the Defendants, and confirms that the opinions expressed in his two previous reports remain the same.

D. *Objection to the Expert Evidence of Dr. Pakes*

[31] The Defendants say that the expert evidence of Dr. Pakes is not admissible in these proceedings, because he has shown himself to be unwilling or unable to abide by the *Code of Conduct for Expert Witnesses* annexed as a Schedule to the Rules. In particular, they maintain that Dr. Pakes has failed to demonstrate the requisite impartiality, has sometimes expressed factual opinions that are outside his area of expertise, and has acted as an advocate for the Plaintiff.

[32] Expert witnesses have a duty to the Court to give fair, objective and non-partisan evidence. They must be aware of this duty, and be able and willing to carry it out (*White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 [*White Burgess*] at paras 32, 46). Once an expert attests that they accept this duty, the burden shifts to the party opposing admission to show there is a "realistic concern" that the expert is unable or unwilling to meet it

(*White Burgess* at para 48). If the opponent does so, the party calling the evidence must show, on a balance of probabilities, that the expert meets the threshold of providing fair, objective, and non-partisan evidence (*White Burgess* at para 48).

[33] The threshold requirement is not particularly onerous, and a proposed expert's evidence will only rarely be excluded for failing to meet it (*White Burgess* at para 49). Once the threshold is met, concerns about an expert's impartiality will be considered as part of the overall weighing of the costs and benefits of admitting the evidence (*White Burgess* at para 54).

[34] The Defendants challenge Dr. Pakes' impartiality on five grounds.

[35] First, the Defendants say that Dr. Pakes failed to account for the economic incentives of pharmacies. In his initial report, Dr. Pakes described off-invoice discounts as a "facet of costs", rather than an essential aspect of price competition and a key incentive for pharmacies (first Pakes Report at paras 50, 131). He expressed this view despite his acknowledgment of the Competition Bureau's 2007 study, which concluded that off-invoice discounts were a source of competition among generic drug manufacturers. In cross-examination, Dr. Pakes stressed the importance of incentives in constructing any economic model (Pakes Cross-Examination at Questions 613-622). The Defendants therefore argue that Dr. Pakes selectively identified the relevant incentives in order to support his views, improperly assuming the role of an advocate.

[36] Second, the Defendants submit that Dr. Pakes made contradictory assertions about the incentives of private insurers. In his first report, Dr. Pakes stated (at para 107):

> Moreover, rather than pushing back on high prices, private insurers lack incentives to help monitor and rein in drug costs. Many private drug plans are administered by insurance companies that are often compensated based on a percentage of plan costs, leaving them no incentive to negotiate lower drug prices as the result would be a reduction in their own revenue.

[37] Dr. Pakes relied on this contention to support the conclusion that the Canadian generic drug market is conducive to collusion. However, the Defendants maintain that he contradicted himself in his reply report by asserting that, absent the alleged collusion on list prices, pharmacies would compete on retail prices. In his reply report, Dr. Pakes wrote (at para 15):

> In general, insurance companies and [Administrative Services Only plans (ASOs)] have a strong economic incentive to bring down generic costs because they compete heavily for market share in part through providing lower cost formularies that meet client needs. This provides them the incentive to seek the lowest cost drugs through both list price and pharmacy cost reductions.

[38] Third, the Defendants accuse Dr. Pakes of improper fact-finding. Dr. Pakes stated in cross-examination that he examined the Defendants' conduct to determine whether it was collusive, and made a factual determination that it was. The Defendants say this was not part of Dr. Pakes' mandate as an expert witness. They also complain that Dr. Pakes improperly dismissed Ms. Pimentel's evidence as conjecture.

[39] Fourth, the Defendants say that Dr. Pakes made numerous factual assertions that were outside his area of expertise. Dr. Pakes admitted in cross-examination that he had no experience of the Canadian generic drug industry (Pakes Cross-Examination at Question 44).

[40] Finally, the Defendants argue that Dr. Pakes exhibited other hallmarks of improper advocacy. During cross-examination, he displayed an animus towards Defendants' counsel and evaded questions. He improperly suggested that one of the Defendants' expert witness, Dr. Hollis, had a disposition in favour of generic manufacturers, citing the jurisprudence of this Court in an unrelated proceeding.

[41] The Plaintiff defends Dr. Pakes' expert reports and testimony as impartial. With respect to pharmacy incentives, Dr. Pakes acknowledged the importance of off-invoice discounts as an incentive for pharmacies in both his first report and his reply report. With respect to insurer incentives, Dr. Pakes did not contradict himself. Rather, he did not explain his views on insurer incentives with sufficient clarity. Dr. Pakes did not mean to say that insurers lack incentives to lower drug costs, only that it is difficult for insurers to act on those incentives.

[42] With respect to the Defendants' argument of improper fact-finding, the Plaintiff submits that Dr. Pakes is permitted to provide qualified opinions on evidence that tends to confirm anticompetitive behaviour. Moreover, it was reasonable for Dr. Pakes to describe Ms. Pimentel's evidence as conjecture where she did not cite evidence to support it. The Plaintiff also rejects the argument that Dr. Pakes offered opinions outside his area of expertise. Dr. Pakes is a leading economist in industrial organization, and the generic drug market falls squarely within this discipline.

[43] Finally, the Plaintiff says that criticisms of Dr. Pakes' tone and demeanour are unwarranted. Dr. Pakes was understandably curt in his responses to ill-informed questions. His remarks concerning Dr. Hollis' potential disposition in favour of generic drug manufacturers

were consistent with the observations of Justice Michael Phelan in *Teva Canada Limited v Pfizer Canada Inc*, 2017 FC 332 at paragraph 67.

[44] The Defendants' criticisms of Dr. Pakes' impartiality are not without foundation. However, his expert evidence includes information and opinions that are relevant and useful to the Court's analysis of the issues raised by this certification motion. His evidence satisfies the relatively low threshold for admission (*White Burgess* at para 19, citing *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 at 23). To the extent that there are weaknesses or gaps in his evidence, this will have a bearing on whether the Plaintiff has succeeded in demonstrating some basis in fact for the alleged conspiracy among the Defendants.

E. *The Defendants' Evidence*

[45] The Defendants rely on the affidavits of Felisha Ali, Gretel Best, Jesse Evans, Barbara Pimentel and Eric Vincent, and the expert reports of Dr. Aidan Hollis, Dr. Gregory Bell and Dr. James Levinsohn.

[46] Defendants that say they have been improperly named in this proceeding rely on the affidavit and supplementary affidavit of Alex Slota on behalf of Glenmark Pharmaceuticals, appending as exhibits several US cases, Drug Identification Numbers [DINs], and NOCs; the affidavit of Cynthia Perez on behalf of Bausch, appending as exhibits product information sheets, product monographs, and NOCs; and the affidavit of Christine Ingham on behalf of Pfizer, appending as exhibits NOCs and the results of searches of the Drug Product Database.

Affidavits of Felisha Ali, Gretel Best, and Jesse Evans

[47] Ms. Ali and Ms. Best are employees of the Defendants' law firms. Mr. Evans is the Regulatory Affairs Associate Director at Perrigo International Inc and Perrigo New York, two of the Defendants. Their affidavits append the results of searches of the Drug Product Database and NOC Database.

Affidavits of Barbara Pimentel and Eric Vincent

[48] Ms. Pimentel is Vice President, Head of Commercial, Canada, Taro Pharmaceuticals Inc. She is responsible for the commercial decisions of both Taro Canada and the generics business of Sun Pharma Canada Inc. This includes determining which generic pharmaceutical products will be sold by Taro Canada, and which generic pharmaceutical products will be sold and/or distributed by Taro Canada on behalf of Sun Canada.

[49] Taro Canada's portfolio of generic drugs is largely made up of dermatology products, including topically-applied creams, ointments, lotions and gels that are approved by Health Canada to treat a wide variety of different dermatologic conditions. These include acne, psoriasis, eczema, and various other types of skin conditions. Taro Canada currently markets and sells over 40 topical products, which represent about half of its portfolio by revenue.

[50] Each generic prescription product manufactured and distributed by Taro Canada is a pharmaceutical product with a specific formulation prescribed for certain medical conditions. There is tremendous variation between generic drug products, including with respect to (a) their

chemical composition, (b) the conditions they treat, (c) the cost of research and development, (d) the requirements for obtaining regulatory approval, (e) marketing and distribution, (f) demand, (g) the competitors that supply bioequivalent products or competing therapies, (h) prices, and (i) the cost of ingredients and manufacturing.

[51] All of Taro Canada's generic products must satisfy Canadian-specific requirements dictated by Health Canada in order to receive the regulatory approval necessary to sell the product in Canada. There is no reciprocity between health authorities in Canada and the USA in respect of the drug approval process (*i.e*., obtaining approval from the Food and Drug Administration in the USA does not result in approval by Health Canada). In addition, the marketing and distribution of generic products in Canada requires compliance with specific requirements intended only for the Canadian market (*e.g*., labelling must be in English and French). This means that generic products produced for other markets like the USA cannot generally be sold in Canada and *vice-versa*.

[52] Depending on the product being considered, bringing a generic prescription drug product to market can require substantial resources and time, with some products taking up to ten years between assessing the business case for a product and launching the product commercially. Other products can be brought to market more quickly. Even when a decision has been made to invest the resources required to seek regulatory approval for a generic pharmaceutical, the decision whether to commercially produce (or continue to produce a generic drug after regulatory approval is received) is revisited on a regular basis. Changes in approach are often made in response to changing circumstances and market realities.

[53] A generic manufacturer cannot launch a generic pharmaceutical product in Canada without first obtaining regulatory approval from Health Canada to sell the product. This approval is provided from Health Canada in the form of an NOC, the issuance of a DIN, and the approval of a product monograph which describes the therapeutic uses of the product and other information relevant to prescribers.

[54] The final steps in bringing a generic drug to market are listing the pharmaceutical product on public and private formularies, pricing the product, negotiating the terms of sale with Taro Canada's pharmacy customers, and ensuring distribution, including shipping products through wholesalers or distributers. Pricing of generic drugs in Canada is highly regulated. For the vast majority of generic drugs, the public formularies set the maximum list price for reimbursement by provincial and territorial governments. Those list prices are also typically used by private insurers as the basis for the prices at which they are prepared to provide reimbursement.

[55] The key customers for Taro Canada are pharmacies. Taro Canada cannot sell prescription generic drugs directly to patients; patients must purchase prescription drugs from a licenced pharmacy. Thus, the sale of each of Taro Canada's generic prescription products to patients can only occur if a given pharmacy agrees to stock Taro Canada's products on its shelves.

[56] Taro Canada competes vigorously with other generic manufacturers and marketers for the business of its pharmacy customers by offering favourable payment terms and volume incentive discounts or allowances, where such allowances are permitted. These commercial terms are negotiated through confidential supply agreements between Taro Canada and its pharmacy customers. In addition to the financial aspects of supply agreements, Taro Canada competes in

other ways to win the business of pharmacy customers, such as (a) value-added services provided by Taro Canada, (b) trade dress, packaging options, and how similar the appearance of the generic drug is to the brand name's product, (c) the ability to provide consistency and reliability of product, (d) the breadth of product line, in terms of different forms and strength of a given product, and the extent of Taro Canada's overall portfolio that is available for purchase by the pharmacy, (e) the care taken by Taro Canada to cultivate and nurture its customer relationships, including the ease of business practices, and (f) physician, patient and customer preference. From Taro Canada's perspective, the formulary price for a particular prescription product is the price the pharmacy will be reimbursed for the drug cost by the relevant payor (*i.e.*, the government or private insurer), but Taro Canada wins business by negotiating all other aspects of the commercial relationships with its pharmacy customers.

[57] Determining which companies might be considered competitors of each other in respect of a particular generic prescription product needs to be assessed on a product-by-product basis. The number of competitors in respect of a particular drug will also vary over time as different competitors adopt and implement different strategies and enter or exit the market for a particular drug at any given time. Depending on the specific generic pharmaceutical product being examined, Taro Canada's competition for that product can change from one year to the next, or more frequently.

[58] The business reasons why Taro Canada entered, exited, or ceased to market or distribute a generic prescription pharmaceutical product after seeking regulatory approval arise from the specific circumstances that existed at a specific time with respect to that specific drug. The business of manufacturing, distributing and selling generic drugs in Canada, with its distinct

structure and regulatory framework, is very complicated. According to Ms. Pimentel, the Plaintiff's allegations of anticompetitive agreements involving Taro Canada are unfounded and inconsistent with the actual circumstances relating to the products manufactured, marketed and sold by Taro Canada in Canada (numerous details of which are provided in her affidavit).

[59] Mr. Vincent is the Senior Director of Global Generic Pipeline at Pharmascience Inc, one of Canada's largest generic pharmaceutical companies. Pharmascience is headquartered in Montreal, Quebec, and sells its products both domestically and internationally. Mr. Vincent's account of the regulatory framework that governs the sale of generic drugs in Canada is broadly consistent with that provided by Ms. Pimentel and other witnesses called on behalf of the Defendants, including Dr. Hollis.

[60] According to Mr. Vincent, generic drug manufacturers submit a list price as part of an application for listing on public formularies. List prices for generic drugs on public formularies may not exceed the maximum amount reimbursable by public insurers, referred to as the formulary price. Formulary prices are determined by regulation. The list prices set by generic drug manufacturers such as Pharmascience are in effect capped at the regulated formulary price. Pharmascience sets its list prices at the amount reimbursable by public insurers. Pharmascience then competes for business by offering competitive customer service and, where permitted by regulations, customer incentives, resulting in a "net price" below the list price on the formularies.

[61] If a patient presents a prescription to a pharmacist for a specific drug product, and if a Pharmascience version of the drug product is listed on the provincial public formulary as interchangeable at a lower price, the pharmacist may (and in some cases, must) substitute and

dispense the Pharmascience product instead. The formulary regimes generally require or strongly incentivize pharmacists to dispense the lowest cost interchangeable product.

[62] There are many reasons why a generic drug manufacturer like Pharmascience may not sell a generic drug product despite having obtained an NOC, and the status of the drug product may therefore be (or become) dormant or cancelled. These include supply issues, quality compliance issues, the availability of new competing therapies, and low sales. Mr. Vincent is not aware of any circumstance where Pharmascience did not sell a drug for which it had an NOC due to an agreement with other manufacturers not to do so.

[63] Pharmascience competes with other drug manufacturers in Canada to secure confidential supply contracts with pharmacies for the drugs it manufactures. Factors upon which Pharmascience can compete include the breadth of product offerings (Pharmascience supplies a wide range of generic molecules), consistency and reliability of supply, trade dress, net price, and effective leverage of its sales network.

[64] Counsel for the Plaintiff cross-examined Ms. Pimentel and Mr. Vincent only briefly. Ms. Pimentel was not challenged respecting any of the factual assertions summarized above. Instead, the questions focused on her involvement in the CGPA and pCPA. Ms. Pimentel denied that any agreements were ever made during meetings of these associations regarding the formulary pricing of generic drugs or the payment of off-invoice discounts to pharmacies.

[65] The questions asked of Mr. Vincent in cross-examination similarly did not challenge any of the factual assertions summarized above. He was asked whether he was aware of any attempt

by Pharmascience to lower the formulary price for any of the generic drugs it sells, and he replied that he was unaware of Pharmascience using a different price than the formulary price as the gross price. He had never heard of pharmacies asking Pharmascience to lower the formulary prices.

[66] Mr. Vincent could not recall a specific instance of Pharmascience displacing a competitor by offering a higher off-invoice discount to a pharmacy, but he did not rule out the possibility that this may have occurred. He noted that there were times that Pharmascience gained a listing from a competitor, but he could not say whether this was due to what he described as “customer investment”, better trade dress or packaging, or better supply. He confirmed that drugs are sold to pharmacies on a drug-by-drug basis, and not by portfolio. He had never seen a national contract for the sale of generic drugs to major pharmacy chains, and his counsel declined to produce any.

[67] Mr. Vincent was not asked about the existence of any agreement among the Defendants, including Pharmascience, to fix prices or allocate the market for generic pharmaceuticals in Canada.

Expert Evidence of Dr. Aidan Hollis

[68] Dr. Hollis is a Professor of Economics at the University of Calgary. His first expert report includes a comprehensive overview of generic drug pricing in Canada.

[69] A generic drug is a prescription pharmaceutical product that is sold as bioequivalent to a branded, “innovator” or reference pharmaceutical product. Bioequivalence connotes that the generic drug has the same therapeutic effects and safety profile as the reference product when administered to patients under the conditions specified in the approved labelling. When qualified by Health Canada as bioequivalent, generic drugs may be substituted for one another and for the branded drug. Provinces have rules that authorize (or in some provinces, require) pharmacists to substitute a lower-priced generic drug for the branded product, even when a prescription is written for the brand, unless the prescription states that there can be no substitution.

[70] A drug product typically consists of an active pharmaceutical ingredient [API] combined with other ingredients that are used to deliver the API in a specific dosage and formulation. The group of drug products using an API is sometimes referred to as the “molecule”.

[71] A generic drug product is a prescription drug approved for sale in Canada, with a defined API, dosage, and formulation, supplied by a specific generic manufacturer, which has received a declaration of bioequivalence to a “Canadian Reference Product”, pursuant to s C.08.004(4) of the *Food and Drug Regulations*, CRC, c 870. A Canadian Reference Product is a drug product that has been approved for sale in Canada, which was typically developed and marketed by the innovator of that drug product.

[72] Generic drugs are supplied by a variety of firms that are described by Health Canada as “manufacturers”, even though a firm may not engage in manufacturing as that term is normally understood. Under the *Food and Drug Regulations*, a firm that makes drugs is a “fabricator”, while the “manufacturer” is responsible for regulatory compliance. Manufacturers distribute

products directly to pharmacies and hospitals or, more typically, use a contracted third-party wholesaler to do so.

[73] There are many generic drug manufacturers in Canada. Each manufacturer has a different portfolio of drugs, with differing degrees of overlap in the products carried. Many generic manufacturers have a relatively small portfolio of drugs, while others have a large portfolio. For example, as of July 30, 2024, Apotex Inc had 714 products listed on the Ontario formulary, Teva Canada Limited and Actavis Pharma Company together had 556 listed products, Pharmascience Inc had 457 products, and Auro Pharma Inc had 295 products, while Septa Pharmaceuticals Inc had 24 products, Generic Medical Partners Inc had 22 products, and Verity Pharmaceuticals Inc had only two.

[74] Generic manufacturers will generally seek to promote their products to pharmacies, since sales of their products to consumers can occur only if pharmacies stock them. The volume of products that will be dispensed depends on how many prescriptions are written for a product, and generic manufacturers do not control or influence those decisions. Their strategy is therefore to compete to have their suite of products stocked by pharmacies by offering attractive terms to pharmacies, such as off-invoice discounts and other competitive measures.

[75] An important feature of generic pharmaceutical markets in Canada is that the entry process is subject to regulation. At the federal level, Parliament has regulated entry to ensure that drug products are safe, effective and have therapeutic benefits. Generic manufacturers must satisfy Health Canada that the products they are selling are bioequivalent to the Canadian Reference Product, which has already been shown to be safe and effective. A drug cannot be sold

unless the manufacturer first obtains an NOC from Health Canada in respect of that specific product. In practice, the NOC will specify the Canadian Reference Product, the medicinal active ingredients, the therapeutic class of that product, and a DIN.

[76] Following approval by Health Canada, generic manufacturers seek to have their product listed on public and private formularies. If a drug is not insured under the public formulary of a province, the manufacturer of that drug will not make sales in that province for patients insured under the public plan. Thus, obtaining a listing on a public formulary is critical for a manufacturer's ability to launch any drug that is eligible for public insurance.

[77] Most prescription drugs dispensed by pharmacies are at least partly covered by insurance. There are two broad categories of insurance in Canada: public and private. The public plans consist of the provincial and territorial drug plans, which provide drug insurance for seniors and certain indigent persons, and the federal drug plans, which provide coverage for Indigenous people, veterans, and inmates of the Correctional Service of Canada.

[78] Under the regulatory regimes of the provinces, the sale of a prescribed generic drug must be fulfilled by a licensed pharmacist. The pharmacy industry in Canada is complex, with thousands of participants operating under different ownership and distribution models in different provinces under distinct provincial regulations. There were 12,169 licensed pharmacies in Canada at the beginning of 2024, of which 11,712 were community (non-hospital) pharmacies. In 2013, about 18% of community pharmacies were independent, about 18% were located in supermarkets and big-box stores, and the other 64% were chain and banner pharmacies.

[79] Each type of pharmacy interacts differently with generic manufacturers, because they have different bargaining power and sophistication. Some pharmacies are small and independently owned, and some are national chains with centralized procurement. In addition, a number of pharmacies are vertically integrated. For example, McKesson, the wholesale distributor, owns Rexall pharmacies. It also has a franchise relationship with independent pharmacies under the Guardian, IDA, Uniprix, and other banners.

[80] As a result of this complexity, there are many channels of distribution, and manufacturers of generic drugs must negotiate supply, delivery, service and off-invoice discounts with different chains and in many instances with individual pharmacies. Due to the regulatory framework, pharmacies purchase generic drugs at the list price, which they then mark up to a retail price for a prescription. The pharmacy mark-up is normally provincially-regulated for products insured under public plans. Private insurers may also apply mark-up rules. On average, pharmacy mark-ups account for approximately 10.5% of total private plan prescription drug expenditures.

[81] The pharmacy will also add a dispensing fee each time products are dispensed to a patient. Dispensing fees tend to be about $10 per prescription dispensed, but vary across public and private plans. The provinces have strictly controlled maximum dispensing fees for sales that are insured under public plans. In contrast, pharmacies are free to determine their own dispensing fees for sales outside of public plans, and so private insurers may either negotiate caps on dispensing fees, or simply set a maximum dispensing fee that is covered under their plan, which may vary by province.

[82] For any given generic drug purchased by a consumer, that product will be subject to different distribution channels and distribution fees or mark-ups, and different retail mark-ups and dispensing fees, depending on the province and the pharmacy, all of which may vary over time. However, the list price, which forms the basis on which mark-ups are applied, will be the same regardless of the insurance status of the patient.

[83] Not all drugs approved for sale by Health Canada are covered by every public insurance plan. Public drug plans generally offer coverage of all approved generic equivalents of brand drugs covered by those plans. They have sometimes offered coverage of a product only after generic entry, as the lower price associated with generic drugs makes the product cost effective. One of the most important means of controlling costs is by regulating the amount that will be reimbursed for a given drug, which in Canada involves regulating the list price that can be charged by the manufacturer. As a general rule, public insurance plans also limit the amount insured to the lowest price for a given product group.

[84] Private insurance is generally employment-based and is offered as part of supplementary health insurance plans that cover a variety of health needs, including dental, optical, physiotherapy, *etc*. Private drug plans are generally designed so that premiums paid for coverage reflect the anticipated or actual costs borne by the plan, plus a mark-up. Most private plans cover all products approved by Health Canada, offering comprehensive coverage for generic drugs.

[85] Different insurance programs and different individual situations result in different payment arrangements for different patients. Some patients have no insurance at all and must pay the full retail price plus dispensing fee; some are covered by private insurance plans, which vary

in their coverage depending on the plan; some are covered by more than one insurance program; and some are covered through public insurance, which differs depending on the province and the patient's financial circumstances. Patient co-payments also vary significantly by private drug plan.

[86] According to Dr. Hollis, prescription drugs have very low elasticity of demand, which means that decreasing price is likely to have a minimal effect on the volume of sales. This arises, in part, from the high rate of insurance coverage of patients in Canada (and thus low sensitivity to price). As a result, pharmacies tend to engage in limited price competition with one another in relation to dispensing fees and mark-ups for the sale of prescription drugs, whether in respect of brand or generic drugs.

[87] While pharmacies are limited in their ability to earn additional profits by increasing mark-ups and dispensing fees, they can negotiate rebates, professional allowances, and other discounts off list prices [collectively, off-invoice discounts]. Given the regulatory framework governing pharmacists across the provinces, pharmacies have considerable buyer market power and are in a position to obtain favourable terms from competing generic manufacturers who seek to ensure that their products are sold by the pharmacy.

[88] Since each pharmacy will normally carry only one or two generic version(s) of a drug product, generic companies compete for the pharmacy's business by offering off-invoice discounts. Dr. Hollis asserts that competition through off-invoice discounts is preferred by pharmacies over competition on list prices, since a reduction in list price will normally lead to a matching reduction in reimbursement to the pharmacy by insurers.

[89] Provinces have struggled to regulate generic drug prices. The fundamental challenge is that provinces, as public insurers through their health care systems, seek to pay the lowest price that is sufficient to support manufacturing and supply within the cost constraints of their health care systems. Under their payment models, however, provinces do not reimburse manufacturers directly, but rather reimburse pharmacies. Pharmacies are reimbursed on the basis of list prices, but can keep off-invoice discounts as a separate revenue stream.

[90] The challenges associated with setting manufacturers' list prices at appropriate levels were recognized 40 years ago in the 1985 Report of the Commission of Inquiry in the Pharmaceutical Industry [Eastman Commission Report]. The Eastman Commission Report noted:

> This list price is periodically negotiated between manufacturers and provincial authorities. Provinces with formulary prices are aware that manufacturers compete with one another by obtaining relatively high list prices for their products on the formulary, but then selling to pharmacists at discounts from that price that are frequently substantial. As a consequence, in those provinces, pharmacists' incomes arise both from the dispensing fee and from the spread between the price at which they are reimbursed for the drug and the price that they actually pay. Under this system of formulary prices, manufacturers cannot attract business from pharmacists by charging low prices that would benefit taxpayers and consumers. They must create a spread between the formulary price and the lower price they actually charge; the benefit of the spread between the two prices goes to pharmacists, not consumers.

[91] Following publication of the Eastman Commission Report, the provinces attempted to directly control generic drug list prices by tying them to the price of the branded drug. Ontario first put a cap on the allowable reimbursement of generic drugs in 1993 by setting the highest list price any generic could charge at 75% of the branded drug's price, or 67.5% if there was more

than one generic competitor in the market. It then lowered the maximum list price to 70% / 63% in 1998, and then to 50% in 2006. The other provinces were able to benefit from these reimbursement levels by relying on the prices established by Ontario.

[92] The Competition Bureau undertook an analysis of the generic drug sector in 2007, which found that off-invoice discounts – the "spread" identified in the Eastman Commission Report – continued to be the critical feature of competition in generic drug markets, even after list price reductions:

> In the case of sales to retail pharmacies, pricing decisions by manufacturers consist of two elements: the establishment of the product's invoice price and the net pharmacy price. The net pharmacy price is the price paid by the pharmacy net of any off invoice rebates and discounts. Invoice prices are the amounts typically reimbursed by public and private drug plans. As developed further in section 5.A., limited competition appears to take place in invoice prices. Until recently, invoice prices have tended to reflect maximum generic prices allowed under Ontario legislation. Price competition among manufacturers has tended to take place at the pharmacy level in the form of lower net pharmacy prices. […] Traditionally, the most important factor in competing for pharmacies' business, where there are multiple generics available, has been generic manufacturers providing rebates off invoice prices.

[93] The provinces began to collaborate more actively on generic drug pricing through the creation of the "pan-Canadian Pricing Alliance" in 2010. They began to explore different models of drug pricing in this context, recognizing that a pricing model had to achieve multiple goals; simply driving down prices was not the only objective. The provinces also wanted to collaborate to improve consistency in pricing. The provinces were concerned about ensuring security of

supply, given that drug shortages had become common. This required that manufacturers and pharmacies be adequately compensated, ensuring a sustainable system.

[94] Since 2014, the provinces have collaborated in establishing a collective generic drug pricing framework in order to reduce cost and to improve efficiency and transparency. All of the provinces (except for Quebec), the territories, and the federal government participate in the renamed “pan-Canadian Pharmaceutical Alliance” [pCPA], which organizes a pricing framework for generic drugs, the components of which are described as the “pan-Canadian Select Molecules” and “Tiered Pricing Framework” regimes. The pCPA negotiates with the Canadian Generic Pharmaceutical Association [CGPA], the industry association that represents many of the generic manufacturers operating in Canada, to determine the set of products that are covered and the pricing levels under these regimes. Quebec joined the pCPA generic pricing framework in October 2023. Although Quebec did not formally apply the pCPA generic pricing framework before this date, because of its own pricing regulations, the pCPA framework established an upper limit for prices in Quebec.

[95] The regimes that govern the list prices of generic drugs may be divided into four categories (first Hollis Report at para 97):

> (a) “Pan-Canadian Select Molecules” Regime
>
> This regulatory framework applies to certain high-volume product groups. The products are all listed on provincial formularies and have high sales volumes. It has been in place since 2013.
>
> (b) “Tiered Pricing Framework” or “TPF” Regime
>
> This regulatory framework applies to certain product groups, since April 2014. The conditions for being included in this list are that

> (i) at least one provincial public drug plan (other than Quebec's) lists the product group on its formulary; (ii) there is entry or exit from the product group (*i.e.*, an existing manufacturer stops selling the product, or a new manufacturer begins selling it); and (iii) the product is not a pan-Canadian Select Molecule.
>
> (c) "Public Pre-TPF" Regime
>
> This is a collection of regulatory frameworks, specific to each province, and applies to products that were listed in provincial formularies from at least 2012, the start of the Class Period, until the products were incorporated into the TPF regime or pan-Canadian Select Molecules regime.
>
> (d) "Private Only" Regime
>
> This is a collection of private drug plan price controls, specific to each insurer, and applies to products not insured by provincial drug plans.

[96] Pricing regulations for the public insurers effectively determine list prices that affect all buyers of products in each province (*i.e.*, both public and private plans). The manufacturer does not know which sales of a given product will ultimately be made to patients with private insurance, patients with public insurance, or patients with no insurance at all. Therefore, the list price charged to the pharmacy is the same for a given product, regardless of the insurance status of the patient ultimately receiving the drug. While a pharmacy will mark up the list price and add a dispensing fee, the list price controlled by the regulations cannot be adjusted depending on the patient's insurance status. Thus, the pCPA pricing framework effectively determines the list price for all sales of the drug in each province in which the drug is publicly insured.

[97] The regulatory framework governing the pricing of generic drugs in Canada significantly constrains the manner in which generic manufacturers are able to compete for sales of their products to pharmacies. Generic manufacturers that set a list price above the price set by the

pCPA will be deemed “non-compliant” and provinces may refuse to insure those drugs, resulting in no sales. Dr. Hollis concludes that any generic manufacturer that set a list price below the pCPA-determined price would be engaging in an ineffective strategy for increasing sales to pharmacies: pharmacy net revenues from generic drug sales come from dispensing fees, mark-ups and off-invoice discounts.

[98] When the manufacturer lowers its list price, the amount that the pharmacy is reimbursed decreases by the same amount since the provinces have rules that set the amount reimbursable equal to the lowest list price of any interchangeable drug. In addition, since the mark-up is often a percentage of the list price, the absolute value of the mark-up will typically be reduced. Thus, a reduction in list price by a generic manufacturer does not result in any gain or benefit for the pharmacy. And if the list price is reduced, that reduces the difference between the manufacturer’s cost of goods and the list price, which in turn must reduce the manufacturer’s scope for paying off-invoice discounts. In Dr. Hollis’ view, a reduction in list price will have the effect of reducing the manufacturer’s competitiveness.

[99] Since a reduction in list price by one manufacturer effectively lowers the reimbursement amount that will be paid for sales of generic products in that product group by all manufacturers, all pharmacies selling that product are likely to be harmed, regardless of which generic manufacturer’s product the pharmacy stocks. In these circumstances, pharmacies do not gain from list price reductions and have no incentive to encourage them; generic manufacturers, in turn, cannot expect to earn additional business by making pricing decisions that reduce the revenues and profits of their customers.

[100] The vast majority of generic drug sales in Canada have list prices that are regulated by the provinces, either through the pCPA regime or through the pre-pCPA regime. The pCPA regime was the product of negotiation between the pCPA, as a representative of the provinces, and the CGPA, as a representative of the manufacturers. The agreement between these parties was first negotiated in 2014, and then again in 2018 and 2023. This agreement focuses on list prices, which are the same for the provincial drug plans as they are for members and plan sponsors of private drug plans and uninsured consumers.

[101] A study published by the Conference Board of Canada titled *Health Care Aware: Understanding Pharmaceutical Pricing in Canada* (Ottawa: The Conference Board of Canada, 2018) included the following commentary (at p 35):

> The various formulary policies and insurance structure in Canada also mean that generic drug manufacturers do not typically compete on the list price of most provinces. Since all public plans (as well as many private plans) only agree to pay for a multi-source drug at the lowest price available in the market, manufacturers tend to match each other's prices. This creates a situation where there is little incentive for manufacturers to lower their list price further, since this would not increase utilization of the product but rather bring other manufacturers to lower their own price to compete in the market.
>
> In 2007, manufacturers' rebates were estimated at between 40 and 80 per cent of the list price of generic drugs. Historically, the strategy employed by manufacturers in Canada has therefore been to keep list prices high, while competing for market share through rebates and allowances offered to retail pharmacies.

[102] Contrary to Dr. Pakes, Dr. Hollis expresses the view that the generic drug industry in Canada is not conducive to collusion. There are many participants and potential participants in

the Canadian generic drug industry, which would make entering into and implementing a conspiracy exceptionally difficult.

[103] A very large number of generic firms are alleged to be co-conspirators in the Statement of Claim, and at least 18 other firms not included in the Statement of Claim would find it attractive to enter profitable markets. Once any intellectual property issues have been resolved, barriers to entry tend to be relatively low, the industry is highly dynamic, and new entrants will seek to enter profitable markets.

Expert Evidence of Dr. Gregory Bell

[104] Dr. Bell is Group Vice President at Charles River Associates, an economics and management consulting firm. According to Dr. Bell, Dr. Pakes does not accurately describe the generic drug industry in Canada, yielding misleading and unfounded assertions regarding the likelihood of an alleged conspiracy to allocate the market, fix prices, and maintain the supply of generic drugs. Rather, the institutional and regulatory framework of the generic drug industry in Canada is such that the provinces and territories effectively set list prices for the vast majority of generic drugs sold in Canada. As a result, there is virtually no incentive for generic manufacturers to reduce the list prices at which provinces, territories, and private insurers have agreed to provide reimbursement. There is competition in net prices that retail pharmacies pay generic manufacturers, but this does not affect list prices.

[105] Dr. Bell states that prices for generic drugs in Canada cannot be usefully compared to those in other countries. Furthermore, due to the significant market and regulatory differences, there is no integrated North American market for generic drugs.

Expert Evidence of Dr. James Levinsohn

[106] Dr. Levinsohn is a Professor of Economics at Yale University, where he also teaches in the School of Global Affairs. According to Dr. Levinsohn, Dr. Pakes has not presented a credible and plausible methodology to demonstrate that the alleged conspiracy caused generic drug manufacturers' list prices to be higher. It follows that he has not presented a credible and plausible methodology to show, based on evidence common to the Class, that harm was suffered by one or more members of the Class. Nor has Dr. Pakes presented a credible and plausible methodology to estimate the damages to Class members on an aggregate, Class-wide basis.

III. Issue

[107] The sole issue raised by this motion is whether the Plaintiff has satisfied the criteria for certifying the proceeding as a class action prescribed by Rule 334.16(1) of the *Federal Courts Rules*, SOR/98-106 [Rules], namely:

A. Do the pleadings disclose a reasonable cause of action?

B. Do the claims of the Class members raise common questions of law or fact?

C. Is a class proceeding the preferable procedure?

D. Is the Plaintiff a suitable Class representative?

[108] The Defendants do not dispute the existence of an identifiable Class of two or more persons (Rule 334.16(1)(b)).

IV. Analysis

[109] The class action is a procedural vehicle that seeks to facilitate access to justice, modify harmful behaviour, and conserve judicial resources (*L'Oratoire Saint-Joseph du Mont-Royal v JJ*, 2019 SCC 35 at para 6). The certification criteria should be assessed with these overarching purposes in mind (*Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 [*Jensen FC*] at para 54). The focus of a certification motion is on the form of the action, not the substance and merits of the claim (*Hollick v Toronto (City)*, 2001 SCC 68 [*Hollick*] at para 16).

[110] With the exception of the reasonable cause of action criterion, the Plaintiff bears the burden of adducing evidence to show "some basis in fact" that the requirements have been met (*Hollick* at para 25). This is a low threshold that falls below the standard of proof on the balance of probabilities. The evidentiary foundations to support the certification criteria need not be exhaustive.

[111] Courts should not seek to resolve conflicts in the evidence (*Jensen FC* at para 59). The Court will consider the entirety of the Plaintiff's evidence and may fill any gaps with reference to

the Defendants' evidence. However, this gap-filling exercise cannot amount to weighing the Plaintiff's evidence against contradictory evidence of the Defendants (*Dine v Biomet Inc*, 2016 ONSC 4039 at para 35).

[112] The Court must bear in mind that the "some basis in fact" standard is neither superficial nor merely symbolic (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*] at para 103).

A. *Reasonable Cause of Action*

(1) Pleading Conspiracy

[113] The Plaintiff's cause of action is advanced under s 36 of the *Competition Act*. This provision confers a right of private action against any person who has caused loss or damage by breaching one of the provisions of Part VI of the *Competition Act*. Part VI of the *Competition Act* establishes a number of criminal offences. The Plaintiff pleads that the Defendants' conduct has contravened ss 45 and 46.

[114] Section 45 is the cornerstone of the *Competition Act*, and has frequently been described as its most significant provision. Allegations of unlawful conspiracies in violation of s 45 are serious and cannot be undertaken lightly, especially when billions of dollars in damages are sought. A competition law class action based on an alleged conspiracy under s 45 cannot be allowed to proceed on the basis of pure speculation or wishful thinking about the existence of an agreement, or without some minimal evidence of unlawful conduct (*Jensen FC* at para 285).

[115] A conspiracy claim must provide material facts and sufficient particularity to support the plea. Those facts include the parties to the conspiracy, their relationship, the agreement between them, the purpose of the conspiracy, any overt acts done in furtherance of the conspiracy, and any injury to the plaintiff. While the Plaintiff is not required to prove her case in the Statement of Claim, she must nonetheless provide the material facts supporting the constituent elements of the claim being made (*Jensen FC* at para 164).

[116] The pleadings must tell the Defendants who, when, where, how, and what gave rise to liability (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] at para 19). The Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action (*Johnston v Canada*, 2021 FC 20 [*Johnston*] at para 18). It cannot be "plain and obvious" that the claim discloses no reasonable cause of action (*Pass Herald Ltd v Google LLC*, 2024 FC 1623 [*Pass Herald*] at para 146).

[117] The facts alleged in the pleadings are presumed to be true. However, "this presumption does not extend to matters which are manifestly incapable of being proven, to matters inconsistent with common sense, vague generalization, opinion, conjecture, bare allegations, bald conclusory legal statements, or speculation that is unsupported by material facts" (*Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89 [*Jensen FCA*] at para 52).

[118] The certification stage is an important gate-keeping mechanism and must operate as a "meaningful screening device". A court that conducts a rigorous review of a plaintiff's certification motion and carefully scrutinizes the allegations, the material facts and the evidence is not "delving into the merits of the case". Rather, this is a part of the courts' expected role and

duty to engage in more than a rubber-stamping exercise or symbolic review, and be satisfied that the certification requirements are indeed met (*Jensen FC* at para 292; *Jensen FCA* at para 49).

[119] It is highly unusual in competition law class actions brought under ss 36 and 45 of the *Competition Act* for the formation and existence of the conspiracy to be the central issue in dispute (*Jensen FC* at para 5). The existence of an alleged conspiracy is generally not an issue. Ordinarily, the battle is fought over whether the harm or loss that allegedly resulted from the actionable conspiracy is common to the class members. There are several reasons for this (*Jensen FC* at para 41):

> In some instances, there were express agreements, rules or contracts at the source of the impugned unlawful conspiracy. In other matters, there were admissions on the conspiracy element of the impugned conduct, or guilty pleas had been previously entered by the defendants in related criminal proceedings in Canada or abroad. In yet other cases, there was an existing criminal investigation by the Canadian competition authorities or by foreign authorities (and affecting Canada). All of these situations meant that there were not only ample material facts supporting the conspiracy allegations made in the pleadings but also the minimal required evidentiary basis (i.e., some basis in fact) for the proposed common issues relating to the alleged wrongful conduct.

[120] As Justice Gascon observed in *Jensen FC* (at para 298):

> I must underscore that this is an area where a public authority (i.e., the Commissioner [of Competition]) is vested with extensive powers and tools to investigate criminal anti-competitive conduct and enforce the criminal provisions of the Act. The Commissioner has repeatedly affirmed that section 45 is the most important provision of the Act and that taking actions against hard-core cartels is his priority. I accept that the absence of any investigation by the Competition Bureau on an impugned conduct is not determinative of the potential existence of a section 45 conspiracy. But it is certainly telling.

(2) Conspiracy Among Competitors

[121] The *Competition Act* provides in s 45:

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges	**45 (1)** Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement:
(a) to fix, maintain, increase or control the price for the supply of the product;	**(a)** soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;
(b) to allocate sales, territories, customers or markets for the production or supply of the product; or	**(b)** soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;
(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.	**(c)** soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

[122] There are three elements to an offence under s 45: (a) a conspiracy, agreement or arrangement; (b) with a competitor; (c) to do one or more acts described in ss 45(1)(a)-(c), namely, fix prices; allocate sales, territories, customers or markets; or control output. The Plaintiff must plead sufficient material facts with respect to each of the elements of the offence. Following legislative amendments, there is no longer a need to prove actual or likely anti-competitive effects or harm to competition in a market (*Jensen FCA* at para 20; *Difederico v Amazon.com, Inc*, 2023 FC 1156 [*Amazon*] at para 41).

(a) *Conspiracy, Agreement, or Arrangement*

[123] To properly plead the *actus reus* of a conspiracy, agreement or arrangement, the Plaintiff must assert sufficient material facts to establish two-way communication, or communication from one party followed by a course of conduct from which a meeting of the minds or concerted purpose can be inferred (*Pass Herald* at para 153). The Plaintiff must also plead the *mens rea* of (a) a subjective intention of each party to enter into the alleged agreement and knowledge of its terms; and (b) an objective intention to do one or more of the acts in ss 45(1)(a)-(c). It may also suffice for a Plaintiff to allege that the agreement was entered into knowingly and voluntarily, "so long as the pleadings also provide sufficient material facts from which the requisite objective intention may be inferred" (*Pass Herald* at para 154).

[124] The Plaintiff alleges a vast conspiracy to allocate the generic drug market and fix prices at the maximum public formulary price. The Plaintiff repeatedly claims the conspiracy encompasses "all generic drugs sold in Canada" (Statement of Claim at paras 314, 443, 500, 558). The Plaintiff maintains that the full extent of the conspiracy will be revealed through discovery.

[125] In *Jensen FCA*, the Federal Court of Appeal (*per* de Montigny JA) stressed the importance of pleading the particular acts of each co-conspirator (at para 61, citing *Mancinelli v Royal Bank of Canada*, 2020 ONSC 1646 [*Mancinelli*]. In *Mancinelli*, Justice Paul Perell of the Ontario Superior Court of Justice said the following at paragraph 142:

> In a conspiracy pleading, it is necessary to set out discretely the particular acts of each co-conspirator so that each defendant can know what he or she is alleged to have done as part of the conspiracy. A recitation of a series of events coupled with an assertion that they were intended to injure the [*sic*] insufficient, and it is not appropriate to lump some or all of the defendants together into a general allegation that they conspired to injure the plaintiff. If the plaintiff does not, at the time of pleading have knowledge of the facts necessary to support the cause of action, then it is inappropriate to make the allegations in the statement of claim. [Citations omitted]

[126] Conspiracies are by their nature secretive, and it may therefore be difficult for plaintiffs to obtain details absent discovery (*Jensen FC* at para 162). However, in the words of Justice Denis Gascon, "being generous with the pleadings does not mean being blind to what they do not contain" (*Jensen FC* at paragraph 164). Class actions can seriously affect the rights of class members and engage the interests of defendants, and proper pleadings are therefore essential (*Johnston* at para 20).

[127] The Plaintiff's initial pleading named as Defendants the companies that were implicated in the US proceedings, as well as their Canadian affiliates. The first amendments purported to take into account the distinct Canadian regulatory context. The revised pleading no longer asserted that the Defendants had colluded to maintain artificially high list prices, but instead characterized the off-invoice discounts offered to pharmacies as illegal and anticompetitive "kickbacks". Further amendments to the pleading named as additional Defendants certain Canadian manufacturers that do not operate in the USA, including Pharmascience. Counsel for the Plaintiff says it was necessary to amend the pleading as new information was provided by the Defendants' witnesses in their affidavits and through cross-examination.

[128] Counsel for the Plaintiff described the Statement of Claim as shorter than Leo Tolstoy's *War and Peace* but longer than Ernest Hemmingway's *The Old Man and the Sea*. The pleading has been amended four times. The current iteration is more than 700 paragraphs long.

[129] Despite its extraordinary length, the Statement of Claim does not contain sufficient, or indeed any, particulars of the acts of each alleged co-conspirator. The Plaintiff has failed to plead material facts to support the assertion that the alleged conspiracy extends across North America and into Canada. The alleged harm consists only of bald allegations.

[130] In oral submissions, counsel for the Plaintiff recited long lists of paragraphs from the Statement of Claim that were said to support reasonable causes of action under the *Competition Act*. The Plaintiff submits that paragraphs 26 to 28 of the Statement of Claim outline the relationships between the Defendants. This may be true in a general sense, but there are no particulars. Paragraph 27 states simply:

> Absent a conspiracy, the Defendants are competitors and potential competitors of each other with respect to the manufacture of generic drugs in Canada who would have, and could have, competed on the prices for generic drugs.

[131] Paragraph 28 of the Statement of Claim is similarly lacking in detail. It lists a number of activities the Defendants are alleged to have engaged in, such as "participating in meetings […] to discuss the sale and price of drugs" and "agreeing and arranging […] to inflate the price of generic drugs."

[132] The Plaintiff says that paragraphs 2 to 12, 14, 17 to 19, and 498 to 515 of the Statement of Claim plead the existence of an agreement between the Defendants. Again, there are no particulars. Paragraphs 2 to 12, 14, and 17 to 19 provide only a high-level overview of the alleged conspiracy. Paragraphs 498 to 515 provide no further details of the alleged agreements among specific Defendants. These paragraphs broadly plead that the Defendants "fix invoice and list prices at the maximum formulary amount", "pay illegal and anticompetitive kickbacks", "conceal the conspiracy", "allocate the kickback retrospectively", and engage in "constant communication". No Defendant is identified by name. Only Shoppers and McKesson – two non-parties – are said to be co-conspirators. The Plaintiff alleges that all Defendants engage in similar conduct, but this does not excuse her failure to plead the particular acts of *each Defendant* in furtherance of the conspiracy (*Mancinelli* at para 142).

[133] The references to Shoppers, McKesson, and other wholesalers and pharmacies as "co-conspirators" are especially puzzling. They are repeatedly alleged to have aided and abetted the other conspirators and benefitted from the conspiracy, yet they are not named as defendants.

[134] Regarding the payment of "kickbacks" to pharmacies, the Plaintiff makes only the bald assertion that they are illegal and uncompetitive (Statement of Claim at para 222):

> The kickbacks are illegal, because they are banned in Ontario and Quebec. The kickbacks are anticompetitive, because they exceed the cost to manufacture and sell generic drugs by 50 percent or more.

[135] Different provinces have enacted legislation at different times to regulate off-invoice discounts paid by generic pharmaceutical companies to pharmacies. The Plaintiff alleges that the

Defendants have responded by falsely attributing the discounts to sales in provinces that lack such regulation. There is no explanation of how this behaviour might give rise to a cause of action under s 36 of the *Competition Act*.

[136] In oral argument, counsel for the Plaintiff stated that the existence of communication among the Defendants is properly pleaded at paragraphs 15, 16, 28, 313, 342, 353 to 368, 387, 498 to 499, 501, 503 to 511, 514 to 536, 761, 763 to 767 of the Statement of Claim. Paragraphs 15 and 16 are introductory in nature, and broadly assert that "the conspiracy was reached and maintained through two-way communication" and "the defendants and their executives constantly met each other." Paragraph 28 is a list of activities in which the Defendants are said to have participated, with no particulars. Paragraphs 313 and 342 consist of broad allegations that the Defendants "maintained the conspiracy through constant communications, meeting and relationships", resulting in "orders or directives" to executives and employees to carry out the conspiracy.

[137] Paragraphs 353 to 368 of the Statement of Claim list several industry associations, trade shows, conferences and social events in which the Defendants are active. The Plaintiff baldly asserts at paragraph 366 of the Statement of Claim that "there is no commercially reasonable explanation for the defendants' near weekly meetings, nor the decision to fund these constant events." Paragraph 387 adds that "the frequent meetings are also made possible by the proximity in which many of the defendants are headquartered […]." Paragraphs 498, 499, and 501 do not particularize communications between the Defendants, but rather assert that the Defendants allocate the market and fix prices. Paragraphs 503 to 511, 514 to 536, 761, and 763 to 767 repeat the general assertions that the Defendants allocated the market and fixed prices through constant

communication in person, by telephone and by text message. Specific Defendants are not named, nor are their particular acts identified.

[138] Paragraphs 369 to 376 of the Statement of Claim refer to meetings that occurred in the USA, and appear to have been derived from legal proceedings in that country. The Plaintiff states that market allocation and price increases were discussed in relation to particular drugs. These allegations concern only the US affiliates of the Defendants Sandoz, Perrigo, Taro, G&W, and Wockhardt, and identify only six generic drugs. The Plaintiff does not specify how the discussions may have concerned the Canadian generic drug market as a whole.

[139] This is a recurring problem in the Plaintiff's pleading. Many of the allegations appear to have been derived from legal proceedings in the USA, with no material facts to support the assertion of a conspiracy that extends to Canada. Where the pleading describes an aspect of the conspiracy that is unique to Canada, there is an absence of particulars.

[140] The Plaintiff says that paragraphs 17, 18, 28 and 504 of the Statement of Claim particularize the purpose of the conspiracy. As previously noted, paragraphs 17, 18, and 28 are introductory in nature. Paragraph 504 states that the Defendants knowingly and voluntarily fixed prices to avoid competition and generate supracompetitive profits. This is intended to satisfy the *mens rea* requirement of the offence, but it is plainly inadequate.

[141] The long list of paragraphs that are said to satisfy the requirement to plead the overt acts done in furtherance of the conspiracy encompasses paragraphs 216, 218, 223, 224, 247, 297 to 317, 353 to 368, 402 to 410, 420, 422 to 424, 500, 502, 504 to 507, 509 to 511, 536 to 553, 712

to 720. Paragraphs 216, 218, 223, and 224 plead that the Defendants paid “kickbacks”.

Paragraph 247 states (in its entirety):

> All generic drug prices were harmed and maintained at the maximum formulary prices by the conspiracy.

[142] Paragraphs 297 to 317 appear in a section of the pleading titled “overview of the conspiracy”. The section lacks any description of the particular acts undertaken by any Defendant. The only reference to named Defendants is in paragraph 312:

> The Defendants refer to the conspiracy by various names, including “plying nice in the sandbox”, and “fair share” or “FS”. Big defendants are referred to by colour. For example, Green is used to refer to Teva, and Blue is used to refer to Apotex.

[143] Paragraphs 353 to 368 state that the Defendants meet through industry associations, trade shows, customer conferences, and social events. Paragraphs 402 to 410 discuss the involvement of Shoppers, McKesson, and other pharmacies in the conspiracy. Paragraphs 420 and 422 to 424 state that the Defendants engage in two-way communication to allocate sales and customers across the US and Canada. Paragraphs 500, 502, 504 to 507, and 509 to 511 allege that the Defendants fix prices and pay “illegal and anticompetitive kickbacks” to Shoppers, McKesson, and other pharmacies. Finally, paragraphs 712 to 720 state that the conspiracy resulted in inflated drug prices surpassing the prices in other comparator countries.

[144] In sum, the Statement of Claim fails to plead with sufficient particularity how each Defendant participated in the alleged conspiracy. It is impossible to understand the involvement of each Defendant and what specific actions were taken to advance the alleged conspiracy. The

pleadings fail to perform their basic function of making the pre-trial and trial proceedings both manageable and fair (*Mancuso* at para 18).

(b) *Among Competitors*

[145] A person is a party to an unlawful conspiracy within the meaning of s 45 of the *Competition Act* only if they are a competitor with respect to the product that is the subject of the conspiracy. The term "competitor" is defined to include "any person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement" (*Competition Act*, s 45(8)). Plaintiffs who allege an agreement contrary to s 45 must plead sufficient material facts with respect to competition between the parties to the impugned agreement, in relation to that product (*Amazon* at para 44).

[146] The Defendants say that generic drugs are not a single product. There are thousands of different generic drugs, each of which requires separate government approval before it can be marketed. The Defendants argue that they can be regarded as competitors with respect to a generic drug only if they each had regulatory approval to sell the particular drug in Canada. The claim concerns "generic drugs" generally, and the Plaintiff has failed to particularize the manner in which the Defendants are competitors. The Plaintiff has not specified which generic drugs she allegedly purchased.

[147] The Plaintiff responds that the courts have not always required that competitors and products be specified before certifying a class proceeding. In *David v Loblaw*, 2021 ONSC 7331 [*Loblaw*], Justice Edward Morgan of the Ontario Superior Court of Justice certified a class action

involving an alleged conspiracy in relation to packaged bread that encompassed many different products, such as sliced bread, naan, pita, and tortilla. In *Mancinelli*, Justice Perell certified a class action pursuant to s 45 of the *Competition Act* that involved an alleged conspiracy in relation to the purchase of foreign currency, despite the abundance of different currency pairs.

[148] The Plaintiff also relies on *In Re: Generic Pharmaceuticals Pricing Antitrust Litigation*, 394 F Supp 3d 509 (ED Pa 2019) at 526, in which the Pennsylvania Eastern District Court found that the defendants in that case had engaged in conduct directed at the broad market for generic drugs, beyond the drugs they each manufactured. The Plaintiff says that generic drugs are part of a single, overarching conspiracy. Moreover, she notes that the Defendants sell generic drugs as a bundle or basket of drugs, and prices are set for the entire basket (Statement of Claim at para 501).

[149] The Plaintiff therefore maintains that she has advanced a claim against every Defendant. Each is alleged to be a participant in an industry-wide conspiracy, and is jointly liable for damages resulting from the conspiracy regardless of the degree of participation (citing *Mancinelli* at para 141).

[150] The range of products sold by the competitors in the *Loblaw* packaged bread case is considerably narrower than the range of products sold by generic drug manufacturers in Canada. As evidenced by the affidavits of Ms. Pimentel and Mr. Vincent, many Defendants market only a small subset of generic drugs (*e.g.*, dermatological products). They cannot reasonably be said to "compete with respect to a product" with Defendants that do not market similar or interchangeable products.

[151] Even if one accepts that it is possible to plead a vast over-arching conspiracy encompassing the entire generic drug market in Canada, the Plaintiff has failed to particularize the acts of each Defendant that furthered the conspiracy, or the manner in which the Defendants are all competitors with each other. The Statement of Claim states only that all Defendants compete with each other (at para 27). This is a bald assertion lacking particularization, and cannot be assumed true.

[152] In order to fall within ss 36 and 45 of the *Competition Act*, and bring the proposed class proceeding within the jurisdiction of this Court, it is necessary to plead the basis upon which the Defendants are alleged to be competitors. The Statement of Claim does not accomplish this, and it therefore fails to disclose reasonable causes of action under ss 36 and 45 of the *Competition Act*.

(3) Foreign Directives

[153] The *Competition Act* provides in s 46:

Foreign directives	**Directives étrangères**
46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of	**46 (1)** Toute personne morale, où qu'elle ait été constituée, qui exploite une entreprise au Canada et qui applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis

giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.	par la personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.

[154] The constituent elements of an offence under s 46 are: (a) a corporation carrying on business in Canada; (b) that implements a direction, instruction, intimation of policy, or other communication; (c) from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation; and (d) the directive, instruction, intimation of policy or communication is for the purpose of giving effect to a conspiracy entered outside of Canada that would breach s 45 if entered into within Canada.

[155] If a statement of claim does not disclose a reasonable cause of action under s 45, it cannot disclose a reasonable cause of action under s 46 (*Amazon* at para 36). Furthermore, the Plaintiff has offered little to demonstrate a cause of action under s 46. The Statement of Claim states (at paras 420-421):

> The defendants agreed and arranged to allocate sales and customers for generic drugs across both the Canadian and U.S. markets. A defendant's "fair share" includes their share of products and sales for both drags the defendant sold in Canada and the United States. Maintenance or increase of a defendant's market

> share in Canada is traded off against maintenance or increase of other defendants' market share in the United States.
>
> In particular, from the beginning of the conspiracy, the defendants' agreement and arrangement to allocate sales and the market included protection of Teva and Apotex's large shares of the Canadian market for generic drugs in exchange for greater shares of the U.S. market for other defendants.

[156] Later in the Statement of Claim, the Plaintiff merely repeats the language of s 46 (at paras 757, 770, 774):

> Contrary to section 46 of the Competition Act, the defendants implemented a foreign directive, instruction, intimation of policy, or other communication, which communication was for the purpose of giving effect to a conspiracy, combination, agreement, or arrangement entered outside Canada that, if entered in Canada, would have been in contravention of section 45 of the Competition Act. The directives included directives given by any parent corporate defendants resident outside of Canada, to their subsidiary defendant(s) resident in Canada. The directives were to engage in the anticompetitive behaviour described in this claim.
>
> […]
>
> The defendants intended to and did implement a foreign directive, instruction, intimation of policy, or other communication, which communication was for the purpose of giving effect to the conspiracy, combination, agreement, or arrangement entered outside Canada.
>
> […]
>
> The defendants' implementation of a foreign directive, instruction, intimation of policy, or other communication, which communication was for the purpose of giving effect to the conspiracy, combination, agreement, or arrangement entered outside Canada, inflated generic drug prices in Canada, and caused loss and damage to the plaintiff and the Class.

[157] The Plaintiff has failed to plead sufficient particulars of the alleged foreign directives. The parties to the foreign directives are not identified. Beyond repeating the language of the provision, the Plaintiff has not pleaded any material facts to support a claim under s 46 of the *Competition Act*.

(4) Improperly Named Defendants

[158] The Plaintiff's claim groups related corporate Defendants together, and alleges that the acts of each corporation within the group constitute the acts of the others. The Plaintiff asserts that the businesses of each affiliated entity are interwoven, and "each is the agent of the other". She states that a parent company uses a subsidiary "as a shield for its illegal conduct".

[159] An exception to the foundational principle of corporate separateness arises where the subsidiary is a mere puppet of the parent (*Loblaw* at para 38, citing *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co*, 1996 CanLII 7979 (ON SC) at para 22). Here, the Plaintiff has not pleaded material facts to support the assertion that each of the Defendants' parent companies used their subsidiaries as mere puppets for improper activity. Nor has the Plaintiff pleaded material facts to show that each affiliated corporate entity acted as an agent for the others. The Plaintiff must plead with clarity and precision how the agency relationship exists for each Defendant (*Loblaw* at paras 32-34). The Plaintiff's bald assertions of interconnectedness among corporate groups cannot be presumed to be true for the purpose of establishing a cause of action against each named Defendant.

[160] The Plaintiff's improper grouping of Defendants is most stark in her reliance on the DPAs entered into by the Defendants' parent or affiliated companies in the USA. If one member of a corporate group was party to a DPA, then the Plaintiff maintains that all members of the corporate group have admitted to the conspiracy, including with respect to Canada. In the absence of particulars, this cannot be assumed to be true.

[161] The Plaintiff treats all entities within a group as if they are manufacturers of generic drugs in Canada. There are no material facts to support this claim. Instead, she baldly asserts that an entity "directly or through its subsidiaries, affiliates, or agents, licensed, manufactured, marketed, and sold generic drugs in Canada".

[162] The Plaintiff has not advanced material facts to support the assertion that several Defendants ever sold generic drugs in Canada, in particular: Apotex Corp; Aurobindo Pharma USA Inc; Bausch Health Companies Inc; Bausch Health Americas, Inc; Bausch Health US, LLC; 0909657 BC Ltd; Valeant Canada GP Limited; V-Bac Holding Corp; 9079-8851 Quebec Inc; Glenmark Pharmaceuticals Inc, USA; Lannett Company, Inc; Lupin Pharmaceuticals, Inc; Mylan NV, Mylan Inc, Mylan Pharmaceuticals Inc, Mylan Institutional Inc, Viatris Inc; Perrigo International Inc; Perrigo New York, Inc; Pfizer Inc; Greenstone LLC; Pendopharm Inc, Joddes Limited; Sandoz Inc; Fougera Pharmaceuticals Inc; Sun Pharmaceutical Industries, Inc; Taro Pharmaceuticals USA, Inc; Teva Pharmaceuticals USA, Inc; Actavis Holdco US, Inc; Actavis Elizabeth LLC, Actavis Pharma, Inc; Barr Pharmaceuticals, LLC; and Upsher-Smith Laboratories, LLC.

[163] The Defendants Lannet Company, Inc, Upsher-Smith Laboratories, LLC, Perrigo International Inc and Perrigo New York state that neither they nor any of their affiliated entities sold prescription drugs in Canada. Nor are they party to any DPAs in the USA. The Plaintiff has not pleaded any material facts to suggest they intentionally conspired to stay out of the Canadian market. Accordingly, there can be no reasonable cause of action against these Defendants.

[164] In oral submissions, counsel for the Plaintiff acknowledged the absence of any cause of action against Bausch Health Companies Inc; Bausch Health Americas, Inc; Bausch Health, Canada Inc; Santé Bausch a.k.a. Bausch Health; Bausch Health US, LLC; 0909657 B.C. Ltd; Valeant Canada GP Limited; Valeant Canada Limited; Valeant Canada S.E.C.; V-BAC Holding Corp; 9079-8851 Québec Inc; Valeant Canada LP/Valeant Canada S.E.C; Lannett Company, Inc; Upsher-Smith Laboratories, LLC; Perrigo International Inc; and Perrigo New York, Inc. The Plaintiff invited the Court to dismiss the action against these Defendants, with prejudice.

B. *Common Issues*

[165] The Court will certify a class proceeding only if the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual class members (Rule 334.16(1)(c)). The Court's task is not to determine the common issues, but rather to "assess whether the resolution of the issue is necessary to the determination of each class member's claim" (*Jensen FC* at para 188, citing *Wenham v Canada (Attorney General)*, 2018 FCA 199 at para 72). The determinative question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis (*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at para 39).

[166] The Federal Court of Appeal has recently confirmed a two-step approach to assessing the commonality requirement. The Plaintiff must show some basis in fact that (a) the proposed common issues exist, and (b) their resolution is necessary to the resolution of each class member's claim (*Jensen FCA* at paras 78).

[167] The Plaintiff proposes six common questions:

> 1. Did the defendants, or any of them, breach section 45 of the Competition Act?
>
> 2. Did the defendants, or any of them, breach section 46 of the Competition Act?
>
> 3. Did the Class members suffer loss or damage as a result of the defendants' conduct contrary to any provision of Part VI of the Competition Act?
>
> 4. Are the Class members entitled to recover the loss or damage suffered by them pursuant to section 36 of the Competition Act? If so, in what amount or amounts?
>
> 5. Are the defendants, or any of them, liable to pay pre-judgment interest and post-judgment interest pursuant to sections 36 and 37 of the Federal Courts Act? If so, in what amount or amounts?
>
> 6. Should the full costs of investigation in connection with this matter, including the cost of the proceeding or part thereof, be fixed or assessed on an aggregate basis pursuant to section 36 of the Competition Act? If so, in what amount or amounts?

[168] The Plaintiff argues that evidence from legal proceedings in the USA, together with the expert evidence she has presented, provide more than some basis in fact to support the existence of the alleged conspiracy. She notes that in *Jensen FC*, Justice Gascon provided numerous examples of class proceedings that were certified in Canada based on conspiracies uncovered by the US Department of Justice (*Jensen FC* at para 42).

[169] In *Pro-Sys*, the Supreme Court of Canada recognized that some basis in fact for the loss suffered by class members may be established by expert evidence (*Pro-Sys* at para 114). The Plaintiff submits that Dr. Pakes' models will permit the Court to determine the effect on the pricing of generic drugs if there were no collusion, as well as the loss suffered by each Class member (citing *Pioneer Corp v Godfrey*, 2019 SCC 42 [*Godfrey*] at para 97).

[170] In a class action for damages pursuant to s 36 of the *Competition Act* that is premised on a breach of s 45, a plaintiff must show some basis in fact for the existence of both the conspiracy and consequent loss. Accordingly, the Defendants say this Court cannot certify common issues relating to s 36 if the plaintiff does not present some basis in fact for a common loss suffered by all Class members (*Godfrey* at para 118).

[171] More broadly, the Defendants insist that the generic drug markets in Canada and the USA are separate and distinct. They deny that documentation arising from the US litigation provides any basis in fact for an alleged conspiracy that extends throughout North America or into Canada. The Defendants rely on *Lilleyman v Bumble Bee Foods LLC*, 2024 ONCA 606, in which the Court of Appeal for Ontario upheld the Superior Court's dismissal of a certification motion in a case involving an alleged price-fixing conspiracy with respect to canned tuna in Canada. According to the Court of Appeal for Ontario (*per* Monahan JA at para 30):

> The fundamental problem was that the evidence relied upon by the plaintiff had nothing to do with Canada and concerned conduct that occurred only with respect to the U.S., which had an entirely separate market for tuna.

[172] With respect to the examples of successful certification motions provided by Justice Gascon in *Jensen FC*, the Defendants note that none of these occurred in the context of distinct US and Canadian markets. Furthermore, the Defendants in this case have not admitted to the existence of a conspiracy in Canada. They note that Dr. Pakes was not asked his opinion on the existence of the alleged conspiracy in Canada. According to his first expert report (at para 20), his mandate was:

> (a) To review the market structure for generic drugs in Canada and determine if the economic conditions were conducive to collusion.
>
> (b) To determine whether there is evidence common to the Class Members that could be derived from economic methods and available data that could be used to show that the alleged collusion resulted in overcharges to one or more members of the Class.
>
> (c) To determine if well accepted economic methods can be used to estimate aggregate damages to the Class Members.
>
> (e) To form an opinion on what methods would be available for allocating aggregate damages across Class Members.
>
> (f) To determine if data required to perform the analyses described in this report would likely be available in post-certification discovery.

[173] Dr. Pakes confirmed in cross-examination that he was not asked to determine whether generic drug companies in Canada did in fact collude to fix prices or allocate the market (Pakes Cross-Examination at Questions 85-86).

[174] The uncompetitive and illegal “kickback” scheme alleged in the Statement of Claim has no counterpart in the conspiracies alleged in the USA, and does not figure in any of the documentation arising from the US litigation. The Defendants point to the Competition Bureau’s 2007 study of the Canadian generic drug industry as confirmation that Canada’s regulatory

framework incentivizes manufacturers to set list prices at the maximum formulary price, and compete with off-invoice discounts to pharmacies. These conclusions are consistent with those of the Conference Board of Canada in 2018.

[175] The Defendants say that their pricing behaviour is akin to "conscious parallelism". Generic manufacturers unilaterally adopt similar approaches to pricing due to rational profit-maximizing strategies. These are not illegal, because there is no collusive agreement within the meaning of s 45 of the *Competition Act* (*Jensen FCA* at para 54, citing *Atlantic Sugar Refineries Co Ltd et al v Attorney General of Canada*, 1980 CanLII 226, [1980] 2 SCR 644 at 657). Despite the potential for "bad optics", off-invoice discounts are permitted, assuming that pharmacies and drug companies comply with applicable provincial regulations (*Spina v Shoppers Drug Mart Inc*, 2023 ONSC 1086 at para 443).

[176] As Justice Gascon observed in *Jensen FC*, an expert's description of pricing behaviour does not constitute some basis in fact for a conspiracy where the behaviour is also consistent with perfectly legal conduct (at para 273). With respect to the alleged conspiracy to allocate the market, the Defendants again say there are legal and commercially rational reasons why they may choose not to market a drug in Canada despite having obtained an NOC.

[177] There is no evidence whatsoever of any foreign directive, or that any Defendant has abided by one. Accordingly, the Defendants say there is no basis in fact to establish the s 46 claim as a common issue.

[178] In *Jensen FC*, Justice Gascon cautioned against attributing too much weight to expert evidence tendered to establish some basis in fact for a common issue (at para 274):

> Simply tendering an expert report is not sufficient to amount to some basis in fact of a proposed common issue. I must be satisfied, without entering into a detailed scrutiny of the evidence, that the expert's evidence on the issue at stake is sufficiently reliable that it provides some basis in fact for the existence of the common issue. While I accept that the evidence at the certification stage, including expert evidence, is scrutinized at a lower standard than it will be subject to at trial, there remains a standard that must be met.

[179] The expert report tendered on behalf of the plaintiff in *Jensen FC* was not intended to, and did not, advance an opinion regarding the existence of the alleged conspiracy (at para 274). The same is true in this case. Dr. Pakes was not asked to opine on the existence of the alleged conspiracy; only whether the Canadian generic drug market is "conducive to collusion". As Justice Gascon found in *Jensen FC*, this cannot constitute evidence of "an agreement" within the meaning of s 45 of the *Competition Act*. The possibility that a market may be conducive to collusion does not constitute some basis in fact that this actually occurred.

[180] Documentation arising from the US litigation offers little support for the Plaintiff's far-reaching claims. None of these materials suggest that the conspiracy extended throughout North America or into Canada. While some entities affiliated with drug manufacturers in Canada may have acknowledged their involvement in conspiracies in the USA, this is insufficient to establish some basis in fact for the proposition that Canadian subsidiaries or affiliates have engaged in similar behaviour in Canada. Furthermore, only a few Defendants are affiliated with entities mentioned in the DPAs.

[181] In *Lilleyman v Bumblebee Foods LLC*, 2023 ONSC 4408, Justice Perell stated (at para 303):

> […] The three Defendants in the U.S. conspiracy cannot easily be connected to Canada, as was the case in some of the precedent certification decisions, where the very same product was being sold in Canada and in the United States. If it had been the case that *Bumble Bee* branded tuna, *Chicken of the Sea* branded tuna, and *StarKist* branded tuna were being sold in both Canada and the United States, then these precedent decisions would be helpful to Ms. Lilleyman […].

[182] There is no evidence of any reciprocity between health authorities in Canada and the United States in respect of the drug approval process. The marketing and distribution of generic products in Canada requires compliance with specific requirements intended only for the Canadian market. Generic products produced for the US market cannot generally be sold in Canada, and *vice-versa*. There are important differences between the regulatory framework governing the sale of generic drugs in Canada and the one that applies in the USA.

[183] The Plaintiff has not adduced any evidence to demonstrate that some Defendants ever manufactured, sold, or marketed generic drugs in Canada. (See discussion under the heading "Improperly Named Defendants", above.)

[184] In sum, the Plaintiff's evidence fails to establish some basis in fact for the alleged conspiracy among the Defendants to fix prices or allocate the market for generic drugs in Canada. Nor has the Plaintiff provided any evidentiary basis to support her claim under s 46 of the *Competition Act* that the Defendants implemented a foreign directive. The proposed common questions on conduct and liability are therefore not certifiable. The same is true of the other

proposed common issues on loss, harm or payments flowing from the allegedly wrongful acts (*Jensen FC* at para 186).

C. *Preferable Procedure*

[185] The Plaintiff must establish that a class proceeding is a fair, efficient and manageable method of advancing the claim, and that it would be preferable to other reasonably available ways to resolve the dispute (*Hollick* at para 28; *Doan v Canada (Attorney General)*, 2023 FC 236 at para 115). The Court must conduct its analysis though the lens of the objectives of class actions: judicial economy, behaviour modification, and access to justice.

[186] These objectives cannot be considered solely from the perspective of the Plaintiff. The certification process also protects defendants against facing groundless suits and being forced to invest significant resources to contest large-scale, time-consuming actions that have no chance of success or lack the minimal evidentiary foundation required. “Preventing baseless class actions from monopolizing the judicial system to the detriment of other litigants’ actions is also part of preserving access to justice for all litigants” (*Jensen FC* at para 62).

[187] In this case, I have found that the common issues proposed by the Plaintiff are unsuitable for certification. As Justice Gascon held in *Jensen FC* (at para 301):

> […] A class action cannot be the preferable procedure for a claim under section 36 of the Act where the alleged wrongful acts and the alleged harm or loss resulting from the wrongful conduct cannot be certified as common issues. The preferable procedure analysis in a competition class action is closely linked to the question of whether the court has a basis to certify common issues

> comprising the elements of a defendant's liability (*Ewert v Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para 84). This requires, at a minimum, the unlawful conspiracy and harm to be certifiable as common issues because, these form the core elements of any plaintiff's claim under section 36 of the Act for a breach of sections 45 and 46.

[188] It is axiomatic that, if there is no basis in fact for the proposed common issues, then there is no basis in fact for a class action that is capable of satisfying the preferable procedure criterion (*Jensen FC* at para 303). Absent common issues, a class action is not the preferable procedure for resolving the Plaintiff's claims.

D. *Suitable Representative Plaintiff*

[189] The Plaintiff must demonstrate that there is some basis in fact that she satisfies the conditions in Rule 334.16(1)(e):

(e) there is a representative plaintiff or applicant who	e) il existe un représentant demandeur qui :
(i) would fairly and adequately represent the interests of the class,	(i) représenterait de façon équitable et adéquate les intérêts du groupe,
(ii) has prepared 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 as to how the proceeding is progressing,	(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
(iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and	(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,
(iv) provides a summary of any	(iv) communique un sommaire des conventions relatives aux honoraires

agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.	et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[190] The Defendants argue that the Plaintiff is not a suitable representative plaintiff for a number of reasons. They say she has not advanced a viable cause of action against every Defendant. Furthermore, she has a conflict of interest with other members of the proposed Class, in particular insurance companies that are alleged to benefit from higher generic drug prices.

[191] In my view, it is unnecessary to consider these issues in depth. The motion to certify this proposed class actions suffers from a more fundamental flaw: the rudimentary nature of the litigation plan put forward by the Plaintiff.

[192] The litigation plan provided by the Plaintiff is boilerplate and superficial. It avoids grappling with foreseeable difficulties. The litigation plan simply lists steps that are common to any lawsuit. It is plainly inadequate.

[193] The observations of the Court of Appeal for Ontario (*per* Tulloch CJO) in *Carcillo v Ontario Major Junior Hockey League*, 2025 ONCA 652, are applicable here (at paras 4, 55):

> […] Even though the appellants' objectives may well be admirable, their proposed class action is of an unprecedented scale and complexity, far greater than that of other systemic negligence class actions previously recognized. This reality made it essential for counsel to present a litigation plan capable of meeting those challenges. Because no such plan was offered, the motion judge was justified in finding the action unmanageable, and therefore not the preferable procedure.

> […]
>
> A workable litigation plan must be detailed, concrete, and tailored to the case. It should explain how common and individual issues will be resolved efficiently and fairly, in light of the case's particular scale and challenges. As Nordheimer J. noted in *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (6th) 68 (Ont. S.C.), at para. 53, such plans should address a range of relevant factors. In especially complex cases, more detail is required. Boilerplate or superficial plans that avoid grappling with foreseeable difficulties, or that simply list steps common to any lawsuit, are inadequate: *McCracken*, at paras. 145–146; *Caputo*, at paras. 76–79; Bellaire, at paras. 52–54.
>
> [Footnote omitted]

[194] Given the deficiencies in the litigation plan, the Plaintiff has not satisfied the criterion of presenting some basis in fact that she is a suitable representative of the Class.

V. Conclusion

[195] With the exception of the existence of an identifiable Class, which was conceded by the Defendants, the Plaintiff has not satisfied any of the criteria for certification of a class action. In addition to failing to plead reasonable causes of action against the Defendants, the Plaintiff has not demonstrated that there is any basis in fact for the proposed common issues concerning the alleged wrongful acts under ss 45 and 46 of the *Competition Act*.

[196] No purpose would be served by granting the Plaintiff leave to amend the pleadings or reapply for certification (*Jensen FC* at para 183). The motion will be dismissed without leave to amend.

[197] In accordance with the request made by counsel for the Plaintiff in oral submissions, the Statement of Claim will be dismissed, with prejudice, against the Defendants Bausch Health Companies Inc; Bausch Health Americas, Inc; Bausch Health, Canada Inc; Santé Bausch a.k.a. Bausch Health; Bausch Health US, LLC; 0909657 B.C. Ltd; Valeant Canada GP Limited; Valeant Canada Limited; Valeant Canada S.E.C.; V-BAC Holding Corp; 9079-8851 Québec Inc; Valeant Canada LP/Valeant Canada S.E.C; Lannett Company, Inc; Upsher-Smith Laboratories, LLC; Perrigo International Inc; and Perrigo New York, Inc.

[198] Consistent with Rule 334.39, there will be no order of costs against any party.

ORDER

THIS COURT ORDERS that:

1. The motion to certify this proceeding as a class action is dismissed without leave to amend.

2. The action is dismissed, with prejudice, against the Defendants Bausch Health Companies Inc; Bausch Health Americas, Inc; Bausch Health, Canada Inc; Santé Bausch a.k.a. Bausch Health; Bausch Health US, LLC; 0909657 B.C. Ltd; Valeant Canada GP Limited; Valeant Canada Limited; Valeant Canada S.E.C.; V-BAC Holding Corp; 9079-8851 Québec Inc; Valeant Canada LP/Valeant Canada S.E.C; Lannett Company, Inc; Upsher-Smith Laboratories, LLC; Perrigo International Inc; and Perrigo New York, Inc.

3. No costs are awarded.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-607-20
STYLE OF CAUSE:	KATHRYN EATON v TEVA CANADA LIMITED, TEVA PHARMACEUTICALS USA, INC., ACTAVIS HOLDCO U.S., INC., ACTAVIS ELIZABETH LLC, ACTAVIS PHARMA, INC., ACTAVIS PHARMA COMPANY, BARR PHARMACEUTICALS, LLC, AKORN, INC., AKORN SALES, INC., HI-TECH PHARMACAL CO., INC., AMNEAL PHARMACEUTICALS, INC., IMPAX LABORATORIES, INC., APOTEX INC., APOTEX CORP., AUROBINDO PHARMA USA, INC., AURO PHARMA INC., AVET PHARMACEUTICALS INC., MARCAN PHARMACEUTICALS INC., BRECKENRIDGE PHARMACEUTICAL, INC., DR. REDDY'S LABORATORIES, INC., DR. REDDY'S LABORATORIES CANADA INC., GLENMARK PHARMACEUTICALS INC., USA, GLENMARK PHARMACEUTICALS CANADA INC., LANNETT COMPANY, INC., LUPIN PHARMACEUTICALS, INC., LUPIN PHARMA CANADA LTD., MAYNE PHARMA INC., MYLAN N.V., MYLAN PHARMACEUTICALS ULC, MYLAN INC., MYLAN PHARMACEUTICALS INC., MYLAN INSTITUTIONAL INC., DAVA PHARMACEUTICALS, LLC, GENERICS BIDCO I, LLC, PAR PHARMACEUTICAL COMPANIES, INC., PAR PHARMACEUTICAL, INC., PERRIGO INTERNATIONAL INC., PERRIGO NEW YORK, INC., PFIZER INC., PFIZER CANADA ULC/PFIZER CANADA SRI, GREENSTONE LLC, SANDOZ INC., SANDOZ CANADA INC., FOUGERA PHARMACEUTICALS INC., SUN PHARMACEUTICAL INDUSTRIES, INC., SUN PHARMA CANADA INC., TARO PHARMACEUTICALS INC., TARO PHARMACEUTICALS U.S.A., INC., TELIGENT, INC., TELIGENT CANADA INC., UPSHER-SMITH LABORATORIES, LLC, WOCKHARDT USA LLC, MORTON GROVE PHARMACEUTICALS, INC., ZYDUS PHARMACEUTICALS (USA), INC., BAUSCH HEALTH AMERICAS, INC., BAUSCH HEALTH,

	CANADA INC., BAUSCH HEALTH COMPANIES INC., SANTÉ BAUSCH A.K.A. BAUSCH HEALTH, BAUSCH HEALTH US, LLC, 0909657 B.C. LTD., VALEANT CANADA GP LIMITED, VALEANT CANADA LIMITED, VALEANT CANADA S.E.C., V-BAC HOLDING CORP., 9079-8851 QUÉBEC INC., G&W LABORATORIES, INC., G&W PA LABORATORIES, LLC, MALLINCKRODT PUBLIC LIMITED COMPANY, MALLINCKRODT INC., MALLINCKRODT US LLC, MALLINCKRODT LLC, MALLINCKRODT CANADA ULC, AA PHARMA, PHARMASCIENCE INC., PENDOPHARM INC., JODDES LIMITED, VALEANT CANADA LP/VALEANT CANADA S.E.C., NOVARTIS PHARMACEUTICALS CANADA INC., PALADIN LABS INC., UPJOHN CANADA ULC, MYLAN PHARMACEUTICALS ULC., VIATRIS INC., BGP PHARMA ULC, HERITAGE PHARMACEUTICALS INC., AND INTERNATIONAL PHARMACEUTICAL GENERICS LTD.
PLACE OF HEARING:	TORONTO, ONTARIO AND BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 27-31, 2025
ORDER AND REASONS:	FOTHERGILL J.
DATED:	FEBRUARY 20, 2026

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