

THE COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended; and

AND IN THE MATTER OF an application for orders pursuant to section 74.1 of the *Competition Act* for conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON’S BAY COMPANY

Respondent

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT Date: March 21, 2108 CT-2017-008 Andrée Bernier for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 61

AMENDED RESPONSE

1. The Respondent, Hudson’s Bay Company (“**HBC**”) submits this Amended Response to the Amended Notice of Application and Application of the Commissioner of Competition (the “**Commissioner**”), dated February 26, 2018 (the “**Application**”) for an order pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “**Act**”). For the reasons set out below, the Application should be dismissed in its entirety.

I. OVERVIEW

2. The Commissioner alleges that HBC “is engaging or has engaged in reviewable conduct, contrary to paragraph 74.01(1)(a) and subsection 74.01(3) of the Act” and seeks declaratory relief, a prohibition order, an administrative monetary penalty and corrective notices against HBC. The Commissioner’s Application is fundamentally flawed and should be dismissed for multiple reasons.

3. The Commissioner claims that HBC contravened subsection 74.01(3) of the *Act*, as a result of HBC's retail banner Hudson's Bay ("**Hudson's Bay**") advertising ~~certain~~ sleep sets; ~~(among dozens offered by Hudson's Bay)~~, at prices that were "grossly inflated" and "not an actual regular price". The fact is that Hudson's Bay's regular prices were set in relation to and were in line with the regular prices of Hudson's Bay's main, and much larger, retail competitors in the sale of mattresses in Canada. Hudson's Bay did not negotiate the prices of its sleep sets with customers and there was no undisclosed price at which Hudson's Bay was willing to sell sleep sets to customers during non-promotional periods other than the regular price. Contrary to the Commissioner's allegations, Hudson's Bay's regular prices for ~~the identified~~ its sleep sets were manifestly actual prices offered in good faith by Hudson's Bay.

4. The Commissioner's position is based on an inherently flawed interpretation of the meaning of "good faith" in paragraph 74.01(3)(b) of the *Act*; it is an interpretation that conflicts with the Competition Bureau's own Ordinary Price Guidelines and that, if adopted, would effectively write the "time test" contained in paragraph 74.01(3)(b) right out of the *Act*. Hudson's Bay offered the identified (and all of its) sleep sets at a good faith regular price for a substantial period of time within the meaning of paragraph 74.01(3)(b), and therefore HBC did not contravene the *Act*.

5. Moreover, even if HBC had not complied with the "time test" set out in paragraph 74.01(3)(b) (which it did), Hudson's Bay's advertising of the sleep sets was not "false or misleading in a material respect" under 74.01(1)(a) of the *Act*, as the Commissioner alleges, especially when considering the competitive nature of advertising and pricing for mattresses

in Canada in which most of Hudson's Bay's major competitors follow similar "high-low" pricing strategies. In no way was Hudson's Bay's advertising of its sleep sets deceptive, nor were its customers deceived by it.

6. In the Application as amended, the Commissioner now alleges that HBC "continues to engage" in conduct purportedly in violation of subsection 74.01(3) of the Act and asserts that "inflated regular price representations were and continue to be made by HBC to the public about all or substantially all of its sleep sets." At paragraph 75, Table 4 of the Application, the Commissioner provides a Table purporting to list the "number of identified Sleep Sets promoted using O[r]dinary S[elling] P[rice] Representations" and the number "of OSP representations with savings of 50% or more off the regular price" by Hudson's Bay during each year from 2013 through 2017. This Table ignores that it is not a contravention of the Act simply to advertise products at "50 or more off the regular price". HBC's "high-low" marketing of mattresses did not violate the Act.

7. The Commissioner's (amended) Application also ignores that, beginning on February 2, 2018, Hudson's Bay implemented a change to the manner in which it promotes and sells mattresses. Hudson's Bay has now shifted to the general marketing strategy of promoting regular low everyday prices for mattresses, as opposed to its previous "high-low" selling strategy. Under its current marketing approach, Hudson's Bay is not advertising sale prices with "deep discounts" of "50% or more off the regular price" of its mattresses (sleep sets).

8. The Commissioner also claims that HBC contravened paragraph 74.01(1)(a) of the Act by publishing advertisements for certain sleep sets that contained "clearance" or "end of line" language. There is no basis for the assertion that Hudson's Bay's use of "clearance" or

“end of line” terminology to advertise mattresses was false or misleading in any respect whatsoever, or otherwise contravened section 74.01 of the *Act*.

9. Contrary to the Commissioner’s allegations, most consumers would not assume that a “clearance” sale of sleep sets involves only sleep sets that the retailer physically has in stock in its stores – something which common sense suggests would be impractical given the size and nature of mattresses. Rather, the term “clearance” reasonably denotes to consumers that a mattress is available for purchase for a limited time at the end of the model’s life at a price that is lower than typical promotional pricing. This is exactly the context in which Hudson’s Bay used the term “clearance”.

10. Notwithstanding this, Hudson’s Bay voluntarily ceased using “clearance” language, and instead shifted to the use of “end of line” in its advertising promotions for mattress models which are about to be discontinued. When used with respect to mattresses, the phrase “end of line” does not, as the Commissioner asserts, give customers the impression that “Hudson’s Bay will be selling specific inventory and will not replenish what gets sold”. Rather, the general impression created by Hudson’s Bay’s “end of line” advertising for some of its mattresses was limited and obvious: those models were being discontinued and new sales of those models would not be made past a certain date – which again is exactly the context in which Hudson’s Bay used the phrase.

11. In addition, even if some of Hudson’s Bay’s advertising did contravene section 74.01 of the *Act*, which is denied, the Commissioner is not entitled to the corrective notices and administrative monetary penalty he is seeking against HBC because HBC exercised due diligence to prevent the reviewable conduct from occurring. HBC has (and at the relevant

times, had) a strict and comprehensive advertising compliance program and trains all of its employees engaging in marketing or buying the mattresses that Hudson's Bay offers for sale on the importance of being, and how to be, compliant with advertising law.

12. As none of the Commissioner's claims has any merit, this Application should be dismissed in its entirety.

II. ADMISSIONS/DENIALS

13. HBC denies each and every allegation in the Commissioner's Application unless specifically admitted herein.

14. With respect to the allegations in paragraphs 29-35 of the Application, HBC admits that Hudson's Bay advertised the four identified mattresses/sleep sets in the described flyers at the prices listed therein.

15. With respect to the allegations in paragraphs 37-38 of the Application, HBC admits that Hudson's Bay did not make a substantial volume of sales of the four identified sleep sets at their respective regular prices over a twelve month period from the respective dates of the launches of those mattresses.

16. HBC denies that any of Hudson's Bay's regular price/savings promotional representations with respect to those four sleep sets constituted a breach of subsection 74.01(3) of the *Act*, as alleged by the Commissioner or at all.

17. With respect to the allegations in paragraphs 12, 26, 28, 53 and 74-76 of the Application, as amended, HBC denies that Hudson's Bay made or is making representations

with “grossly inflated” or “deceptive regular prices” for any, let alone “all or substantially all of its sleep sets”. Moreover, HBC specifically denies the allegation in paragraph 75 of the Application (as amended) that, as of February 26, 2018, HBC “continues to follow the same practice” with respect to the marketing of its sleep sets that it employed in 2013-2014 with respect to the four sleep sets specifically identified and used as “examples” in the Application.

18. With respect to the allegations in paragraphs 78, 82, and 91 of the Application, HBC admits that Hudson’s Bay made the alleged “clearance” or “end of line” representations concerning the identified mattresses/sleep sets in the described flyers.

19. With respect to the allegations in paragraphs 86-87 of the Application, HBC admits that Hudson’s Bay changed from making “clearance” to “end of line” promotional representations in respect of mattresses/sleep sets in or about December 2014. HBC further states that the Commissioner was aware of Hudson’s Bay’s change in this regard at the time it was made, and did not object to the use of “end of line” representations by Hudson’s Bay until the Application was filed.

20. HBC denies that any of Hudson’s Bay’s “clearance” or “end of line” representations constituted a breach of paragraph 74.01(1)(a) of the *Act*, as alleged by the Commissioner or at all.

III. MATERIAL FACTS RELIED ON BY HBC

A. About HBC

21. Founded in 1670, HBC is North America's oldest company. HBC is a Canadian corporation amalgamated under the *Canada Business Corporations Act*. HBC's registered head office is in Toronto, Ontario.

22. HBC operates Hudson's Bay, which is a leading North American retailer offering a wide selection of branded merchandise throughout Canada.

23. There are 90 Hudson's Bay stores across Canada and Hudson's Bay also sells merchandise online at thebay.com.

B. Hudson's Bay's Sale of Mattresses/Sleep Sets in Canada

24. The mattress industry in Canada is a highly competitive business. During 2013, the year in which the first advertisements challenged by the Commissioner appeared, retail sales of mattresses in Canada were approximately \$1.2 billion.

25. Major manufacturers or suppliers of mattresses in Canada include Simmons/Serta, Sealy/Tempurpedic, Kingsdown and Springwall. Mattress manufacturers have significant influence on the retail market for mattresses in Canada. In 2013, Simmons/Serta (with a share of approximately 40%) and Sealy/Tempurpedic (with of a share of approximately 36%) were the two largest manufacturers of mattresses sold in Canada.

26. Hudson's Bay sells mattresses at 78 of its retail stores across Canada and online, as part of its major home products division. Hudson's Bay's share of overall mattress sales in

Canada is relatively small: in 2013, it was approximately 4% of total Canadian mattress sales. Hudson's Bay had (and has) no "market power" in respect of the sale of mattresses.

27. The business of retail mattress sales in Canada is highly competitive, and Hudson's Bay faces stiff competition from a number of competitors, several of which sell substantially more mattresses than Hudson's Bay. In 2013, Hudson's Bay's major Canadian competitors included The Brick/Leon's (which made approximately 29% of overall mattress sales in Canada); Sleep Country (which had approximately a 25% share); Sears (approximately 14% share of sales); Costco (approximately 3%) and IKEA (approximately 3%). In addition, Hudson's Bay faced competition from a number of independent retailers, such as Bad Boy, which made substantial mattresses sales. The independents' combined share of sales in 2013 was approximately 20%.

1. Hudson's Bay's Sourcing of Mattresses/Sleep Sets

28. In the 2013-2014 time frame, Hudson's Bay purchased mattresses for sale in Canada from three mattress manufacturers/suppliers: Simmons/Serta, Sealy/Tempurpedic and Marshall (a mattress manufacturer located in Toronto, Ontario). It currently also purchases from 3 additional manufacturers.

29. Generally, Hudson's Bay offers its particular mattress models for sale for approximately twelve months, as the mattress manufacturers typically update or change their mattress models and collections each year. Accordingly, Hudson's Bay will discontinue selling the manufacturers' "old" (previous year) mattress models and replace them with the new (current year) models. On occasion, Hudson's Bay will sell a mattress model for longer

than 12 months; such occurrences usually are the result of a delay in the availability of the new model from the manufacturer.

30. Every year, Hudson's Bay's mattress buyer deals with the mattress manufacturers' sales representatives as part of determining which mattress models Hudson's Bay will offer for sale in the upcoming year. As stated in the Commissioner's Application, mattress manufacturers make a variety of mattress models, each of which typically comes in several different sizes ranging from twin to king. Each manufacturer's mattress model typically can be matched with one of several corresponding box-springs from the manufacturer that have different "profiles" (such as standard, low-profile, and split-profile box springs). The combination of mattress and box-spring is known as a "sleep set". Manufacturers typically group their sleep sets by "collection," which may consist of multiple different mattress models and matching box-springs.

31. As also noted in the Commissioner's Application, the characteristics and features of a manufacturer's mattresses will vary across collections and by model within a collection. The variation across mattress models may include differences in construction, format, ticking and comfort level.

32. In a given year, many of the particular mattress models selected by Hudson's Bay's buyer, in consultation with the manufacturer's sales representative, to be offered for sale by Hudson's Bay will be exclusively available at retail from Hudson's Bay. However, HBC denies the Commissioner's allegation that such exclusivity purportedly makes it "very difficult for consumers to comparison shop between retailers" and states that consumers can and do compare mattress models offered by different retailers, particularly with respect to the

central “features” for consumers, which are comfort and price. Indeed, certain of Hudson’s Bay’s competitors offer price matching for “comparable” mattresses regardless of a particular model name, number or construction.

33. The nature of the mattress industry is such that Hudson’s Bay tends (as do other retailers) to maintain relatively low levels of mattress inventory in its stores and warehouses, and many mattresses are sold on a “made to order” basis. Factors which favour this method of production and sale include: the wide range of choices available to customers in terms of mattress sizes, technologies and features; the relatively large size of mattresses, which makes handling and storage costs high; and the importance of cleanliness and hygiene with respect to mattresses (making it undesirable that the mattresses be stored for long). It is important to note, however, that while many Hudson’s Bay mattresses are sold on a “made to order” basis, the mattresses will generally be produced by the manufacturers from fabrics and materials that were chosen by and earmarked for Hudson’s Bay prior to the launch of the mattress model, and that the stock of such materials will be reduced as mattresses are sold throughout the year.

34. Each year, Hudson’s Bay offers numerous collections and, within those collections, multiple sleep sets, for sale in Canada. In 2013, for example, Hudson’s Bay offered approximately two dozen collections of mattresses for sale, consistent with a product assortment developed by Hudson’s Bay’s mattress buyer in conjunction with managers in Hudson’s Bay’s major home products division. ~~The Commissioner’s Application in respect of HBC’s purported breach of subsection 74.01(3) of the Act relates only to four particular sleep sets offered for sale by Hudson’s Bay in 2013 and 2014.~~

2. Hudson's Bay's Regular Pricing for Sleep Sets

35. Hudson's Bay follows a consistent process for setting the regular prices of the sleep sets it offers for sale in any given year. In this regard, consistent with its share of mattress sales in Canada, Hudson's Bay is a price-follower (price-taker), rather than a price-leader.

36. Hudson's Bay's primary considerations in setting regular prices for its sleep sets are the products and prices of its competitors in the industry at the relevant time. In determining the regular price for a sleep set, Hudson's Bay compares that sleep set to similar products being offered by Hudson's Bay's competitors and the prices at which those similar sleep sets are being offered. The primary benchmarks that Hudson's Bay considers when comparing the sleep sets are the brand and the various aspects of the mattress' construction (*e.g.*, the type and number of coils where applicable, the foam used, whether the mattress is a eurotop, the fabric, ticking and other applicable features).

37. In making its comparison, Hudson's Bay pays particular attention to the pricing of market leaders, such as The Brick/Leon's and Sears. In addition, as noted above, the manufacture/supply of mattresses in Canada is concentrated, with the two leading manufacturers having a combined share of approximately 70%. Accordingly, Hudson's Bay's buyers take guidance from mattress manufacturers about the marketplace, competitive offerings, and suggested retail prices, when determining the regular prices for Hudson's Bay's sleep sets. Once set, Hudson's Bay generally does not change the regular price of a sleep set, until the set is being discontinued.

38. HBC denies the Commissioner's allegations that Hudson's Bay lacked "an appropriate benchmark of their competitors' regular prices against which to assess their own

regular prices” or that the Hudson’s Bay buyers’ product comparisons were purportedly “arbitrary and informal.” Hudson’s Bay’s regular pricing for its sleep sets was based on an informed view of the competitive landscape – in which Hudson’s Bay was a relatively small player and a price-taker – and its regular prices for sleep sets were in line with those of its major competitors.

39. It should also be noted that Hudson’s Bay offers certain premium value items for its mattress customers, such as: free delivery, order cancellation prior to delivery, and a generous “comfort guarantee” that allows the customer to exchange a used mattress for up to 60 days from the date of delivery.

3. Hudson’s Bay’s Promotional Pricing for Sleep Sets

40. Each year, when Hudson’s Bay introduces its new mattress models for sale, the new models are offered at Hudson’s Bay’s regular price for at least four weeks. For example, the Brooklyn sleep set identified in the Commissioner’s Application was launched by Hudson’s Bay on February 24, 2013 and was offered at its regular price of \$3,098 continuously through April 11, 2013, before it was first offered by Hudson’s Bay at a promotional price. HBC states that this establishes the product’s ordinary price for purposes of the *Act*.

41. Hudson’s Bay operates on a February through January fiscal year. Throughout its fiscal year, Hudson’s Bay runs various marketing and promotional events. These include weekly marketing events (generally running from Friday – Thursday) as well as promotional events based upon special occasions in the Canadian calendar (such as Mother’s Day, Victoria Day long weekend, Father’s Day and Thanksgiving) or other seasonal events (for example, Back to School and Boxing Day/Week) that are significant for Canadian retailers

generally. In addition, Hudson's Bay plans certain major corporate marketing events at various points in its fiscal year, such as Bay Days and White Sales that involve significant promotional activities for Hudson's Bay. These events represent opportune times for customers to be shopping for mattresses, and, accordingly, Hudson's Bay will plan targeted promotional activities for sleep sets around these important dates/events.

42. When Hudson's Bay plans its promotional activities for sleep sets, whether as part of a weekly marketing event, an important calendar date or occasion, or a major Hudson's Bay sale event, Hudson's Bay will choose to promote a range of price points and models in order to demonstrate the breadth and variety of its mattress selection to customers. In general, Hudson's Bay will choose to put all the sleep sets within a collection on sale at the same time rather than only one or two models within the collection. Over the course of the year, Hudson's Bay will rotate the sleep set models it is featuring from promotional event to event, in order to ensure its promotions are "fresh" and present appropriate variety to consumers.

43. As with its regular price-setting for sleep sets, Hudson's Bay's process for setting promotional prices for its mattresses primarily takes into consideration the product and prices of its competitors and their promotional/marketing activities. Hudson's Bay reviews the activities of its major competitors (such as The Brick/Leon's and Sears) on a weekly basis to make sure that Hudson's Bay remains competitive and relevant to consumers in the marketplace in light of those retailers' promotions. In addition, the major mattress manufacturers provide input to Hudson's Bay on promotional pricing levels for sleep sets and on when to consider offering those sleep sets on promotion.

44. Hudson's Bay's advertising for mattresses takes place in-store, in flyers, via e-mail communications and/or over the radio. During the period prior to February 2018, Hudson's Bay and many of its major competitors in the sale of sleep sets, including The Brick/Leon's, Sears, and Bad Boy, followed a "high-low" retail marketing strategy for mattresses.¹ That is, their promotions ~~will~~ offered substantial discounts off the regular sleep set prices (50% or more). Indeed, the advertised savings in the Hudson's Bay flyers which are ~~the subject of~~ used as examples in the Commissioner's Application are similar to and in line with the promotions and savings claims in respect of mattresses made by Hudson's Bay's competitors in the same time frame, which also advertised hundreds or thousands of dollars of savings from the regular prices of many mattress models.

4. Hudson's Bay's Advertising Compliance for Mattresses

45. HBC has, and during the entire period ~~of the advertising flyers~~ challenged by the Commissioner in his Application had, a comprehensive advertising compliance manual (the "**Compliance Manual**") ~~that~~ applicable to Hudson's Bay's sale of sleep sets. Among other things, the Compliance Manual addresses matters such as price representations, the use of disclaimers or "fine print", performance claims, and the potential need for corrective action.

46. As the Compliance Manual states, HBC "regards compliance with advertising laws as being of fundamental importance," such that failure to comply with the rules "may result in disciplinary action, up to and including dismissal." HBC requires all of its employees in Hudson's Bay's marketing and buying groups to take an online course on advertising

¹ Although Sleep Country advertises extensively, it does not follow this marketing strategy. Sleep Country does not consistently advertise prices for its mattresses, and the price the customer pays for a mattress is negotiated with the Sleep Country sales associate on the floor. As such, there is little transparency to Sleep Country's mattress pricing.

compliance annually (and to pass that test with a perfect score), and to attend a session with HBC's legal counsel on advertising law. There is no basis for the Commissioner's assertions in the Application that "Hudson's Bay management failed to demonstrate a clear, continuous and unequivocal commitment to compliance."

47. HBC's Compliance Manual provides that Hudson's Bay's regular prices must be set in "good faith"; the regular price "should be a price at which we reasonably believe that sales of the item may occur; or it must be a price which is comparable to that offered by a competitor." With respect to sales events, in which "the regular price is temporarily lowered," the Compliance Manual provides, among other things, that: an item can only be put 'on sale' if it has been (or will be) available for at least four weeks; the maximum length of a single sales event is 10 weeks; a regular price item may be on sale up to 45% of the days it is available; and Hudson's Bay buyers should (and do) use a Hudson's Bay form to plan and track the number of days on sale.

48. As noted above, Hudson's Bay offered each new mattress model at its regular price for a period of at least four weeks from the launch date, in order to establish the sleep set's ordinary or regular price, before placing it on promotion. Thereafter, during the 2013-14 period of the advertising challenged in the Commissioner's Application (prior to it being amended), Hudson's Bay tracked the number of days each sleep set was on sale over the year, for purposes of ensuring compliance with "time on sale" requirements over that period.

49. Particularly given that Hudson's Bay generally offered mattress models for sale for a period of 12 months, monitoring compliance over the period of one year was reasonable and appropriate. As discussed further below, HBC denies the Commissioner's allegations that,

for the purposes of the “time test” in section 74.01(3)(b) of the *Act*, a reasonable period of time is “six months prior” to the challenged representation. Moreover, HBC states that the “rolling six-month” periods constructed by the Commissioner at paragraphs 67-72 of his Application for the stated purpose of “testing” Hudson’s Bay’s advertising compliance are neither mandated by the *Act* nor consistent with commercial sense.

C. HBC’s Modifications to Hudson’s Bay’s Mattress Marketing

50. As described below, contrary to the Commissioner’s allegations in the Application that HBC failed to prevent or detect “clear and obvious contraventions of the *Act*”, Hudson’s Bay’s marketing of mattresses was compliant with the *Act*. As such, HBC was not required or obligated to change any of Hudson’s Bay’s mattress marketing practices.

51. However, demonstrating the very clear and continuous commitment to compliance which the Commissioner now alleges (without foundation) that HBC lacks, HBC modified some of Hudson’s Bay’s mattress marketing and compliance-monitoring practices subsequent to the 2013-2014 time frame addressed in the Commissioner’s Application. HBC made these changes after having been contacted by the Competition Bureau in connection with the Commissioner’s investigation into Hudson’s Bay’s marketing of mattresses.

52. In particular, although HBC’s position is that Hudson’s Bay’s prior method of monitoring “time on sale” compliance for mattresses was reasonable and compliant with the *Act*, Hudson’s Bay has now adopted the practice of monitoring “time on sale” compliance over a six-month period for all of its sleep sets.

53. Moreover, although, as discussed further below, HBC denies that Hudson’s Bay’s use of “clearance” terminology to advertise mattresses contravened the *Act* as alleged by the

Commissioner, Hudson's Bay nevertheless voluntarily ceased using that terminology, and instead shifted to the use of "end of line" in its advertising promotions for mattress models which are about to be discontinued. The Commissioner was fully aware of HBC's change in this regard (and adverts to it in the Application), but did not object to Hudson's Bay's use of "end of line" promotional language for mattresses until this Application was filed.

54. In addition, as stated above, beginning on February 2, 2018, HBC implemented a change to the manner in which Hudson's Bay markets its mattresses. Hudson's Bay has now shifted to the general marketing strategy of promoting regular low everyday prices for mattresses, as opposed to its previous "high-low" selling strategy (which did not violate the Act). The Commissioner's allegations that, as at the time of the amended Application (February 26, 2018), Hudson's Bay "continues" to advertise sale prices with "deep discounts" of "50% or more off the regular price" of its mattresses, are wrong.

IV. GROUNDS ON WHICH THE APPLICATION IS OPPOSED

55. None of the Commissioner's claims in the Application has merit.

56. As described below, Hudson's Bay's regular price and savings claims with respect to the advertisements of the four sleep sets identified and used as "examples" by the Commissioner satisfied the "time test" in paragraph 74.01(3)(b) of the *Act*. Moreover, even if the "time test" was not satisfied with respect to these mattresses, the "saving" provision in subsection 74.01(5) of the *Act* applies, such that there was no contravention of the *Act*, because Hudson's Bay's price representations were not "false and misleading in a material respect". The same analysis applies and the same conclusions hold true with respect to

Hudson's Bay "high-low" marketing of all of its sleep sets during the period (prior to February 2018) covered by the Commissioner's Application (as amended).

57. As also described below, none of Hudson's Bay's impugned representations concerning "clearance" or "end of the line" mattress promotions was "false or misleading in a material respect" and therefore, HBC did not contravene paragraph 74.01(1)(a) of the *Act*.

58. Furthermore, HBC exercised due diligence in seeking to prevent the occurrence of the reviewable conduct, such that subsection 74.1(3) of the *Act* applies to limit the relief available to the Commissioner even if contraventions of the *Act* occurred (which HBC denies).

A. No breach of subsection 74.01(3) of the *Act*

1. Hudson's Bay Complied with the Time Test

59. Subsection 74.01(3) of the *Act* provides that:

A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

60. As the plain wording of this provision indicates, reviewable conduct under subsection 74.01(3) of the *Act* only exists if the conditions in **both** paragraphs (a) and (b) are applicable. That is, it is not necessary for a person to satisfy both the “volume” and “time” tests; if either test is satisfied, there is no reviewable conduct.

61. As the Commissioner states in his Application, the “time test” in paragraph 74.01(3)(b) of the *Act* has two elements: (1) the regular price must have been offered “in good faith”; and (2) it must have been offered for “a substantial period of time” recently before (or immediately after) the impugned representation. The Commissioner’s Application misconstrues each of the elements of the “time test.”

(a) **Hudson’s Bay set regular prices in “Good Faith”**

62. With respect to the first element of the time test, there is no basis for the Commissioner’s assertion that Hudson’s Bay’s regular prices for mattresses were not set in “good faith.” As described above, contrary to the Commissioner’s allegations, Hudson’s Bay did employ “sound pricing principles” in setting the regular prices for its sleep sets. Hudson’s Bay’s mattress buyers set the regular prices for Hudson’s Bay’s mattresses based on comparisons with the products and prices being offered by Hudson’s Bay’s direct retail competitors for mattresses in Canada, with input from the manufacturers/suppliers of the mattresses. That process ensured that Hudson’s Bay’s regular sleep set prices were in line and competitive with the regular prices of its competitors in Canada.

63. In his Application, the Commissioner asserts that Hudson’s Bay did not set the regular sleep set prices for the four identified sleep sets in “good faith” because “[t]here were almost no genuine sales of the Specified Sleep Set mattresses at the regular price.” That

position is fundamentally flawed. First, by attempting to determine “good faith” based on the volume of regular price mattress sales, the Commissioner is improperly conflating the “volume test” and the “time test” in a way which would write the latter test right out of the *Act*. Had Parliament intended that volume of regular price sales would be determinative of the existence of reviewable conduct in respect of ordinary price representations, there would have been no need for paragraph 74.01(3)(b) of the *Act*.

64. Indeed, the Commissioner’s position on the “good faith” element of the time test in the Application is not consistent with the Competition Bureau’s own Ordinary Price Claim Guidelines. Those guidelines provide that factors to be taken into consideration in determining good faith include whether the reference price “was reasonable in light of competition in the relevant market during the time period in question” and/or “was a price comparable to that offered by competitors.” Hudson’s Bay’s regular prices were reasonable and comparable to its competitors’ regular prices during the relevant time period.

65. In the Overview section of his Application, the Commissioner asserts that Hudson’s Bay’s “regular price” was not “an actual regular price” for the four identified sleep sets used as examples in the pleading, and contends that Hudson’s Bay used “grossly inflated” regular prices for “all or substantially all of its sleep sets.” That assertion is untenable. As noted above, Hudson’s Bay set the regular price for its mattresses before those mattresses were launched. When the mattresses “hit the floor”, they were offered for sale at the regular price for at least the first four weeks; thereafter, the same regular price was offered whenever the sleep set was not on sale at a promotional price. Hudson’s Bay did not negotiate the prices of its sleep sets with customers, and there was no undisclosed price at which Hudson’s Bay was

willing to sell the sleep sets to customers during the non-promotional sale periods other than the regular price. Accordingly, Hudson's Bay's regular price manifestly was an "actual" price, it was not "grossly inflated", and it was offered in good faith by Hudson's Bay.

(b) Hudson's Bay met the "substantial period of time" requirement

66. The Commissioner's Application also presents a fundamentally flawed view of the second element of the "time test" in paragraph 74.01(3)(b) of the *Act*. First, the Commissioner offers no factual basis for the assertion at paragraph 64 of the Application that "[g]iven the nature of sleep sets, a reasonable period of time" over which to evaluate this element of the time test is **six** months. It should be noted that, for purposes of evaluating the "volume test," the Commissioner asserts at paragraph 38 of the Application that, "[g]iven the nature of sleep sets, a reasonable period of time" over which to evaluate the volume test is **twelve** months. The Commissioner offers no explanation as to why the reasonable evaluation period should differ as between the two tests.

67. Moreover, the purported "compliance" tables constructed by the Commissioner and reproduced at or alongside paragraphs 67-70 of the Application present a highly contrived, unduly mechanistic view of the "time test" in paragraph 74.01(3)(b) of the *Act*, which, if adopted, would unduly restrict retailer promotional activity and turn compliance with the *Act* into a daily trap for the unwary.

68. As reflected in the tables, the Commissioner's position in the Application appears to be that Hudson's Bay's compliance with the *Act* for each sleep set turns on whether, counting backward from the date each advertising flyer was published for the arbitrarily determined six month "evaluation" period, Hudson's Bay had offered that mattress at a promotional price

for more or less than 50% of the days in that six-month period. Thus, for the Brooklyn sleep set, Hudson's Bay's first advertising flyer on July 18, 2013 was compliant with the *Act*, because the Brooklyn had been offered at regular price 60% of the time counting backwards from that date (but not for the full six months, because the product had only launched four months before), whereas Hudson's Bay's second advertising flyer promoting the Brooklyn was not, because counting backwards for the arbitrary six-month period from February 6, 2014, the Brooklyn had been offered at the regular price for only 44.3% of that period.

69. This approach to the second element of the "time test" makes little commercial sense. As noted above, Hudson's Bay, like other major Canadian retailers, plans a variety of promotional events throughout its fiscal year, many of which are planned to coincide with significant dates on the Canadian calendar, such as Thanksgiving, Black Friday, Boxing Week and other holidays and occasions. The distribution of these seasonal events, occasions, and holidays, and the promotions surrounding them, does not easily lend itself to the Commissioner's continuous retroactive "rolling 6 month" approach to the "time test," and there is no reason to adopt such a rigid test for compliance.

70. As stated above, during the 2013-14 period, Hudson's Bay was very mindful of the need to limit "time on sale" for the mattresses it offered to Canadian consumers, but it did not evaluate the "time test" on the basis of a rolling 6 month period backward from the dates of its advertising flyers promoting the mattresses, nor was it required to do so under the *Act*.

71. Hudson's Bay's new mattress models were launched and remained at their regular prices for four weeks (or more). Thereafter, Hudson's Bay's compliance procedures were designed to keep the number of days the mattress was put on sale to under 50% for the year.

Moreover, Hudson's Bay had limits on the number of consecutive weeks a mattress could be put on sale, thereby ensuring that there would be substantial periods of time throughout the year at which the sleep set was offered at regular price. Hudson's Bay's position is that the *Act* did (and does) not require it to do anything more.

72. As also stated above, and although it was not required to do so, after being contacted by the Competition Bureau at a time which post-dated the period relevant to the Application (prior to it being amended), Hudson's Bay has changed its "time on sale" evaluation period to six months. This further demonstrates good faith on the part of HBC and its continuous commitment to be, and to be seen by the Commissioner to be, in compliance with the *Act*.

2. Hudson's Bay made no False or Misleading Representations

73. Even if HBC did not comply with subsection 74.01(3) of the *Act* (which is denied), it did not engage in reviewable conduct because of the "saving" provision in section 74.01. Subsection 74.01(5) of the *Act* provides that "[s]ubsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect".

74. There was nothing false or misleading to consumers about the regular prices and savings claims made by Hudson's Bay in the advertising flyers for the four sleep sets identified by the Commissioner in the Application (or adverted to in Table 4 with respect to OSP and savings claims for mattresses in 2015, 2016 and 2017). The regular prices advertised **were** the actual regular prices at which Hudson's Bay offered those mattresses for sale, and those regular prices were genuinely set in relation to the regular prices offered by Hudson's Bay's competitors in the retail sale of mattresses in Canada. When those sleep sets

were not on promotion, there were no prices other than the stipulated regular prices at which Hudson's Bay was willing to sell those mattresses. Thus, the savings advertised to consumers were not illusory, they were real.

75. The lack of deception in Hudson's Bay's advertising is particularly evident in light of the similar marketing strategies followed by many of Hudson's Bay's competitors in the retail sale of mattresses in Canada, which also followed a high-low approach to pricing, such that mattress promotions routinely advertised deep discounts from the mattresses' regular prices. Like the Hudson's Bay flyers identified by the Commissioner in the Application, Hudson's Bay's competitors The Brick/Leon's, Sears, Bad Boy and the Linen Chest regularly advertised prices of 50% or more off the regular prices for their mattresses and made claims that customers would save hundreds or thousands of dollars on their mattresses if purchased on sale.

76. Moreover, the retail marketplace for mattresses in Canada was and is highly competitive, and consumers were and are in a position to evaluate and compare the mattresses offered by Hudson's Bay and its competitors based on the two criteria for mattresses they valued most: comfort and price.

77. Under these circumstances, Hudson's Bay's advertising manifestly was not deceptive, consumers were not deceived, and HBC did not contravene the *Act*.

B. No Breach of paragraph 74.01(1)(a) of the Act

78. Paragraph 74.01(1) (a) of the *Act* provides that:

A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect; [...]

79. In support of its position that HBC contravened paragraph 74.01(1)(a) of the *Act*, the Commissioner takes issues with “clearance” representations made by Hudson’s Bay in flyers that ran from January 10 to 16, 2014 and February 14 to 27, 2014.

80. The first defect in the Commissioner’s position is that Hudson’s Bay’s “clearance” representations were not false or misleading. The Commissioner asserts that such “representations create the general impression that on-hand inventory is being ‘cleared out’, likely to make room for new merchandise.” Hudson’s Bay agrees that “clearance” representations do suggest an “out with the old, in with the new” theme – but that is exactly the context in which Hudson’s Bay made its clearance representations. The mattress models being advertised as “clearance” by Hudson’s Bay were old models (given the general one-year model life of mattresses), and were about to be replaced with new models by Hudson’s Bay.

81. The Commissioner in his Application asserts that the concept of “making room for” that he associates with “clearance” promotions must be taken literally, such that retailers are limited only to selling off inventory they physically have on hand in the store. However, such a literal interpretation of clearance is more than the terminology necessarily implies and, in the context of mattresses, where very little product is kept in inventory, is unreasonably restrictive. Most consumers would not assume that a clearance sale for mattresses involves only product that the retailer physically has in stock at its stores. Rather, “clearance” denotes

to consumers that a mattress is available for purchase at a price that is lower than the promotional pricing offered for a limited time, which is exactly the context in which Hudson's Bay used the term. Hudson's Bay's use of the clearance terminology for mattresses it did not necessarily have in inventory therefore was not misleading.

82. The second defect with the Commissioner's position is that, even if the consumers may have thought "clearance" implied that Hudson's Bay was selling the mattresses from its in-store stock when it was not, where the mattresses actually were coming from was not material to the customer's decision to purchase the mattress. In support of its position that this was a "material" fact, the Commissioner asserts that a "clearance promotion implies scarcity of product" but offers no support for that proposition. Indeed, the need for "clearance" sales may be all the more pressing because the retailer has too much product, not relatively little.

83. The Commissioner further speculates that, if consumers thought there were a limited number of sleep sets available (which itself may be unlikely), "they may have rushed their purchasing decision..." That assertion, however, is difficult to reconcile with the Commissioner's own allegation that in general, consumers shop for mattresses **once every 10 years and are in the market for 10 days**. The idea that consumers' purchasing decisions were rushed because of Hudson's Bay's "clearance" representations, therefore, is far-fetched. Those representations were not material to the purchasing decision and therefore did not contravene the *Act*.

84. The Commissioner also impugns (as examples) “end of line” representations made with respect to certain mattresses by Hudson’s Bay in flyers which ran from January 9 to January 15, 2015.

85. As stated above and adverted to by the Commissioner in his Application, at the end of 2014, Hudson’s Bay stopped making “clearance” representations in respect of mattresses and began instead to advertise “end of line” promotions for mattress models nearing discontinuance. Hudson’s Bay’s change in this regard was the result of a concern expressed by the Competition Bureau; although HBC did not believe Hudson’s Bay’s “clearance” representations contravened the *Act*, HBC made the change to demonstrate its good faith and commitment to compliance. The first objections made by the Commissioner to Hudson’s Bay’s “end of line” representations concerning mattresses were made in the Application, which was brought more than two years after Hudson’s Bay started making those representations.

86. The Commissioner’s position that Hudson’s Bay’s “end of line” representations contravened paragraph 74.01(1)(a) of the *Act* is without merit for multiple reasons. First, there is no basis for the Commissioner’s assertion that the use of the phrase “end of line” creates the impression that “Hudson’s Bay will be selling specific inventory and will not replenish what gets sold.” The general impression created by the phrase “end of line” is limited and obvious: that the model is being discontinued and new sales of the model will not be made past a certain date – which is exactly the context in which Hudson’s Bay used the phrase in its advertisements.

87. The Commissioner also appears to contend that Hudson's Bay's use of the phrase "end of line" was misleading because it was juxtaposed with the term "clearance" in its flyers such that there would be confusion created and/or consumers would view the two terms interchangeably. This contention fails for two reasons. First, a review of the flyers in question shows that the "end of line" representations and "clearance" representations are separate and it is clear that the former representations apply to the mattress models being advertised.

88. Moreover, even if consumers construed Hudson's Bay's "end of line" representations as being "clearance-like", as the Commissioner contends, for the reasons set out above, in the context in which Hudson's Bay made those representations concerning its mattresses, they would neither be misleading nor material to the consumers' purchasing decisions. Accordingly, HBC did not contravene paragraph 74.01(1)(a) of the *Act*.

C. HBC Exercised Due Diligence

89. Subsection 74.1(1) of the *Act* provides that:

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, \$750,000 and, for each subsequent order, \$1,000,000, or

(ii) in the case of a corporation, \$10,000,000 and, for each subsequent order, \$15,000,000; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

90. Subsection 74.1(3) of the *Act* provides, however, that “[n]o order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.”

91. As described above, HBC has, and at all relevant times, had a strict, comprehensive advertising compliance program, which included the Compliance Manual and training programs for all employees engaged in marketing or buying the mattresses that Hudson’s Bay offered for sale. Contrary to the Commissioner’s allegations, HBC’s compliance program demonstrates that it had a “clear, continuous and unequivocal commitment to compliance” and exercised due diligence to prevent contraventions of section 74.01 of the *Act* from occurring.

92. Accordingly, even if the Commissioner establishes that HBC did contravene section 74.01 of the *Act*, which is denied, pursuant to subsection 74.1(3) of the *Act* he would not be entitled order directing HBC to publish corrective notices or to pay an administrative monetary penalty.

D. No Basis for Prohibition Order Requested

93. As described above, the marketing of sleep sets by Hudson's Bay did not contravene the *Act*.

94. Even if HBC did contravene the *Act*, which is denied, the Commissioner would not be entitled to the relief sought in paragraph 1(b) of the Application, which seeks a 10-year prohibition order applicable to “**any product** supplied by [Hudson's Bay] in Canada” (emphasis added).

95. The Commissioner's assertions in paragraphs 107-110 of the Application, concerning the applicability of HBC's Compliance Manual to most Hudson's Bay products sold in Canada, are bald allegations in respect of which there has not been any investigation by the Commissioner.

96. The Commissioner's investigation into sleep sets marketed by Hudson's Bay provides no basis for the broad prohibition order he is seeking in the Application.

V. ORDER REQUESTED

97. The Respondent agrees with the Commissioner's proposal that proceedings in this matter be heard in English.

98. HBC requests that the Application be dismissed, with costs.

DATED at Toronto, this 10th day of April, 2017.

Amended this 21st day of March, 2018.

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