

THE COMPETITION TRIBUNAL

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

B E T W E E N:

COMMISSIONER OF COMPETITION

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: February 2, 2018
CT-2017-008

Bianca Zamor for / pour
REGISTRAR / REGISTRAIRE

-and-

HUDSON'S BAY COMPANY

Applicant

OTTAWA, ONT.

#48

Respondent

Motion Record of the Commissioner of Competition

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B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

HUDSON'S BAY COMPANY

Respondent

NOTICE OF MOTION

TAKE NOTICE THAT the Commissioner of Competition (the "**Commissioner**") will make a motion to the Competition Tribunal ("**Tribunal**") on February 9, 2018.

THE MOTION IS FOR:

- a) An order for leave to amend the Notice of Application;
- b) Costs, should Hudson's Bay Company ("**HBC**") oppose this motion; and
- c) Such further and other relief as counsel may request and the Tribunal may permit.

THE GROUNDS FOR THE MOTION ARE:

- a) The Commissioner alleges that HBC has engaged and continues to engage in conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”);
- b) On November 14, 2017, the Commissioner brought a motion seeking to require HBC to produce an Affidavit of Documents concerning the period after February 2015 on the basis that HBC’s conduct is ongoing;
- c) In an Order dated December 7, 2017 the Tribunal granted the Commissioner’s motion in part. HBC was ordered to produce documents after 2015 in respect of the Commissioner’s allegations pursuant to paragraph 74.01(1)(a) of the Act as the Commissioner’s Notice of Application was clear in alleging that HBC’s conduct was ongoing in respect of its allegedly deceptive clearance/end of line representations. HBC was not ordered to produce post-2015 documents in respect of subsection 74.01(3) of the Act because the Commissioner’s Notice of Application was found to give the erroneous impression that the Commissioner’s allegations were limited to six specified sleep set advertisements from July 19, 2013 to October 30, 2014;
- d) The proposed Amended Notice of Application clarifies the Commissioner’s allegations in respect of subsection 74.01(3) of the Act by elaborating on the points at issue between HBC and the Commissioner. The proposed amendments also seek to clarify the erroneous impression given by the original Notice of Application that the Commissioner reviewed all of HBC’s sleep set advertisements and was only able to identify six advertisements making allegedly deceptive ordinary sale price representations -- which is not correct;
- e) Allowing the amendment does not prejudice HBC and rather serves the interests of justice;

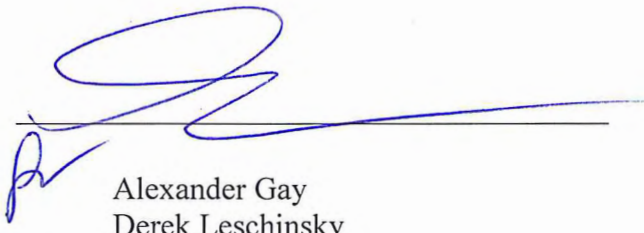
- f) The costs to HBC in producing documents in relation to the proposed Amended Notice of Application are not costs thrown away. The proposed amendments cover a period of time for which HBC did not produce documents and for which it did not conduct electronic searches. While there may be added costs to HBC, they are not duplicative of the efforts that have already been made;
- g) If this Tribunal grants this motion, the Commissioner requests that HBC be made to produce a supplemental Affidavit of Documents on a timely basis. However, in the alternative, to the extent that this Tribunal has concerns relating to the schedule, the Commissioner is prepared to proceed to examination based on HBC's existing Affidavit of Documents. Any additional documentary request can be dealt with by way of undertakings at discovery;
- h) The Commissioner is of the view that while there may have to be some minor consequential adjustments to the Scheduling Order, the November 2018 dates for a hearing can be preserved;
- i) The *Competition Tribunal Rules*, Rule 34 and the *Federal Court Rules*, Rule 75; and
- j) Such further or other grounds as counsel may advise and the Tribunal may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

- a) The proposed Amended Notice of Application; and
- b) Such further or other documents as counsel may advise and this Tribunal may permit.

DATED AT OTTAWA, ONTARIO, this 23rd day, January, 2018.

SIGNED BY:



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Derek Leschinsky
Katherine Rydel

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CT-2017-008

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

**RESPONSE OF HUDSON'S BAY COMPANY
(Motion to Amend Notice of Application)**

1. The Respondent, Hudson's Bay Company ("**HBC**") submits this Response to the Motion of the Commissioner of Competition (the "**Commissioner**") to amend his Notice of Application (the "**Amendment Motion**").

I. OVERVIEW

2. The Amendment Motion comes on the heels of the Tribunal's December 7, 2017 decision (the "**Decision**") which substantially dismissed the Commissioner's motion for a Further and Better Affidavit of Documents from HBC (the "**Production Motion**"). On the Production Motion, the Commissioner sought to require HBC to produce "tens of thousands" of additional documents related to its pricing and sales of sleep sets during the period from "February 2015 until the present" (the "**Disputed Time Period**") on the purported basis that

his (unamended) Notice of Application alleged that HBC had engaged and continues to engage in reviewable conduct contrary to subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 (the “*Act*”) during the Disputed Time Period.

3. In its Decision, the Tribunal flatly rejected the Commissioner’s position, finding that documents “from the Disputed Time Period having to do with HBC’s purported deceptive ordinary price representations” concerning sleep sets were not relevant to the Application, because a “plain reading of the Commissioner’s Notice of Application” indicated that HBC’s impugned conduct allegedly “took place prior to the Disputed Time Period (from July 19, 2013 to October 30, 2014)” in respect of only the four “specified sleep sets” identified by the Commissioner in his Application.¹ Thus, contrary to the Commissioner’s contention on the Production Motion, the Tribunal found HBC was not “substantially non-compliant with the Scheduling Order” in respect of its document production in this proceeding.²

4. Having essentially lost his Production Motion, the Commissioner is now again seeking to inject the Disputed Time Period into this case by other means – that is, by amending his pleading with respect to HBC’s alleged contravention of subsection 74.01(3) of the *Act*. In his Notice of Motion for the Amendment Motion, the Commissioner suggests that his proposed amendments simply seek “to clarify the erroneous impression given by the original Notice of Application” that his allegations with respect to deceptive ordinary sale price representations were limited to the four specified sleep sets and did not apply to the Disputed Time Period.³ The Commissioner further states that, if the Amendment Motion is

¹ Order and Reasons for Order of the Tribunal, dated December 7, 2017 [Decision], Exhibit B to the Affidavit of Lucy Esposito, sworn January 26, 2018 [Esposito Affidavit], at paras 25, 29

² *Ibid*, at para 38

³ Notice of Motion dated January 23, 2018 [NOM], Grounds for the Motion, at para d

granted there may need to be “some minor consequential amendments to the Scheduling Order,” but that “the November 2018 dates for a hearing can be preserved.”⁴

5. In HBC’s respectful submission, the positions taken by the Commissioner on the Amendment Motion are untenable. As a threshold matter, the Tribunal held in the Decision that, based on a “plain reading” of the original pleading, the Commissioner’s allegations with respect to the purported contravention of subsection 74.01(3) of the *Act* were limited to four sleep sets sold by HBC prior to the Disputed Time Period.⁵ The Commissioner has not appealed the Decision. It thus does not lie in the mouth of the Commissioner to assert that there was any erroneous impression about the original Notice of Application that the proposed amendments are designed to clarify.

6. Moreover, far from being a matter of mere clarification, the proposed Amendments would dramatically expand the scope of this proceeding. The Commissioner now proposes to allege, among other things that “[g]rossly inflated regular price representations were and continue to be made by HBC to the public about all or substantially all of its sleep sets, and HBC has no expectation that the market would validate any of its regular prices on sleep sets.”⁶ Thus, if permitted, the proposed amendments would double the length of the relevant time period covered by the Application and vastly increase the number of sleep sets at issue between the parties (well beyond the current pleading and, indeed, the scope of the Commissioner’s prior investigation into HBC’s marketing of sleep sets), thereby substantially expanding the case HBC has to meet in this proceeding.

⁴ *Ibid*, at para h

⁵ Decision, Esposito Affidavit Ex B, at paras 24 to 29

⁶ Proposed Amended Notice of Application, at para 53

7. In light of the actual scope of the proposed amendments to the Notice of Application, the Commissioner's suggestion that the currently scheduled November 2018 hearing dates in this proceeding could be preserved if the Amendment Motion were granted is disingenuous. Although the Commissioner now proposes, as an alternative, that the additional document production necessitated by the proposed amended Notice of Application could be "dealt with by way of undertakings at discovery",⁷ that suggestion is directly contrary to the Commissioner's position on the Production Motion that "tens of thousands" of documents from the Disputed Time Period were required to be produced by HBC *before* proceeding to examinations for discovery.⁸ The document production required in response to the proposed amended Application would take at least 3 – 4 months for HBC to make.⁹ Thus, it is readily apparent that if the Amendment Motion were granted, an entirely new Scheduling Order, with hearing dates well into 2019 would be required for this proceeding.

8. The Commissioner had years to bring his case against HBC and chose to limit his proceeding as set out in the original Application. HBC joined issue with the Commissioner on the basis of the original pleading, the parties agreed to (and the Tribunal made) the existing Scheduling Order on that basis, and HBC has proceeded with document production and preparations for discovery accordingly. Fundamentally altering the scope of the proceeding now would clearly prejudice HBC and result in substantial delays.

9. Accordingly, HBC respectfully submits that the Amendment Motion should be denied, with costs to HBC.

⁷ NOM, Grounds for the Motion, at para g

⁸ Esposito Affidavit, at para 13

⁹ Affidavit of Beth Alexander, sworn November 10, 2017 [Alexander Affidavit], at para 14; Memorandum of Fact and Law of the Commissioner of Competition, dated November 28, 2017 [Production Motion Factum], at para 3

II. THE INTERESTS OF JUSTICE FAVOUR DENIAL OF THE AMENDMENT MOTION

10. Whether to permit an amendment to a pleading at any stage of a proceeding lies within the discretion of the Tribunal. Such amendments may be permitted where they would assist in determining the real questions in controversy between the parties, provided that allowing the amendment would not result in an injustice to the other party (not compensable by an award of costs) and the interests of justice would be served by the amendment.

11. The factors which bear on the Tribunal's exercise of its discretion include the timeliness of the motion to amend, the extent to which the proposed amendments would delay the expeditious hearing of the matter, the extent to which the position of the opposite party would be undermined, and whether the amendments would facilitate consideration of the true substance of the dispute.

12. HBC submits that these factors overwhelmingly favour denial of the Amendment Motion in the circumstances of this proceeding.

A. The Commissioner had years to bring and frame his case against HBC

13. This matter has a long history. On March 11, 2014, the Commissioner commenced an inquiry into HBC's marketing practices in relation to sleep sets. The Commissioner advised HBC of the commencement of the inquiry in April 2014.¹⁰

¹⁰ Esposito Affidavit, at para 3

14. Over the following several months, communications took place between HBC's counsel and the Competition Bureau ("**Bureau**"), during which HBC voluntarily provided the Bureau with certain documents related to its sleep set marketing practices.¹¹

15. On January 30, 2015, the Commissioner obtained from the Federal Court an order pursuant to paragraphs 11(1)(b) and 11(1)(c) of the *Act* (the "**Section 11 Order**"), which required HBC to make written returns of information and produce certain records relevant to the Commissioner's inquiry into sleep sets.¹²

16. The requirements imposed on HBC by the Section 11 Order applied to the time period from March 1, 2013 to January 30, 2015 (the "**Relevant Time Period**"). Moreover, the Section 11 Order did not apply to all of the sleep sets marketed by HBC during the Relevant Time Period, but rather only to 18 distinct sleep sets specifically identified therein.¹³

17. Over the next several months, HBC devoted substantial time and resources, at considerable expense, to making production of documents and information in response to the Section 11 Order. That production was completed by April 30, 2015.¹⁴

18. Nearly a year later, on April 20, 2016 the Commissioner obtained another order from the Federal Court, this time pursuant to paragraph 11(1)(a) of the *Act*, requiring certain of HBC's current and/or former employees to attend for oral examination. The Commissioner

¹¹ *Ibid*, at para 4

¹² *Ibid*

¹³ *Ibid*, at para 5 & Ex A

¹⁴ *Ibid*, at para 6

conducted those oral examinations of HBC employees over a two-week period in June 2016.¹⁵

19. The Commissioner did not file his Notice of Application commencing this proceeding until February 22, 2017. Thus, the Commissioner had nearly three years from the time the inquiry was commenced to investigate, develop and plead his claim against HBC.

20. As the Tribunal held in its Decision on the Production Motion, the “language that the Commissioner use[d] in his Notice of Application” made it very clear that his allegations concerning HBC’s deceptive ordinary price representations were limited in time and scope.¹⁶ The Commissioner pleaded that “[f]rom the various sleep sets offered by HBC, the Commissioner identified” four sleep sets “for review under subsection 74.01(3) of the Act” and the alleged reviewable conduct in respect of those “specified sleep sets” took place in 2013 and 2014.¹⁷ Thus, the subsequent Disputed Time Period (from February 2015 onward) was not relevant to the Commissioner’s case against HBC under subsection 74.01(3) of the *Act* as pleaded in the Application.

21. Now, nearly one year after commencing this proceeding and close to four years after beginning his inquiry, the Commissioner seeks to drastically expand his case against HBC by way of the Amendment Motion. The Commissioner now seeks to allege that deceptive ordinary selling price “representations were and continue to be made by HBC to the public about all or substantially all of its sleep sets.”¹⁸

¹⁵ *Ibid*, at para 7

¹⁶ Decision, Esposito Affidavit Ex B, at para 29

¹⁷ Notice of Application, Alexander Affidavit Ex A, at para 26

¹⁸ Proposed Amended Notice of Application, at para 53

22. The proposed new allegations go far beyond the original pleading – and the Commissioner’s investigation, as reflected in the scope of the Section 11 Order – in two respects. First, within the existing “Relevant Time Period”, the Commissioner seeks to put dozens of additional sleep sets at issue. Moreover, the Commissioner also seeks to put in issue all of the distinct sleep sets marketed by HBC during the Disputed Time Period, thus (more than) doubling the time frame in which the purported reviewable conduct under subsection 74.01(3) of the *Act* is said to have occurred.

23. In his Notice of Motion for the Amendment Motion, the Commissioner does not identify any newly discovered information which precipitated the requested amendments or any explanation for why the proposed allegations could not have been made in his original pleading. Rather, the Commissioner simply seeks a pleading “do over”.

24. Under these circumstances, the (un)timeliness factor weighs heavily against granting the Amendment Motion.

B. The proposed amendments are prejudicial to HBC and would cause delay in the hearing of this proceeding

25. HBC filed its Response to the Commissioner’s Application on April 10, 2017 and the Commissioner filed his Reply on April 24, 2017.

26. Following the closing of the pleadings, the parties engaged in discussion concerning a schedule for this proceeding, which resulted in the Scheduling Order issued by the Tribunal on May 26, 2017. The Scheduling Order provided (among other things) for document

production to be made by the end of September 2017, examinations for discovery to be conducted by February 23, 2018 and for the hearing to commence on November 19, 2018.

27. In accordance with the Scheduling Order, HBC served its Affidavit of Documents and made its document productions on September 29, 2017. HBC produced approximately 10,000 documents (in addition to the approximately 27,000 documents which had been provided to the Bureau in response to the Section 11 Order), which it had taken HBC (with the assistance of a third party document services provider) approximately four months to gather, review and prepare for production, at considerable expense to HBC.¹⁹

28. HBC did not collect, review or produce documents concerning its sale and marketing of sleep sets during the lengthy Disputed Time Period on the grounds that such documents were not relevant to the Commissioner's case under subsection 74.01(3) of the *Act*. On November 14, 2017, the Commissioner brought his Production Motion seeking to compel HBC to produce its documents for the Disputed Time Period. In support of the Production Motion, the Commissioner's affiant deposed to her belief that HBC had "tens of thousands" of "relevant" documents for the Disputed Time Period.²⁰ As an annex to his Memorandum of Fact and Law in support of the Production Motion, the Commissioner filed a chart identifying the various broad categories of documents which he was seeking from HBC in respect of the Disputed Time Period.²¹ The Commissioner's position was that he could not

¹⁹ Esposito Affidavit, at paras 9-10 & Ex C

²⁰ Alexander Affidavit, at para 14

²¹ Production Motion Factum, Annex A

proceed with examinations for discovery without production of such purportedly relevant and unquestionably voluminous documents.²²

29. Having now substantially lost his Production Motion, the Commissioner's transparent purpose in bringing the Amendment Motion is to inject the lengthy Disputed Time Period into this case. The Commissioner's request to dramatically expand his case against HBC under subsection 74.01(3) of the *Act* mid-way through the course of this proceeding is inherently prejudicial to HBC. HBC cannot defend itself against the case which the Commissioner now proposes to bring against it - which would put in issue all (dozens of) sleep sets marketed by HBC over a four-year period as opposed to four sleep sets sold over a two-year period - on the basis of the existing documentary record, which excludes the entire Disputed Time Period. Nor could HBC adequately prepare its witness(es) for examinations for discovery without first identifying and reviewing HBC's relevant documents covering that Period.

30. Indeed, given the nature of the proposed amendments, the Commissioner's suggestion in his Notice of Motion that only minor adjustments to the Scheduling Order need be made and the existing November 2018 hearing dates in this proceeding could be preserved if the Amendment Motion were granted simply attempts to pile prejudice on top of prejudice to HBC. Notwithstanding his position on the Production Motion that he could not proceed to examination for discoveries without having received documents from the Disputed Time Period, the Commissioner now proposes to proceed to discoveries on the amended pleading

²² *Ibid*, at para 3

and deal with “additional documentary request[s]” via “undertakings at discovery.”²³ Clearly, given the scope of the relevant documents for the Disputed Time Period contended for by the Commissioner on the Production Motion, production for that Period (if the Amendment Motion were granted) could not be done by way of discovery undertakings at all, let alone under the existing schedule, without fundamentally impairing HBC’s ability to defend this proceeding.

31. HBC’s position (consistent with its evidence on the Production Motion) is that, if the Amendment Motion were granted, it would require approximately four months (at further considerable expense to HBC) to make production of the relevant documents in respect of the Commissioner’s expanded pleading,²⁴ at which time the parties would essentially be back in the position they were in on September 29, 2017 in respect of the current Application.

32. It is thus readily apparent that the existing November 2018 hearing dates cannot be preserved if the Amendment Motion is granted and that an amended Scheduling Order with new dates for the completion of document production and all subsequent steps would be required, which Order would need to provide for substantially later hearing dates, well into 2019, in this proceeding.

33. HBC respectfully submits that the inherent prejudice to HBC and substantial delays in the hearing of this proceeding that would result from the proposed amendments are such that the interests of justice favour denial of the Amendment Motion.

²³ NOM, Grounds for Motion, at para g
²⁴ Esposito Affidavit, at para 13

III. CONCLUSION

34. The proposed amendments to the Commissioner's Application are untimely, inherently prejudicial to HBC and antithetical to the interests of justice in this proceeding.

35. Accordingly, HBC requests an Order dismissing the Amendment Motion, with costs to HBC.

36. In the alternative, if the Amendment Motion is granted, HBC seeks an amendment of the Scheduling Order permitting it 3 - 4 months to make further documentary production and otherwise adjusting the schedule to provide for a hearing commencing no earlier than May 2019.

37. *Competition Tribunal Rules*, SOR/2008-141, Rule 34(1).

38. Federal Courts Rules, SOR/98-106, Rule 75.

39. Such further and other grounds as counsel may submit and the Tribunal accept.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

40. The Affidavit of Lucy Esposito, sworn January 26, 2018;

41. The pleadings and prior proceedings herein, including the materials filed on the Commissioner's Production Motion; and

42. Such further and other evidence as counsel may submit and the Tribunal consider.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Toronto,

this 26th day of January, 2018.



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BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

AFFIDAVIT OF LUCY ESPOSITO
(sworn January 26, 2018)

I, Lucy Esposito, of the Town of Ajax, in the Regional Municipality of Durham
MAKE OATH AND SAY:

1. I am the eDiscovery Case Manager in the Toronto office of Stikeman Elliott LLP (“**Stikeman**”), external counsel to Hudson’s Bay Company (“**HBC**”) in this proceeding. I have been Stikeman’s lead document management specialist on this matter since May 2017. As such, I have personal knowledge of the matters to which I hereinafter depose, except where stated to be on information and belief, in which case I have set out the source of the information and verily believe it to be true.

2. Since May 2017, I have been involved in all aspects of document management in this matter, including instructing Transperfect, HBC’s third party document review service provider for this case, in connection with the preparation of HBC’s Affidavit of Documents (the “**AOD**”). Although part of the Commissioner of Competition’s (the “**Commissioner**”) inquiry into this matter and some of the work done by Transperfect pre-date my involvement

on this file, my work since May 2017 has required me to become familiar with the chronology of the Commissioner's inquiry and all of Transperfect's prior work (including its bills) in this matter.

The Commissioner's Inquiry

3. On March 11, 2014, the Commissioner commenced an inquiry into HBC's marketing practices in relation to mattresses or sleep sets and advised HBC of the commencement of the inquiry in April 2014.

4. Following several months of communication with HBC, during which HBC voluntarily provided the Commissioner with certain documents related to its sleep set marketing practices, on January 30, 2015, the Commissioner obtained from the Federal Court an order pursuant to paragraphs 11(1)(b) and 11(1)(c) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "**Competition Act**") (the "**Section 11 Order**"), which required HBC to make written returns of information and produce certain records relevant to the Commissioner's inquiry.

5. The Section 11 Order was limited to HBC's marketing practices in respect of sleep sets (18 "Specified Sleep Sets" in particular) for the time period from March 1, 2013 to January 30, 2015. The Section 11 Order sought no information about HBC's marketing practices in respect of any other products sold by HBC. A copy of the Section 11 Order is attached at Exhibit "A".

6. With the assistance of Transperfect, HBC spent approximately three months to undertake and complete its document collection and review in response to the Section 11 Order. HBC made its final document production in response to the Section 11 Order on April 30, 2015. In total, HBC provided approximately 27,000 documents in addition to its written return of information.

7. On April 20, 2016, the Commissioner obtained an order from the Federal Court pursuant to paragraph 11(1)(a) of the *Competition Act* requiring certain of HBC's past and current employees to attend for oral examination. The oral examinations took place over the course of two weeks in June 2016.

8. The Commissioner filed his Notice of Application with the Competition Tribunal (the “**Tribunal**”) on February 22, 2017. HBC filed its Response on April 10, 2017. The Commissioner filed his Reply on April 24, 2017.

9. On May 26, 2017, the Tribunal issued a Scheduling Order, requiring the parties to serve their respective Affidavits of Documents and productions by September 29, 2017. This time was required for HBC to review and prepare for production additional documents that were relevant to the Commissioner’s Application but which had not been produced in response to the Section 11 Order.

10. On September 29, 2017, HBC provided its AOD and produced approximately 10,000 new documents to the Commissioner (in addition to the 27,000 previously provided in response to the Section 11 Order). On the same date, the Commissioner provided its Affidavit of Documents and produced approximately 1,600 documents.

11. On November 14, 2017, the Commissioner sought an order to compel HBC to produce an Affidavit of Documents that included a substantial number of documents for the period from “February 2015 until now”. Following an oral hearing, the Tribunal required HBC to produce a few additional documents but rejected the Commissioner’s broad production request. A copy of the Tribunal’s decision in this regard is attached as Exhibit “B”. HBC produced its additional documents to the Commissioner together with a Supplementary Affidavit of Documents on December 20, 2017.

HBC’s Costs and Time of Document Collection, Review, and Production

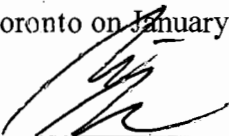
12. My affidavit sworn in this matter dated November 21, 2017, describes the costs incurred to that date by HBC in collecting, reviewing and producing documents. A copy of my November 21 affidavit is attached as Exhibit “C”.

13. Using the effort and cost involved in the previous productions as a proxy, I estimate that making production of the documents responsive to the time period “February 2015 until now” would require approximately three to four months (probably closer to four months given that we would need to do an additional collection of documents from HBC’s systems) and

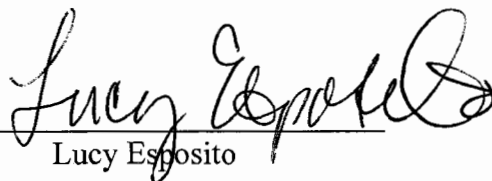
would likely cost approximately US\$200,000 in costs from Transperfect (plus expenses by Stikeman).

14. Further, I believe that certain costs and effort in making this new production will be duplicative of costs and effort already incurred by HBC in its previous document production processes. Specifically, some of the cost of collection, processing and project management incurred in the preparation of HBC's AOD will be duplicated if the additional production is required because such costs tend not to vary significantly by the document volume or the time period covered.

SWORN BEFORE ME at the City of
Toronto on January 26, 2018.



Commissioner for Taking Affidavits



Lucy Esposito

A handwritten signature in black ink, appearing to be 'Lucy Esposito', written over a horizontal line.

This is Exhibit A to the Affidavit of Lucy Esposito, sworn on January 26, 2018

Federal Court



Cour fédérale

Date: 20150130

Docket: T-88-15

Ottawa, Ontario, January 30, 2015

PRESENT: THE CHIEF JUSTICE**IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;****AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* relating to marketing practices of Hudson's Bay Company reviewable under Part VII.1 of the *Competition Act*;****AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring Hudson's Bay Company to produce records pursuant to paragraph 11(1)(b) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.****BETWEEN:****COMMISSIONER OF COMPETITION****Applicant****and****HUDSON'S BAY COMPANY****Respondent****ORDER FOR THE PRODUCTION OF RECORDS
AND WRITTEN RETURNS OF INFORMATION**

UPON the *ex parte* application made by the Commissioner of Competition (the "Commissioner") for an Order pursuant to paragraphs 11(1)(b) and 11(1)(c) of the *Competition*

Act, R.S.C., 1985, c. C-34, as amended (the “Act”), which was heard on January 28th, 2015 at the Federal Court, Ottawa, Ontario;

AND UPON reading the affidavit of Adam Zimmerman sworn on January 22nd, 2015 2015 (the “Affidavit”);

AND UPON being satisfied that an inquiry is being made under section 10 of the Act relating to certain marketing practices of Hudson’s Bay Company (“HBC”) (the “Inquiry”);

AND UPON being satisfied that the Respondent HBC has or is likely to have information that is relevant to the Inquiry;

1. **THIS COURT ORDERS** that the Respondent shall produce to the Commissioner all records and any other things specified in this Order, in accordance with the terms of this Order.
2. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver to the Commissioner all written returns of information specified in this Order, in accordance with the terms of this Order.
3. **THIS COURT FURTHER ORDERS** that in order to facilitate the handling, use, and orderly maintenance of records and to ensure the accurate and expeditious return of records, other things specified in this Order and written returns of information produced pursuant to this Order, the Respondent shall comply with the following requirements:
 - a. The Respondent shall produce records, other things and information in the possession, control or power of the Respondent;

- b. the Respondent shall make and deliver a written return of information in such detail as is required to disclose all facts relevant to the corresponding Specification in this Order;
- c. all written returns of information made by the Respondent shall be made under oath or solemn affirmation by a duly authorized representative of the Respondent;
- d. unless otherwise specified, the Respondent shall produce records created or modified during, or that concern, the period from 1 March 2013, to the date of this Order as set out in the Specifications; and written returns of information in respect of the same period;
- e. the Respondent shall produce all records that are stapled or attached in any manner to a record that is responsive to this Order;
- f. if a portion of a record is responsive to any Specification in this Order, the Respondent shall produce the record in its entirety, including any covering records and attachments to the record;
- g. if a record is responsive to more than one Specification in this Order, the Respondent shall produce the record only once;
- h. the Respondent may utilize de-duplication or email threading software or services to produce records pursuant to this Order if the Respondent identifies the proposed software or service to the satisfaction of the Commissioner and receives confirmation from the Commissioner that the Respondent may utilize that service or software;

- i. each record or thing produced by the Respondent shall be an original or a true copy of the original;
- j. the Respondent shall produce records in the order in which they appear in its files and shall not shuffle or otherwise rearrange records;
- k. the Respondent shall identify all calendars, appointment books, telephone logs, planners, diaries, and items of a similar nature that are produced in response to this Order with the name of the person or persons by whom they were used and the dates during which they were used;
- l. if the Respondent produces a record or makes and delivers a written return of information containing data that is recorded based on a period other than the calendar month or year, the Respondent shall identify in a written return of information the period used in the record or written return of information;
- m. if a record contains information that the Respondent claims is privileged, the Respondent shall produce the record with the privileged information redacted and in accordance with paragraph 5 of this Order;
- n. the Respondent shall produce all electronic records in their original format or as described below:
 - i. the Respondent shall produce database records as a flat file, in a non-relational format, exported as a comma-delimited (CSV) text file;
 - ii. the Respondent shall produce spreadsheets in MS Excel format;

- iii. the Respondent shall produce word processing files in MS Word or searchable PDF format;
 - iv. the Respondent shall produce e-mail records and attachments in a native email format, such as Outlook Express EML format, Outlook MSG format, PST format, or searchable PDF format;
 - v. the Respondent shall produce map records in a MS MapPoint or MS Streets & Trips format; and
- in the event that the Respondent cannot deliver an electronic record in a format described above, the Respondent shall produce the electronic record along with such instructions and other materials, including software, as are necessary for the retrieval and use of the record;
- o. notwithstanding subparagraph 3(n), the Respondent may produce litigation application exports by providing a cross-reference file (e.g., CSV, Dii, or MDB database) and related images (e.g., single page TIFF files) and/or electronic records and, where available, additional field information (e.g., title, description, date, etc.). Where feasible, each Respondent shall produce electronic records in the predefined Ringtail MDB format;
 - p. the Respondent shall produce electronic records on portable storage media that is appropriate to the volume of data (e.g., USB drive, CD, DVD, or hard drive) and that shall be identified with a label describing the contents. The Respondent shall produce

- files (e.g., native files or images or combinations of both) in batches of no more than 250,000 files;
- q. before producing records pursuant to this Order, and in order to facilitate receipt of documents in electronic format, a representative of the Respondent responsible for producing electronic records in accordance with subparagraphs 3(n) to (p) of this Order shall contact François Brabant at (819) 994-5173 and provide particulars regarding how it will comply with subparagraphs 3(n) to (p) of this Order. The Respondent shall make reasonable efforts to address any additional technical requirements the Commissioner may have relating to the production of electronic records in accordance with subparagraphs 3(n) to (p) of this Order;
- r. the Respondent shall define, explain, interpret or clarify any record or written return of information whose meaning is not self-evident;
- s. the Respondent shall make all written returns of information, including those relating to revenues, costs and margins, in accordance with generally accepted accounting principles (“GAAP”), International Financial Reporting Standards (“IFRS”), or other accounting principles that the Respondent uses in its financial statements. Where a Respondent produces a record or makes and delivers a written return of information using accounting principles other than GAAP or IFRS, the Respondent shall explain the meaning of all such accounting terms;

- t. use of the singular or the plural in this Order shall not be deemed a limitation, and the use of the singular shall be construed to include, where appropriate, the plural; and vice versa; and
 - u. use of a verb in the present or past tense in this Order shall not be deemed a limitation, and the use of either the present or past tense shall be construed to include both the present and past tense.
4. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver, in written returns of information, two indices in which the Respondent identifies:
- a. all records (or parts of records) that are responsive to the Specifications in Schedule I of this Order for which no privilege is claimed; and
 - b. all records (or parts of records) that are responsive to the Specifications in Schedule I of this Order for which privilege is claimed.

The indices shall include the title of the record, the date of the record, the name of each author, the title or position of each author, each addressee and recipient, the title or position of each addressee and recipient, and the paragraphs or subparagraphs of Schedule I of the Order to which the record is responsive. In lieu of listing the title or position of an author, addressee or recipient for each record, the Respondent may make and deliver a written return of information listing such persons and their titles or positions.

5. **THIS COURT FURTHER ORDERS** that where the Respondent asserts a legal privilege in respect of all or part of a record, the Respondent shall, in a written return of information:

- a. produce, for each record, a description of the privilege claimed and the factual basis for the claim in sufficient detail to allow the Commissioner to assess the validity of the claim; and
- b. identify by name, title and address, all persons to whom the record or its contents, or any part thereof, have been disclosed.

Without restricting any other remedy he may seek, the Commissioner may, by written notice to the Respondent, at any time require the Respondent to produce records for which solicitor-client privilege is claimed to a person identified in subsection 19(3) of the Act.

6. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information confirming that the records produced pursuant to this Order were either in the possession of or on premises used or occupied by the Respondent or in the possession of an officer, agent, servant, employee or representative of the Respondent. If a record produced by the Respondent pursuant to this Order does not meet the above conditions, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, power, control and location of such record. The Respondent shall provide the same information for the records of its affiliate produced pursuant to this Order.
7. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that the Respondent is not producing pursuant to this Order a record, thing, type of record or type of thing that was formerly in

the possession, control or power of the Respondent or its affiliate identified in Schedule I of this Order and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent or its affiliate identified in Schedule I of this Order had continued to have possession, control or power over the record, thing, type of record or type of thing. The Respondent shall state in this written return of information (a) when and how the Respondent or its affiliate lost possession, control and power over a record, thing, type of record or type of thing; and (b) the Respondent's best information about the present location of the record, thing, type of record or type of thing.

8. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that the Respondent or its affiliate identified in Schedule I of this Order never had possession, control or power over a record, thing, type of record or type of thing responsive to a Specification in this Order, that another person not otherwise subject to this Order has possession, control or power over the record, thing, type of record or type of thing, and that the record, thing, type of record or type of thing would be responsive to a Specification of this Order if the Respondent or its affiliate identified in Schedule I of this Order possessed the record, thing, type of record or type of thing. The Respondent shall state in this written return of information the Respondent's best information about (a) the Specification to which the record, thing, type of record or type of thing is responsive, (b) the identity of the person who has possession, control or power of the record, thing, type of record or type of thing, and (c) that person's last known address.

9. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe that a record, thing, type of record or type of thing responsive to this Order has been destroyed and that the record, thing, type of record or type of thing would have been responsive to a Specification of this Order if it had not been destroyed. The Respondent shall in this written return of information state whether the record, thing, type of record or type of thing was destroyed pursuant to a record destruction or retention policy, instruction or authorization and shall produce that policy, instruction or authorization.
10. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information stating whether, upon having conducted a diligent search and made appropriate enquiries, it has reason to believe the Respondent or its affiliate identified in Schedule I of this Order does not have records, things or information responsive to a Specification in this Order because the record, thing or information never existed. The Respondent shall, upon request of the Commissioner, make and deliver a further written return of information explaining why the record or thing never existed.
11. **THIS COURT FURTHER ORDERS** that where a Respondent previously produced a record to the Commissioner the Respondent is not required to produce an additional copy of the record or thing provided that the Respondent: (1) identifies the previously produced record or thing to the Commissioner's satisfaction; (2) makes and delivers a written return of information in which it agrees and confirms that the record was either in the possession of the Respondent, on premises used or occupied by the Respondent or was in the

possession of an officer, agent, servant, employee or representative of the Respondent; and where this is not the case, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, power, control and location of such record; and (3) receives confirmation from the Commissioner that such records or things need not be produced.

12. **THIS COURT FURTHER ORDERS** that where the Respondent produces records, things or delivers written returns of information that are, in the opinion of the Commissioner, adequate for the purposes of the Inquiry, the Commissioner may, by written notice, waive production of any additional records, things or information that would have otherwise been responsive to the Order.

13. **THIS COURT FURTHER ORDERS** that the Respondent shall make and deliver a written return of information that:
 - a. describes the authority of the person to make the written return of information on behalf of the Respondent;

 - b. includes a statement that, in order to comply with this Order, the person has made or caused to be made:
 - i. a thorough and diligent search of the records and things in the possession, control or power of the Respondent and any affiliate of the Respondent identified in Schedule I of this Order;

- ii. appropriate enquiries of the Respondent's personnel and the personnel of any affiliate of the Respondent identified in Schedule I of this Order; and
- c. includes a statement that the person believes that the Respondent has complied with the terms of this Order.

14. **THIS COURT FURTHER ORDERS** that all the requirements herein, including the returns of records, things and written returns of information, shall be completed within 90 calendar days of the service of this Order, provided that the production of records and things and delivery of written returns of information shall be conducted on a "rolling" basis, with the first production of records and things and delivery of written returns of information taking place no later than 30 calendar days following service of this Order.

- a. the Respondent shall produce all records and things and deliver all written returns of information to the Commissioner at the following address:

Competition Bureau
Fair Business Practices Branch
50 Victoria Street
Gatineau, Québec
K1A 0C9

Attention: Adam Zimmerman, Competition Law Officer

- b. communications or inquiries regarding this Order shall be addressed to:

Andrew D. Little
General Counsel
Department of Justice
Competition Bureau Legal Services
50 Victoria Street
Gatineau, Québec
K1A 0C9

15. **THIS COURT FURTHER ORDERS** that this Order may be served by means of facsimile machine, electronic mail (with acknowledgement of receipt) or registered mail on a duly authorized representative of the Respondents or on counsel for the Respondents who have agreed to accept such service.

“Paul S. Crampton”

Chief Justice

SCHEDULES I AND II

Notice Concerning Obstruction

Any person who in any manner impedes or prevents or attempts to impede or prevent any inquiry or examination under the *Competition Act* (the “Act”), or who destroys or alters or causes to be destroyed or altered, any record or thing that is required to be produced under section 11 of the Act may be subject to criminal prosecution for obstruction of justice, contempt of court or other federal criminal violations. Where a corporation commits such an offence, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence may also be prosecuted. Conviction of any of these offences is punishable by fine or imprisonment or both.

For all Specifications, the applicable time period is “for the Relevant Period” unless otherwise stated expressly.

Definitions

In this order, the term:

“**Act**” means *the Competition Act*, R.S.C. 1985 c. C-34, as amended;

“**Clearance Sale**” means a promotion where a Sleep Set is represented to the public as being available, or offered to consumers, on “clearance”;

“**Clearance Sale Flyers**” means the HBC flyers with an effective date starting on or about 26 December 2013 and 31 January, 30 May, 6 June, and 15 August 2014;

“**Compliance Policy**” (or **Policies**) means any policy, program or procedure of HBC to promote or ensure compliance with the Act including (without limitation) the provisions of the Act relating to ordinary price representations and representations to the public;

“**HBC**” means Hudson’s Bay Company doing business as Hudson’s Bay, and includes any of its predecessors, divisions, and Subsidiaries that sell or offer to sell Sleep Sets to consumers located in Canada;

“**National Brand Sleep Sets**” means those Sleep Sets manufactured by Kingsdown, Sealy, Serta, Simmons and TEMPUR-pedic;

“**Pricing Personnel**” means individuals responsible for or directly involved in setting, changing or approving HBC’s prices for Sleep Sets or the Specified Sleep Sets or both. Pricing Personnel includes HBC’s mattress buyer(s);

“**Reduced Price**” means the price at which a Sleep Set is offered for sale by HBC to the public in Canada, or any part of Canada, where that price is less than HBC’s Regular Price for any reason, including “Do not pay the tax” and “Scratch & Save” sale events.

“**Record**” has the meaning in subs. 2(1) of the Act, and includes Reports;

“**Regular Price**” means the price at which HBC represents that a Sleep Set is ordinarily sold or offered for sale to the public in Canada, or any part of Canada;

“**Relevant Period**” means the period from 1 March 2013 until the date of this Order; and “for” the Relevant Period shall be read to include matters and events that occurred prior to 1 March 2013, but are referable to the Relevant Period, as applicable, including: (i) Records that were in effect, created or produced for the Relevant Period; (ii) meetings, decisions, discussions or other communications concerning the pricing or other attributes of a Sleep Set(s) that would or did apply in the Relevant Period;

“**Retail Channel**” means all channels of distribution used by HBC to offer or sell a Sleep Set to the public, including but not limited to HBC’s bricks and mortar stores and the www.thebay.com website, individually or collectively;

“**Reports**” means analyses, presentation decks, reports, spreadsheets, strategic and business plans, studies, and surveys;

“**Senior Management**” means the chairperson, members of HBC’s Board of Directors, president, chief executive officer, vice-president, secretary, treasurer, chief financial officer, chief operating officer, general manager, managing director, leader of a division or unit of HBC, or any individual who performs their respective functions within HBC. Senior Management also includes the general counsel or senior legal counsel acting in a business or other capacity in which legal advice was not being sought or given;

“**Sleep Set**” means any mattress set made up of a mattress and foundation;

“**Specified Sleep Sets**” means each of the Sleep Sets identified in Appendix A;

“**Subsidiary**” has the meaning in subs. 2(3) of the Act;

“**Supplier**” means a person that provides a Sleep Set or Specified Sleep Set to HBC for retail sale and includes a supplier, distributor or manufacturer;

“**Transaction Price**” means a price of a Sleep Set paid by a consumer to HBC that is less than HBC’s Regular Price for any reason, including a lower price negotiated by an individual consumer;

“**Website Analytics**” includes, in relation to visitors’ use of the website at www.thebay.com, factors such as the number of visits, views and viewtime for each webpage that displayed a Specified Sleep Set, the number of visitors who ordered or purchased the Specified Sleep Sets on www.thebay.com, the price at which customers ordered or purchased Specified Sleep Sets on www.thebay.com, the total number of Sleep Sets available for purchase on www.thebay.com and where each of the Specified Sleep Sets was ranked when displayed on the “Mattress Set” webpage (e.g. product 5 of 25).

SCHEDULE I

**RECORDS TO BE PRODUCED PURSUANT TO PARAGRAPH 11(1) (b) OF THE
*COMPETITION ACT***

1. Provide all Records used, referred to or created by Pricing Personnel in setting or changing the Regular Price or Reduced Prices of the Specified Sleep Sets. Without limiting the foregoing, include all of the following:
 - a. Reports concerning the establishment or change of the Regular Price or Reduced Prices of each Specified Sleep Set;
 - b. Records of Pricing Personnel and all Reports that concern the use of any of the following to set or change the Regular Price or Reduced Prices of a Specified Sleep Set:
 - i. the Regular Price or a Reduced Price of comparable Sleep Sets offered by HBC prior to the Relevant Period, such as the previous year's model of a Sleep Set;
 - ii. the Regular Price or a Reduced Price of comparable Sleep Sets offered by a competitor of HBC;
 - iii. the volume (in units) of that Specified Sleep Set actually sold by HBC at the Regular Price, Reduced Price or Transaction Price;
 - iv. any assistance or guidance provided by a Supplier, including communications, manufacturer's suggested retail price or similar; and
 - v. any other Records or information Pricing Personnel used for the Specified Sleep Sets;
 - c. Reports created for each of the Specified Sleep Sets using any internally generated standard forms, merchandising information system or similar internal system; and
 - d. buying plans prepared by HBC's mattress buyer(s).

2. Provide copies of all HBC flyers, promotional emails and any other representations which:
 - a. specifically promoted the Specified Sleep Sets;
 - b. promoted Sleep Sets or mattresses generally and had the effect of offering the Specified Sleep Sets at a Reduced Price;
 - c. were brand-wide, store-wide or department-wide promotions that had the effect of offering the Specified Sleep Sets at a reduced price.

If such flyers, promotional emails or other representations were prepared on a national basis with no variation in layout or content apart from references to local matters such as applicable provincial taxes, the location of local HBC stores and the language in which the record is published, provide copies of each such national records only and certify that there was no regional variation except as just indicated.

3. Provide copies of all Reports concerning the product “positioning” of the Specified Sleep Sets, including:
 - a. analysis of the characteristics or nature of the Specified Sleep Sets;
 - b. how the Specified Sleep Sets fit into the mix of Sleep Sets to be offered by HBC (e.g. as to quality or perceived quality, differentiation with other Sleep Sets, comparison to Sleep Sets previously offered for sale by HBC);
 - c. comparisons of the manufacturing or technical characteristics of the Specified Sleep Sets with the Sleep Sets sold by any competitors of HBC;
 - d. the target or anticipated customers for the Specified Sleep Sets; and
 - e. any marketing strategies presented to Senior Management, including reviews or assessments of competitors’ marketing strategies and HBC’s responsive marketing strategies.
4. Provide all Reports prepared or received by Senior Management or Pricing Personnel relating to all advertised or unadvertised in-store promotions of the Specified Sleep Sets.
5. Provide all Reports prepared or received by Senior Management or Pricing Personnel relating to the Mix & Match versions of the Specified Sleep Sets and any instructions or directions given to sales personnel about the sale of Mix & Match sets.
6. For (i) Pricing Personnel, (ii) sales personnel who interact with the public for the purpose of selling Sleep Sets, and (iii) HBC’s employees involved in monitoring or ensuring compliance with the Act or with any Compliance Policy, provide all training materials pertaining to:
 - a. retail selling and sales techniques, including materials pertaining to Sleep Sets;
 - b. the pricing of Sleep Sets;
 - c. any Compliance Policy.

Include any advertising compliance course materials and test, advertising law session materials, applicable scripts, policies, guidelines, and frequently asked questions.

7. In respect of the Specified Sleep Sets, provide all price and promotion planning Records, including any internally generated standard forms, “Sales Grids for Mattresses” (or “checkerboards”), weekly competitor promotional activity reviews, retail marketing plans

for the mattress unit of the Major Home department and any marketing packages exchanged between the mattress unit and any other unit or department within HBC for the Specified Sleep Sets.

8. In respect of the Specified Sleep Sets, provide all sales forecasts and planning Records, including commodity budgets; and any “vendor forecasts” or “program buying plans”.
9. Provide all Reports comparing Sleep Sets generally, or any of the Specified Sleep Sets with a Sleep Set of a competitor including competitive profiles and Reports relating to the sales or promotional strategy used by HBC’s competitors.
10. Provide all Reports relating to the volume (in units sold) of the Specified Sleep Sets sold by HBC at the Regular Price.
11. Provide all Reports relating to the volume (in units sold) of the Specified Sleep Sets sold by HBC at the Transaction Price.
12. Provide copies of all agreements or arrangements entered into by HBC with a Supplier to provide one or more of the Specified Sleep Sets.
13. In respect of Clearance Sales:
 - a. provide copies of all representations to the public for Clearance Sales for the Specified Sleep Sets, other than radio and television advertisements;
 - b. provide copies or summaries of all orders placed with a Supplier to increase HBC’s inventory of the Specified Sleep Sets in advance of a Clearance Sale;
 - c. provide all agreements, arrangements and written communications concerning the supply of Sleep Sets between HBC and any Supplier in anticipation of a Clearance Sale that included a Specified Sleep Set;
 - d. provide all Reports showing the number of each of the Specified Sleep Sets in HBC’s own inventory, as at the commencement of each Clearance Sale;
 - e. provide Records sufficient to show whether and (if applicable) when HBC ran out of supply of each of the Specified Sleep Sets during each Clearance Sale; and
 - f. provide all Reports as to the sales in dollars and units sold of Sleep Sets and the Specified Sleep Sets during each Clearance Sale.
14. Provide all Reports concerning HBC’s and its competitors’ market shares in the supply of Sleep Sets or mattresses generally in Canada or any area thereof.
15. Provide copies of HBC’s Compliance Policy (or Policies).

16. In respect of the Specified Sleep Sets, provide all audits, verification or other Reports prepared or received by Senior Management or Pricing Personnel concerning compliance with the Act and with the Compliance Policy (Policies).
17. Provide all Reports prepared or received by Senior Management or Pricing Personnel relating to the financial results of the Specified Sleep Sets. Include financial reports or statements covering the smallest period of time that were actually generated in the ordinary course of business for Senior Management or Pricing Personnel.

SCHEDULE II

**INFORMATION TO BE RETURNED PURSUANT TO PARAGRAPH 11(1)(c) OF THE
*COMPETITION ACT***

Uncertified responses previously provided by HBC may be incorporated by reference as returns to these Specifications, provided the return is identical to the previously submitted response and it is certified in the return as correct and complete in all material respects in accordance with the terms of the Order.

1. With respect to HBC's planning for the marketing and promotion of National Brand Sleep Sets, describe:
 - a. the annual cycle of promotional activities it decided to engage in;
 - b. how it selected when those activities were to occur;
 - c. how it selected the types of in-store promotions or sales events and relayed that information to store managers; and
 - d. how it selected the types of online promotions or sales events.
2. With respect to the determination of the Regular Prices and Reduced Prices for each of the Specified Sleep Sets:
 - a. provide the name, title and a brief description of the roles and responsibilities of the Pricing Personnel; and
 - b. provide a description of the training provided to the Pricing Personnel, including a description of each person's involvement, roles and responsibilities to forecast, analyse and set prices.
3. On a step-by-step basis, provide a description of how HBC set the Regular Prices and Reduced Prices for each Specified Sleep Set. In so doing, provide:
 - a. the name and title of all Pricing Personnel in each step;
 - b. the name and a description of any Reports or classes of Records considered, created or referred to in this process, when they were used in the process, and identify the applicable specification if such Reports or Records are provided in response to Schedule I;
 - c. the name of any comparable offering from any prior HBC Sleep Set model lineup that was identified when setting the Regular Price or Reduced Price for each Specified Sleep Set; the first and last days that the prior Sleep Set was offered for sale to the public; the Regular Price of the prior Sleep Set; and the

- volume (in units) of the prior Sleep Set sold at the Regular Price and the Transaction Price;
- d. if HBC identified competitive offerings for any of the Specified Sleep Sets, provide the name of each competitive Sleep Set, the competitor retailer (if applicable), a description of how and when the competitive analysis was undertaken, and the role, if any that it had in the setting of the Regular Prices and Reduced Prices;
 - e. to the extent that HBC reviewed sales at the Regular Prices and Reduced Prices of each Specified Sleep Set, whether and how Website Analytics were used to set or change the Regular Price;
 - f. when and how frequently Pricing Personnel took steps to determine whether or not actual sales were occurring at the Regular Price, the volume (in units) of those actual sales, how that information was provided to Pricing Personnel and how it was incorporated into determining, assessing or re-assessing HBC's Regular Price; and
 - g. the name, title and a description of the role played by any Supplier personnel in each step.
4. Explain the precise steps HBC took, and when they were taken, to set the Regular Price for the Specified Sleep Sets featured in the following HBC flyers:
- a. the "Bay Days" flyer with an effective date starting on or about 12 April 2013;
 - b. the "What He Really Wants" flyer with an effective date starting on or about 7 June 2013;
 - c. the "Boxing Day Sale" flyer with an effective starting date on or about 26 December 2013;
 - d. the "Love to Give" flyer with an effective starting date on or about 7 February 2014; and
 - e. the "What He Really Wants" flyer with an effective starting date on or about 6 June 2014.
5. Explain how and the reasons why HBC changed the Regular Price for the Simmons BEAUTYREST Recharge Castlebridge tight top Queen size sleep set promoted in HBC flyers with an effective date starting on or about 12 April 2013 from the Regular Price that immediately preceded it.
6. Describe HBC's general approach to setting Reduced Prices for Sleep Sets. In addition, specifically explain:

- a. which competitors' Sleep Sets are taken into consideration, and why they are included or excluded for the purposes of making price comparisons; and
 - b. if and how the Regular Prices and Reduced Prices of its competitors affect the determination or change of HBC's Reduced Prices for Sleep Sets.
7. Describe how HBC identified and kept track of the actual volume of Specified Sleep Sets that were sold at the Regular Price. Advise whether reports were created in the ordinary course of business and if so, how often, by whom, to whom the reports were provided, and what they were used for.
8. Describe how HBC identified and kept track of the number of days that the Specified Sleep Sets were offered for sale at the Regular Price. Advise whether reports were created in the ordinary course of business and if so, how often, by whom, to whom the reports were provided, and what they were used for.
9. Provide the gross revenues for each of the Specified Sleep Sets.
10. Did HBC divide Canada into geographic regions for promotional or operational purposes with respect to the Specified Sleep Sets? If so:
 - a. identify the regions;
 - b. advise why they were created; and
 - c. if HBC offered different Sleep Sets and had different Regular Prices or pricing policies generally in different regions, explain why different Sleep Sets were offered in different regions, what the pricing policies were, why they applied in each region and whether Regular Prices were set at the local, regional or national level.
11. In offering Sleep Sets for sale in different Retail Channels, explain:
 - a. how HBC selected the Sleep Sets it decided to offer and not offer in each Retail Channel;
 - b. whether and why HBC employed different Pricing Personnel for the different Retail Channels and if so, whether and how their roles differed in each Retail Channel;
 - c. whether and why HBC implemented different promotions or different Reduced Prices for the Specified Sleep Sets in different Retail Channels;
 - d. any differences between Retail Channels as to the point in time in advance of a promotion when HBC set its Regular Price and its Reduced Prices;

- e. whether HBC set different Compliance Policy standards for each Retail Channel. If so, why. Identify and explain the factors that influenced different Compliance Policy standards in the different Retail Channels; and
 - f. any other material differences in the selection, price, quality, brand or quantity of the Sleep Sets offered in each Retail Channel that is directly related to the nature or characteristics of each Retail Channel, including customers who shop in each Retail Channel;
12. Explain whether HBC set different Regular Prices for the same Sleep Set in different Retail Channels. If so, why. Identify and explain the factors that influence a difference in Regular Price in the different Retail Channels.
13. Using Appendix B, provide a monthly calendar or spreadsheet for the period that the Specified Sleep Sets were available for sale including the model name and stock keeping unit (SKU) of the applicable Specified Sleep Set. For each calendar day, indicate:
 - a. whether HBC offered the Specified Sleep Set at the Regular Price or a Reduced Price, and the actual price point that it was offered for sale;
 - b. when HBC offered the Specified Sleep Set at a Reduced Price, provide a description of the promotion that occurred that day; and
 - c. shade each day on the calendar when HBC offered the Specified Sleep Set at a Reduced Price.
14. For each of the Specified Sleep Sets, provide on a daily basis and in an Excel spreadsheet, the number of units sold:
 - a. in aggregate;
 - b. at HBC's Regular Price;
 - c. at a Reduced Price;
 - d. at a Transaction Price excluding the number of units sold at the Reduced Price; and
 - e. as a Mix & Match set comprised of a mattress listed in Appendix A and a non-matching foundation.
15. For each of the Specified Sleep Sets offered for sale longer than 12-months, explain when and why it was decided to offer that Specified Sleep Set for an extended period of time. In addition, specifically explain how clearance sales and Suppliers may have factored into the decision.

16. For each of the Specified Sleep Sets provide the following information using the tables in Appendix C:
 - a. the manufacturer (and where applicable its Canadian representative), including complete address, the name of a senior contact and that person's telephone number;
 - b. whether HBC believed that the Specified Sleep Set was sold exclusively at HBC or was offered for sale in Canada by one or more other retailers, and the names of the top three competing retailers who offered any such non-exclusive Specified Sleep Sets;
 - c. if HBC created reports assessing competing Sleep Sets for the Specified Sleep Sets, the dates of each report, the name and model number of HBC's Sleep Sets and the comparable Sleep Sets assessed including the complete names of the retailers that offered them for sale, the price at which the competitor offered comparable Sleep Sets. This paragraph 16(c) may be answered by identifying specific reports provided pursuant to Schedule 1 that contain the required information.
 - d. explain the reasons why the comparable Sleep Sets identified in specification 16(c) above were identified as comparable Sleep Sets for the Specified Sleep Sets, and a statement as to HBC's view at the time concerning how close a substitute the comparable Sleep Sets were; and
 - e. provide the name and title, for each person who created the competitive profiles for the Specified Sleep Sets as contemplated in specification 16(c) above.
17. Provide a list of all online promotions for the Specified Sleep Sets, including any promotions that resulted in a Reduced Price. Include a description of the kind of promotion, the Regular Price and Reduced Price, the effective start and end dates of the promotion and any applicable exclusions or preconditions that may affect the quantum of the Reduced Price. When listing the online promotions, it is not necessary to provide any promotions already captured by the flyers, promotional emails, or other representations provided in response to specification 2 of Schedule I, for the Specified Sleep Sets displayed on the www.thebay.com website.
18. For each of the HBC's flyers, promotional emails or other representations provided in response to specification 2 of Schedule I, provide:
 - a. the circulation, impressions, or number of recipients for each; and
 - b. the name, and circulation, of any publications that the flyers may have been inserted into.
19. Provide a description of HBC's promotional process for Sleep Sets and mattresses, including but not limited to:

- a. any interaction between Pricing Personnel, or other HBC employees responsible for Sleep Sets and HBC marketing personnel;
 - b. the role played by Pricing Personnel generally and the mattress buyer(s) specifically in this process;
 - c. how HBC selects individual Sleep Sets to be featured in promotional materials generally and flyers specifically;
 - d. how HBC makes decisions with respect to the amount of space Sleep Sets and mattresses will be given in a flyer;
 - e. lead times and timelines with respect to the graphic design, printing and dissemination of flyers, promotional emails and any other electronic promotional materials;
 - f. if, or how, such lead time and timelines affect setting the Regular Price; and
 - g. any Compliance Policy reviews.
20. Explain whether HBC typically keeps inventory of Sleep Sets to meet demand (other than its floor display models and any sets returned by customers), or whether HBC orders them from Suppliers as orders are placed by customers. If the latter, describe how this is done and HBC's steps to order and arrange for delivery to the customer. Advise if there are differences in the steps taken for purchases made in-store or online.
21. Explain whether HBC bears any financial liability with respect to the cost, storage or supply of raw materials used in the manufacture of Sleep Sets, or of any Sleep Set inventory in the possession of a Supplier, prior to a customer's purchase.
22. For the www.thebay.com website, provide the following information using the tables in Appendix D attached:
- a. the total number of Sleep Sets promoted as being subject to a Clearance Sale;
 - b. the length of time that a Specified Sleep Set was promoted as being subject to a Clearance Sale; and
 - c. the length of time that a Specified Sleep Set was available for purchase as part of a Clearance Sale.
23. With respect to the Specified Sleep Sets marked in Appendix A with an asterisk, advise when and the reasons why HBC decided to promote each of those Specified Sleep Sets on "clearance" and the first and last dates each Specified Sleep Set was offered as part of any Clearance Sale, including in the Clearance Flyers. Where applicable, explain the reasons

why HBC later offered or promoted any of those Specified Sleep Sets for sale on a basis other than “clearance” and the dates when that occurred.

APPENDIX A

“Specified Sleep Sets” means both the matching and Mix & Match sets of the Sleep Sets identified in Appendix A;

SEALY
Posturepedic Newhaven Euro top Queen size sleep set
Posturepedic Newhaven tight top Queen size sleep set
* Posturepedic Reflex Hillsbridge Euro top Queen size sleep set
Posturepedic Reflex Mount Royal tight top Queen size sleep set
Posturepedic Titanium Gallantry pillow top Queen size sleep set
Posturepedic Titanium Gallantry tight top Queen size sleep set
Posturepedic Titanium Southdale Euro pillow top Queen size sleep set
Stearns & Foster Huntington pillow top Queen size sleep set
* Stearns & Foster Northampton tight top Queen size sleep set

SIMMONS
BEAUTYREST Black Esteem IV hi-loft pillow top Queen size sleep set
* BEAUTYREST Black Grace IV tight top Queen size sleep set
BEAUTYREST Recharge Castlebridge tight top Queen size sleep set
BEAUTYREST Recharge Wexford hi-loft pillow top Queen size sleep set
* BEAUTYREST Recharge World Class Ashcroft tight top Queen size sleep set
BEAUTYREST Recharge World Class Roslindale super pillow top Queen size sleep set
BEAUTYREST TruEnergy Brooklyn tight top Queen size sleep set
BEAUTYSLEEP Bellamy Euro top Queen size sleep set

TEMPUR-PEDIC
* TEMPUR-Reflect Plus Tight Top Queen Mattress Set Queen size sleep set

APPENDIX B

Schedule II, Specification 13

[MODEL NAME & SKU OF THE SPECIFIED SLEEP SET]

[MONTH, YEAR]

	1 Regular Price \$1,999.99	2 Regular Price \$1,999.99	3 Regular Price \$1,999.99	4 Reduced Price* \$999.99 Manager Days "Save 50%"	5 Reduced Price \$999.99 Manager Days "Save 50%"	6 Reduced Price \$999.99 Manager Days "Save 50%"
7 Reduced Price \$999.99 Manager Days "Save 50%"	8 Reduced Price \$999.99 Manager Days "Save 50%"	9 Reduced Price \$999.99 Manager Days "Save 50%"	10 Reduced Price \$999.99 Manager Days "Save 50%"	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31	*All days in which the Specified Sleep Set was offered for sale at a Reduced Price are to be shaded.		

APPENDIX C

Schedule II, Specification 16

Table 1

#	Specified Sleep Set	Manufacturer's address	Contact info	Exclusive (Y/N)	Competitor(s) selling non-exclusive Specified Sleep Set
1					
2					
3					

Table 2

#	Specified Sleep Set & model number	Dates of each report	Competitive product & model number	Retailer	Price
1					
2					
3					

Table 3

#	Specified Sleep Set	Comparable Sleep Set	Reasons why identified	Substitutability
1				
2				
3				

Table 4

#	Specified Sleep Set	Dates of each report	Competitive product & model number	Author
1				
2				
3				

APPENDIX D

Schedule II, Specification 22

Table 1

JANUARY 2014						
	1	2 25 sleep sets	3 25 sleep sets	4 25 sleep sets	5 25 sleep sets	6 0 sleep sets
7 0 sleep sets	8 0 sleep sets	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

Table 2

#	Specified Sleep Set	Length of time <u>available for purchase</u> on clearance	Length of time <u>promoted</u> as being on clearance
1			
2			
3			

A handwritten signature in black ink, consisting of several fluid, overlapping strokes, positioned above a horizontal line.

This is Exhibit B to the Affidavit of Lucy Esposito, sworn on January 26, 2018

Competition Tribunal**Tribunal de la concurrence**

Reference: *The Commissioner of Competition v Hudson's Bay Company*, 2017 Comp Trib 19
File No.: CT-2017-008
Registry Document No.: 30

IN THE MATTER OF the *Competition Act*, RSC, 1985, c C-34 as amended:

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)



Dates of hearing: December 1st, 2017
Before Judicial Member: J. Gagné
Date of Order and Reasons: December 7, 2017

ORDER AND REASONS FOR ORDER

I. Nature of the Matter

[1] On May 26, 2017, the Tribunal issued a Scheduling Order directing both parties to provide the other with an affidavit of documents by September 29, 2017. While Hudson's Bay Company [HBC] did provide the Commissioner of Competition with an affidavit of documents by this date, it only included material from March 1, 2013 to February 9, 2015, totalling 37,000 documents. The affidavit of documents did not include any material from February 2015 until the present [Disputed Time Period], despite the Commissioner's Notice of Application alleging that HBC continues to engage in reviewable conduct contrary to the *Competition Act*, RSC 1985, c C-34 [Act].

[2] The Commissioner seeks an order from the Tribunal directing HBC to comply with the Scheduling Order by producing a further and better affidavit of documents inclusive of the Disputed Time Period, failing which the Commissioner asks that HBC's Response to the Commissioner's Notice of Application be struck in its entirety. The motion was heard by the Tribunal on December 1st, 2017 and since it soon became obvious that neither party had a firm position on the outcome of the Commissioner's motion, they were given until the end of the day on December 4 to resolve it in whole or in part. By letter from the Commissioner's counsel dated December 4, 2017, the Tribunal was informed that HBC would be producing the following documents by December 13, 2017, but that this supplementary production remains insufficient for the Commissioner:

- Sleep Sets Compliance Grids for February 2015 through January 2017 (two documents). These documents are the annual tracking documents used by HBC's sleep sets "buyer" to track the number of days (and which days) each sleep set collection is offered at regular and promotional prices. They also indicate HBC's promotion schedule for sleep sets. These documents fall within Category D of the Commissioner's chart attached as Annex A to his Memorandum of Fact and Law on the motion.
- Compliance Manual (one document). This document has been updated once since February 2015 and will be produced. It applies to sleep sets as well as to other products. It falls within Categories D and F of the Commissioner's Annex A chart.
- National flyers advertising "End of Line" sleep sets during the period February 2015 through the date of the Notice of Application. These documents respond to Category E of the Commissioner's Annex A chart.

[3] The Commissioner's Annex A is attached to these reasons.

II. The Notice of Application

[4] On February 22, 2017, the Commissioner brought a Notice of Application pursuant to section 74.1 of the Act alleging that HBC has previously engaged in and continues to engage in two unique types of reviewable conduct contrary to paragraph 74.01(1)(a) and subsection 74.01(3) of the Act.

[5] First, in contravention of subsection 74.01(3) of the Act, the Commissioner alleges that HBC has engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices, and then advertising deep discounts off these deceptive regular prices in order to promote the sale of the sleep sets to the public. This alleged contravention is said to have occurred from July 19, 2013 to October 30, 2014 and there are six sleep set advertisements identified in the Notice of Application as distinct instances where HBC made such deceptive representations.

[6] Second, in contravention of paragraph 74.01(1)(a) of the Act, the Commissioner alleges that HBC engages in deceptive marketing practices by offering its sleep sets as part of inventory “clearance” or “end of line” promotions. The Commissioner contends that a “clearance” or “end of line” sale implies that the price has been permanently lowered, with the object of selling any remaining on-hand inventory. Despite such advertisements, the Commissioner alleges that HBC continues to replenish from manufacturers by ordering new sleep sets during these sales.

[7] The allegedly deceptive use of the term “clearance” is said to have occurred between March 1, 2013 and December 26, 2014, while the allegedly deceptive use of the term “end of line” is identified as current HBC practice, dating back to the end of December 2014. In his Notice of Application, the Commissioner provides examples of this deceptive use of the term “clearance” occurring between (i) January 10 and 16, 2014 and (ii) February 14 and 27, 2014. Despite alleging that the use of the term “end of line” is ongoing, the Commissioner only provides two examples of this alleged contravention, both occurring between January 9 and 15, 2015.

[8] The Commissioner is seeking various forms of relief including “a declaration 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 “an order prohibiting HBC from engaging in the reviewable conduct or substantially similar reviewable conduct for any product supplied by HBC in Canada, for a period of ten years from the date of such order.”

III. Document Production

[9] Prior to the start of this proceeding and following an application by the Commissioner, the Federal Court issued an order pursuant to paragraph 11(1)(b) of the Act requiring HBC to produce records up to the date of issuance of that order, January 30, 2015 [Section 11 Order]. HBC produced 27,000 documents in response to the Section 11 Order.

[10] During the course of this proceeding, a case management conference was held on May 25, 2017, following which the Tribunal issued the Scheduling Order. Among numerous pre-hearing steps, the Scheduling Order directed both parties to exchange affidavits of documents and to produce the documents listed therein by September 29, 2017. The parties agreed to list but to not reproduce the documents already provided in response to the Section 11 Order in their respective affidavits of documents.

[11] HBC did provide the Commissioner with an affidavit of documents by September 29, 2017, though it only listed material from March 1, 2013 to February 9, 2015, totalling 37,000 documents. 10,000 documents were newly produced, extending only ten days beyond the issuance of the 2015 Section 11 Order. The affidavit of documents did not include any material after February 9, 2015.

[12] Between October 24, 2017 and November 6, 2017, counsel for the parties corresponded via email, with counsel for the Commissioner seeking an explanation for the lack of material after February 9, 2015. On October 31, 2017, counsel for HBC wrote “it may be appropriate to make supplementary production” and “[a]ssuming that HBC will make some supplementary production, we are hoping to be able to do so by mid-December.” On November 6, 2017, counsel for the Commissioner replied, seeking a firm commitment from HBC counsel to produce more up-to-date documents and a deadline for doing so, without which counsel for the Commissioner would seek a motion to compel further production.

IV. Issues

[13] I believe that this motion raises the following issues:

- A. *Are the documents in the Disputed Time Period relevant to the matters at issue in this proceeding?*
- B. *If documents in the Disputed Time Period are relevant, is the Commissioner’s request consistent with the principle of proportionality in discovery?*
- C. *If documents in the Disputed Time Period are relevant, is the Commissioner entitled to a remedy in respect of HBC’s non-compliance with the Scheduling Order?*

V. Analysis

- A. *Are the documents in the Disputed Time Period relevant to the matters at issue in this proceeding?*

[14] I believe that only those documents relating to HBC's purported false or misleading representations in "end of line" promotions from the Disputed Time Period are relevant to the matters at issue in this proceeding. To be more specific and with reference to Annex A, I believe that only documents in Category E (documents relating to HBC's continued use of "end of line" representations with respect to sleep sets) are relevant.

(1) Documents Relating to HBC's Promotional Practices and Commercial Conduct

[15] I agree with HBC that a reading of the Commissioner's Notice of Application conveys that HBC's alleged contraventions of the Act relate to two unique types of reviewable conduct having to do with sleep sets. In the overview of the Notice of Application, the Commissioner writes, "HBC has engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices, and then advertising deep discounts off these deceptive regular prices in order to promote the sale of the sleep sets to the public" (at para 2). The Commissioner also writes, "HBC also engages in deceptive marketing practices when offering its sleep sets as part of inventory "clearance" or "end of line" promotions" (at para 7).

[16] Contrary to what the Commissioner argues, a plain reading of the Notice of Application does not convey to the reader that HBC is engaging in these alleged contraventions for any product other than sleep sets. In three paragraphs in the Notice of Application, the Commissioner alludes to HBC's alleged use of deceptive marketing practices for products other than sleep sets. First and foremost, paragraph 8 states: "HBC has been making these types of representations throughout Canada to promote the sale of various products since at least March 2013 until now" [my emphasis]. Second, paragraph 108 states: "The types of representations used to promote sleep sets are used extensively by HBC to promote other products". Third, paragraph 111 states: "HBC has made, and continues to make, the foregoing false or misleading representations to the public for the purpose of promoting sleep sets and their business interests more generally". These would be the "catchall" allegations that would render documents pertaining to all products sold by HBC relevant to this proceeding, rather than the specific sleep sets clearly identified in the Notice of Application.

[17] There are references to marketing for other products in the Notice of Application and the Commissioner's Reply (see paras 3, 107, 108 and 110 of the Notice of Application and para 19 of the Reply). However, those references discuss elements of HBC's marketing practices that do not contravene the Act. For example, paragraph 3 of the Notice of Application indicates that, "HBC markets many of the products it sells using a "high-low" pricing strategy." Paragraph 108 states: "All of these divisions, as well as many others, use OSP [ordinary selling price] representations to promote the sale of HBC products." High-low pricing strategies and OSP representations are not in and of themselves deceptive. They can become deceptive when regular prices are grossly inflated and then substantial discounts off of such deceptive regular prices are advertised, as the Commissioner alleges that HBC did for sleep sets.

[18] Additionally, paragraphs 107 and 110 of the Notice of Application and paragraph 19 of the Commissioner's Reply indicate that HBC's compliance policies apply to all products.

However, the Commissioner cannot allege that because HBC's compliance policies may have failed to prevent the materialization of deceptive marketing representations for sleep sets that consequently, all products that HBC sells are under suspicion of being marketed deceptively and may be brought before the Tribunal under the umbrella of this application. There is no logic to that proposition and more importantly, the Commissioner offers no evidence or specific examples of other products in his Notice of Application.

[19] I agree with HBC that the Commissioner's application is about sleep sets and not, more generally, all of HBC's promotional practices and commercial conduct. The scant three references that the Commissioner makes within his 115-paragraph Notice of Application to "other products" are not sufficient to make the Commissioner's application expand to products other than the sleep sets at issue. Had the Commissioner sought to include more of HBC's products and practices within his application, he could easily have done so. In fact, at the hearing, the Tribunal asked the Commissioner's counsel if, from the 37,000 documents received so far, any information led him to believe that HBC used the alleged deceptive practices with respect to any other product, and if such information justified amending the Notice of Application. He answered in the negative.

[20] The Commissioner cannot use section 74.1 of the Act to argue that because he is entitled to a remedy involving "substantially similar reviewable conduct" if successful in this proceeding, then he is also entitled to discovery regarding "substantially similar reviewable conduct." If at the eventual hearing of this application, the Commissioner successfully establishes that HBC has engaged in and is engaging in conduct contrary to the Act, then he may argue for an order prohibiting substantially similar reviewable conduct.

[21] Moreover, as argued by HBC, "[t]he Commissioner raised no issue with the scope of HBC's Schedule 1 production insofar as it related to the period prior to the issuance of the Section 11 Order." That is to say that the 27,000 documents HBC provided to the Commissioner under the Section 11 Order include documents relating to sleep sets, and not its promotional practices and commercial conduct more generally. Rightfully, the Commissioner took no issue with that.

[22] Thus, referring back to Annex A, documents in Category F (documents relating to HBC's post-January 2015 compliance practices and policies for the products other than sleep sets HBC offers and has offered for sale, etc.) are not relevant. Expanding discovery beyond documents related to sleep sets would constitute a fishing expedition.

(2) Documents from the Disputed Time Period relating to (i) HBC's Purported Deceptive Ordinary Price Representations and (ii) HBC's Purported False or Misleading Representations in Clearance and End of Line Promotions

[23] As previously stated, I believe that documents from the Disputed Time Period are relevant to the matters at issue in this proceeding, but only those relating to HBC's purported

false or misleading representations in “end of line” promotions (in other words, documents relating to HBC’s alleged contravention of paragraph 74.01(1)(a) of the Act).

[24] Documents from the Disputed Time Period having to do with HBC’s purported deceptive ordinary price representations and its purported false or misleading representations in “clearance” promotions are, in my view, not relevant.

[25] A plain reading of the Commissioner’s Notice of Application indicates that HBC’s purported deceptive ordinary price representations are limited to six specific sleep set advertisements from July 19, 2013 to October 30, 2014 – well before the Disputed Time Period. This conduct occurred in the past and is not ongoing due to the language that the Commissioner uses, specifically when compared to the language that is used for the second type of reviewable conduct identified in the Notice of Application.

[26] The Commissioner uses the past tense to refer to this first type of reviewable conduct, whereas he uses the present tense to refer to the second type of reviewable conduct. For example, at paragraph 2 of the Notice of Application: “HBC has engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices...” as compared to paragraph 7: “HBC also engages in deceptive marketing practices when offering its sleep sets as part of inventory “clearance” or “end of line” promotions”.

[27] At paragraph 26, the Commissioner writes: “From the various sleep sets offered by HBC, the Commissioner identified the following for review under subsection 74.01(3) of the Act.” Additionally, the Commissioner includes as Heading B at page 30 of the Notice of Application, “Examples of HBC’s False or Misleading Clearance Representations”, and as Heading D at page 35, “Examples of HBC’s False or Misleading End of Line Representations.” These different turns of phrase suggest that the Commissioner reviewed all of HBC’s sleep set advertisements up until the present and was only able to identify six specific advertisements making allegedly deceptive ordinary price representations in contravention of subsection 74.01(3) of the Act. The six advertisements are not presented as “examples” – rather, they are presented as the only instances of this kind of deceptive marketing practice.

[28] In contrast, the Commissioner’s use of the present tense and the word “examples” for the second type of reviewable conduct suggests that HBC’s use of purportedly false or misleading end of line representations is still ongoing (since the Commissioner clearly sets out that HBC stopped using clearance representations for the purpose of promoting sleep sets in December 2014).

[29] Given the language that the Commissioner uses in his Notice of Application, I agree that HBC’s first type of impugned conduct (purported deceptive ordinary price representations) took place prior to the Disputed Time Period (from July 19, 2013 to October 30, 2014). I also agree that HBC’s second type of impugned conduct involving “clearance” representations took place prior to the Disputed Time Period (from at least March 1, 2013 to December 26, 2014).

[30] However, I do not agree that HBC's second type of impugned conduct involving "end of line" representations took place exclusively prior to the Disputed Time Period. I believe that the Notice of Application makes clear that such conduct is ongoing. In fact, this continuity is not clearly denied in HBC's response. During the hearing, I asked counsel for HBC if they deny that the use of end of line representations in sleep set promotions is ongoing, so to potentially render the filing of more contemporaneous documents irrelevant. I did not receive a clear answer.

[31] Consequently, and subject to HBC's undertaking to file the documents listed in paragraph 2, documents in Categories A, B, C and D of Annex A are not relevant. By reference to the Notice of Application, only documents in Category E (documents relating to HBC's continued use of "end of line" representations with respect to sleep sets) are relevant.

B. *If documents in the Disputed Time Period are relevant, is the Commissioner's request consistent with the principle of proportionality in discovery?*

[32] Given my conclusion that documents relating to HBC's continued use of end of line representations with respect to sleep sets are relevant, I believe the Commissioner's request in respect of those documents to be consistent with the principle of proportionality.

[33] HBC has known since February 22, 2017, when it was served with the Commissioner's Notice of Application, that the Commissioner believes its impugned conduct involving end of line representations to be ongoing. Therefore, the obligation to produce these relevant documents is not an "additional production" request. It's a production that HBC should have included in its affidavit of documents by September 29, 2017, as required by the Scheduling Order.

[34] HBC had four months to make this production and failed to do so. Its production of 10,000 additional documents covering a mere ten days beyond what it already provided for the Section 11 Order, simply because the examples of "end of line" representations cited in the Notice of Application stop in February 2015, is not acceptable.

[35] Moreover, given the more limited category of relevant documents that I believe HBC should still produce, the time, expense and effort required to do so should be significantly lower than what HBC initially expected.

C. *If documents in the Disputed Time Period are relevant, is the Commissioner entitled to a remedy in respect of HBC's non-compliance with the Scheduling Order?*

[36] In light of the above, HBC is deficient in its documentary production obligations under the Scheduling Order and the *Competition Tribunal Rules*, SOR/2008-141. HBC should still produce relevant documents from the Disputed Time Period involving its "end of line" representations with respect to sleep sets.

[37] In terms of deadline, I think it is perfectly reasonable to require HBC to provide these additional documents, along with those listed in paragraph 2 of these reasons, by December 20, 2017.

[38] Should HBC fail to make supplementary production within that deadline, the Commissioner would be entitled to some remedy. However, striking out HBC's Response in its entirety is way too drastic as, contrary to the Commissioner's contention, HBC is not substantially non-compliant with the Scheduling Order.

[39] Considering the mitigated outcome of the Commissioner's motion, each party will bear its own costs.

VI. Conclusion

[40] The documents in the Disputed Time Period are relevant insofar as they relate to HBC's continued use of "end of line" representations with respect to sleep sets. By failing to produce these documents, HBC is deficient in its documentary production obligations under the Scheduling Order and the *Competition Tribunal Rules*. HBC is required to produce these documents, along with the ones listed in paragraph 2 of these reasons, on or before December 20, 2017. No costs are granted.

FOR THE ABOVE REASONS, THE TRIBUNAL ORDERS THAT:

[41] The Commissioner of Competition's motion is granted in part.

[42] Hudson's Bay Company is to file a further Affidavit of Documents inclusive of the period from February 2015 until now, listing the following documents, and to deliver the following documents to the Commissioner of Competition, on or before December 20, 2017:

- a) Sleep Sets Compliance Grids for February 2015 through January 2017 (two documents). These documents are the annual tracking documents used by HBC's sleep sets "buyer" to track the number of days (and which days) each sleep set collection is offered at regular and promotional prices. They also indicate HBC's promotion schedule for sleep sets. These documents fall within Category D of Annex A.
- b) Compliance Manual (one document). This document has been updated once since February 2015 and will be produced. It applies to sleep sets as well as to other products. It falls within Categories D and F of Annex A.
- c) National flyers advertising "End of Line" sleep sets during the period February 2015 through the date of the Notice of Application. These documents respond to Category E of Annex A.

- d) Documents relating to HBC's continued use of end of line representations with respect to sleep sets. These documents respond to Category E of Annex A.

[43] The rest of the Scheduling Order of May 26, 2017 remains unchanged.

[44] No costs are granted.

DATED at Ottawa, this 7th day of December 2017.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Jocelyne Gagné

ANNEX "A"

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
<p>A. Documents relating to HBC's post- Jan 2015 practices regarding setting prices for sleep sets, including documents related to setting and establishing regular and promotional prices; monitoring the price; changing the regular or promotional price; monitoring or review of competitors' prices; the influence of manufacturers on prices.</p> <p>B. Documents relating to HBC's post-Jan 2015 sleep set marketing practices, including documents related to the marketing process (approvals, promotional event calendars); market research and studies (but not including actual representations).</p> <p>C. Documents relating to HBC's post-2015 financial results and estimates for sleep sets, including documents setting out gross margin analysis; profitability; revenues; strategic planning and growth strategies, forecasting; internal sales estimates and actual volumes.</p>	<p><u>APPLICATION</u></p> <p>Paragraph 2 – "HBC has engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices, and then advertising deep discounts off these deceptive regular prices in order to promote the sale of the sleep sets to the public. The regular prices of the sleep sets were so inflated above what the market would bear that sales at the regular price were virtually non-existent."</p> <p>Paragraph 3 – "HBC markets many of the products it sells using a 'high-low' pricing strategy. Under this strategy, HBC offers merchandise at a high regular price with frequent deep promotional discounts off that price."</p> <p>Paragraph 8 – "HBC continues to offer sleep sets using both of these types of deceptive marketing practices. HBC has been making these types of representations throughout Canada to promote the sale of various products since at least 1 March 2013 until now."</p> <p>Paragraph 111 – "HBC has made, and continues to make, the foregoing false or misleading representations to the public for the purpose of promoting sleep sets and their business interests more generally."</p> <p>Paragraph 112 – "Pursuant to subsection 74.1(5) of the Act, the deceptive conduct described herein is aggravated by the following: ... b. HBC has made the same or similar representations frequently and over an extended period of time..."</p> <p><u>RESPONSE</u></p> <p>Paragraph 31 – "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."</p>	<p><u>A - SETTING PRICES</u></p> <ul style="list-style-type: none"> • Setting regular and promotional price: <ul style="list-style-type: none"> ◦ HBC00023315 • Establishing regular price (flooring at regular price prior to any promotions): <ul style="list-style-type: none"> ◦ HBC00035526 • Monitoring and changing the price: <ul style="list-style-type: none"> ◦ HBC00039850 • Monitoring or review of competitors prices: <ul style="list-style-type: none"> ◦ HBC00026876 • Influence of manufacturers on prices: <ul style="list-style-type: none"> ◦ HBC00026987 <p><u>B - MARKETING</u></p> <ul style="list-style-type: none"> • Planning/Approvals: <ul style="list-style-type: none"> ◦ HBC00032825 ◦ HBC00028492 • Promotional Event Calendars: <ul style="list-style-type: none"> ◦ HBC00013682 (tab-Marketing Calendar 2013) • Market analysis, research and studies: <ul style="list-style-type: none"> ◦ HBC00034775 ◦ HBC00006106 ◦ HBC00009235 • Marketing costs: <ul style="list-style-type: none"> ◦ HBC00031195 <p><u>C - FINANCIALS</u></p>

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
		<ul style="list-style-type: none"> • Margin analysis: <ul style="list-style-type: none"> ◦ HBC00039406 • Profitability: <ul style="list-style-type: none"> ◦ HBC00021515 • Revenues: <ul style="list-style-type: none"> ◦ HBC00003022 • Growth strategies / Strategic planning: <ul style="list-style-type: none"> ◦ HBC00012016 ◦ HBC00002812 • Internal sales estimates and forecasts: <ul style="list-style-type: none"> ◦ HBC00013682 (tab-Sales Forecast) ◦ HBC00002784 • Actual volume of sales: <ul style="list-style-type: none"> ◦ HBC00038061 ◦ HBC00030439
<p>D. Documents relating to HBC's post-Jan 2015 practices regarding compliance with the Competition Act for sleep sets, including documents related to monitoring of volumes of sleep sets sold at the regular price; sleep set compliance sales grids ; compliance policies, procedures and manuals; practical application of compliance policies; remedial actions taken as a result of breaches with compliance policies, procedures or manuals; internal reporting related to compliance; management monitoring and verification of</p>	<p><u>APPLICATION</u></p> <p>Paragraph 100 – “HBC’s compliance monitoring, verification and reporting mechanisms are all ineffective. Three successive Mattress Buyers conducted ongoing monitoring of promotional representations and yet HBC continued to make deceptive representations during the tenure of all three. Further, HBC management continually failed to verify if monitoring was being done properly and instead relied entirely on the Mattress Buyers self-reporting on whether they were compliant.”</p> <p>Paragraph 106 – “Deceptive OSP representations and false or misleading clearance and end of line representations promoting sleep sets occurred despite HBC’s compliance mechanism. HBC’s compliance mechanism was completely ineffective in preventing contraventions of the law. The shortcomings in HBC’s compliance program and its ineffectiveness regarding sleep sets are representative of the overall poor functioning of HBC’s compliance mechanism. The egregious compliance failures with respect to sleep sets are the inevitable outcome of HBC’s flawed compliance model.”</p>	<ul style="list-style-type: none"> • Volume sold at regular price: <ul style="list-style-type: none"> ◦ HBC00022023 • Compliance Sales Grids: <ul style="list-style-type: none"> ◦ HBC00036295 • Compliance policies, procedures, manuals and training: <ul style="list-style-type: none"> ◦ MMFG00012_00000453 • Practical application of compliance: <ul style="list-style-type: none"> ◦ HBC00017477

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
<p>compliance; changes or modifications in compliance structure and reporting.</p>	<p><u>RESPONSE</u></p> <p>Paragraph 9 – “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.”</p> <p><u>REPLY</u></p> <p>Paragraph 18 – “HBC has neither a credible and effective compliance program, nor has it demonstrated a clear, continuous and unequivocal commitment to compliance with the Act, notwithstanding past judicial proceedings under the Act. The simple existence of a compliance manual and training are not a sufficient exercise of due diligence to prevent reviewable conduct from occurring, as provided for in subsection 74.1(3) of the Act. HBC's failure to adhere to an effective compliance program is illustrative of a corporate culture focused more on sales than on compliance.”</p>	<ul style="list-style-type: none"> • Internal reporting / management monitoring and verification: <ul style="list-style-type: none"> ○ HBC00019319 • Modifications in compliance structure: <ul style="list-style-type: none"> ○ HBC00020740

CATEGORIES OF DOCUMENTS	LINK TO PLEADINGS	SAMPLE DOCUMENTS FROM HBC'S AFFIDAVIT OF DOCUMENTS
<p>E. Documents relating to HBC's continued use of "end of line" representations with respect to sleep sets.</p>	<p><u>APPLICATION</u></p> <p>Paragraph 73 – "In addition to making deceptive OSP representations, as set out above, HBC has also made deceptive clearance representations to consumers in order to further promote sales of sleep sets. HBC has failed to comply with paragraph 74.01(1)(a) of the Act concerning the making of false or misleading representations to the public. HBC has made and continues to make representations to the public that are false or misleading in a material respect in its clearance and end of line promotions of sleep sets."</p> <p>Paragraph 74 – "HBC made clearance representations for the purpose of promoting sleep sets since at least 1 March 2013. HBC changed the language of its representations promoting sleep sets from 'clearance' to 'end of line' on or about 26 December 2014."</p> <p>Paragraph 86 – "Effective December 2014, HBC adopted a revised 'Mattress Transition Pricing Policy'. The policy states that no new orders for end of line sleep sets could be placed with the sleep set manufacturer after a predetermined date (known as the 'D-Date'). Twenty three days prior to the D-Date, the sleep set moves to end of line promotional pricing."</p> <p>Paragraph 87 – "In line with the revised policy, HBC stopped making 'clearance' representations with respect to sleep sets starting with the Boxing Week 2014 promotional materials and instead changed to 'end of line' representations."</p> <p><u>RESPONSE</u></p> <p>Paragraph 16 – "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."</p>	<ul style="list-style-type: none"> • End of Line: <ul style="list-style-type: none"> ○ HBC00026573 ○ HBC00027401 ○ HBC00038954

<p>F. Documents relating to HBC's post-January 2015 compliance practices and policies for the products other than sleep sets HBC offers and has offered for sale; documents concerning whether or the extent to which HBC complies with such policies; compliance policies, procedures and manuals; remedial actions taken as a result breaches with compliance policies, procedures or manuals; internal reporting related to compliance; management monitoring and verification of compliance; changes or modifications in compliance structure and reporting.</p>	<p><u>APPLICATION</u></p> <p>Paragraph 107 – “Furthermore, the policies in the Compliance Manual apply not only to promotions of sleep sets, but to ALL products HBC offers for sale. With the exception of seasonal products and occasion-specific goods, the sections of the Compliance Manual which are meant to promote compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act apply to ALL the products HBC offers for sale.”</p> <p>Paragraph 108 – “The type of representations used to promote sleep sets are used extensively by HBC to promote other products. Sleep sets are but a subset of the larger ‘Major Home Division’ which is responsible for furniture, sleep sets and major appliances. More specifically, the Major Home Division is part of the larger Home Division, which also includes three other divisions offering bed and bath linens, seasonal home products and housewares. All of these divisions, as well as many others, use OSP representations to promote the sale of HBC products. For example, in the 9 to 15 December 2016 flyer, HBC used OSP representations to promote the sale of luggage, women’s clothing, men’s clothing, small appliances, toys, footwear, cookware, jewellery, linen, towels, and glassware as well as sleep sets.”</p> <p>Paragraph 109 – “The consequence of HBC’s lack of a credible and effective compliance program is HBC’s inability to ensure the numerous OSP and clearance representations it makes to the public are compliant with the Act.”</p> <p>Paragraph 110 - “HBC’s internal compliance mechanism, which applies to ALL the HBC products it sells, is unable to ensure compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act.”</p> <p><u>REPLY</u></p> <p>Paragraph 2 – “The sleep set sample and the representations relied on in the Notice of Application are representative of HBC’s overall business practices.”</p> <p>Paragraph 19 – “Paragraph 74.1(1)(a) of the Act states that the Tribunal may make an order that HBC not “engage in the conduct or <u>substantially similar reviewable conduct</u>” [emphasis added]. The conduct at issue is HBC’s promotional practices. Requiring HBC to comply with the law for similar representations regardless of product is in line with an order prohibiting ‘substantially similar reviewable conduct’. HBC’s compliance program applies to a full host of products HBC offers for sale to consumers and in the example of the Specified Sleep Sets, utterly failed to prevent breaches of the Act.”</p>	<ul style="list-style-type: none"> • Compliance practices for other products: <ul style="list-style-type: none"> ◦ Compliance Manual - MMFG00012_00000453
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COUNSEL:

For the applicant:

The Commissioner of Competition

Alexander Gay
Katherine Rydel
Derek Leschinsky

For the respondent:

Hudson's Bay Company

Eliot Kolers
Mark Walli

A handwritten signature in black ink, consisting of several overlapping, fluid strokes, positioned above a horizontal line.

This is Exhibit C to the Affidavit of Lucy Esposito, sworn on January 26, 2018

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

AFFIDAVIT OF LUCY ESPOSITO
(sworn November 21, 2017)

I, Lucy Esposito, of the Town of Ajax, in the Regional Municipality of Durham
MAKE OATH AND SAY:

1. I am the eDiscovery Case Manager in the Toronto office of Stikeman Elliott LLP (“**Stikeman**”), external counsel to Hudson’s Bay Company (“**HBC**”) in this proceeding. I have been Stikeman’s lead document management specialist on this matter since May 2017. As such, I have personal knowledge of the matters to which I hereinafter depose, except where stated to be on information and belief, in which case I have set out the source of the information and verily believe it to be true.

2. Since May 2017, I have been involved in all aspects of document management in this matter, including instructing Transperfect, HBC’s third party document review service provider for this case, in connection with the preparation of HBC’s Affidavit of Documents (the “**AOD**”). Although some of the work done by Transperfect pre-dates my involvement on

this file, my work since May 2017 has required me to become familiar with all of Transperfect's prior work (including its bills) in this matter.

HBC's Substantial Costs of Document Collection, Review, and Production

3. In early 2015, HBC retained Transperfect to assist with the collection, review and production of documents in response to the Federal Court Order which the Commissioner of Competition (the "**Commissioner**") obtained pursuant to Section 11 of the *Competition Act*, R.S.C. 1985, c. C-34, dated January 30, 2015 (the "**Section 11 Order**").

4. Based on Transperfect's invoices for this matter, Transperfect expended more than 4,200 person hours over a three-month period for the collection, review and production of the approximately 27,000 documents produced in response to the Section 11 Order (all of which are also listed in Schedule 1 of HBC's AOD). Transperfect invoiced HBC approximately US\$265,000 for this work.

5. In 2017, after this proceeding was commenced, Transperfect again assisted HBC in the collection, review and production of documents for the AOD. Transperfect expended more than 2,300 person hours and invoiced HBC approximately US\$160,000 for this work, which resulted in the listing and production of approximately 10,000 additional Schedule 1 documents that were not previously produced in response to the Section 11 Order.

6. Accordingly, I conservatively estimate that HBC has already expended in excess of 6,500 person hours and US\$425,000 in gathering, reviewing and producing the 37,000 documents listed in Schedule 1 of its AOD. This estimate is very conservative and does not capture all of HBC's document review and production expenses, because it does not include any costs associated with the time spent by Stikeman for a variety of document-related tasks, including project management and quality control for the preparation of approximately 27,000 documents produced in response to the Section 11 Order and the approximately 10,000 additional documents produced along with HBC's AOD.

Length of Document Collection and Review Time Periods

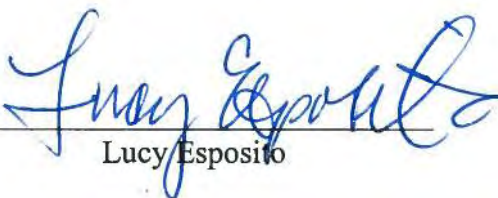
7. Following the issuance of the Section 11 Order on January 30, 2015, with the assistance of Transperfect it took HBC approximately three months to undertake and complete its document collection and review in response to that Order. HBC made its final document production in response to the Section 11 Order on April 30, 2015.

8. Following the issuance of the Scheduling Order by the Competition Tribunal in this proceeding on May 26, 2017, with the assistance of Transperfect it took HBC approximately four months to gather and review the approximately 10 ,000 additional documents which were produced to the Commissioner on September 29, 2017.

SWORN BEFORE ME at the City of
Toronto on November 21, 2017.



Commissioner for Taking Affidavits



Lucy Esposito

**Victoria Anne Hale, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 1, 2018.**

CT-2017-008

THE COMPETITION TRIBUNAL

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

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

CROSS-EXAMINATION OF LUCY ESPOSITO
held at the offices of ASAP Reporting Services Inc.,
333 Bay Street, Suite 900, Toronto, Ontario
on Monday, January 29, 2018 at 11:09 a.m.

REVISED TRANSCRIPT

APPEARANCES:

Mr. Alexander Gay on behalf of the Applicant

Mr. William S. Wu

Mr. Mark Walli

Mr. Eliot N. Kolers on behalf of the Respondent

Also present:

Ms. Beth Alexander

Mr. Adam Zimmerman

A.S.A.P. Reporting Services Inc.© 2018
940 - 100 Queen Street Ottawa, Ontario K1P 1J9 (613) 564-2727
900-333 Bay Street Toronto, Ontario M5H 2R2 (416) 861-8720

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1	Letter from Stikeman Elliott,	15	
2	Ashley Pietrowski to Andrew.		
3	D. Little dated March 4, 2015		
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5	A	marked for identification only	23
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1 Toronto, Ontario,

2 --- Upon commencing on Monday, January 29, 2018,
3 at 11:09 a.m.

4 MR. KOLERS: We are here, obviously, for
5 your cross-examination of Ms. Esposito on her
6 affidavit sworn on Friday.

7 There is one addition that we just wanted
8 to make to the affidavit and do it on this
9 transcript, but in paragraph 6 there is a statement
10 that HBC made its final document production in
11 response to the Section 11 order on April 30th, 2015
12 and while that is true, there was some subsequent
13 back and forth between the bureau and HBC's counsel.
14 And that, in fact, the final amended certificate of
15 completion of the Section 11 deliveries was dated
16 August 31, 2015.

17 I should just add that in the amended
18 certificate and the subsequent back and forth was all
19 related to the information return, as opposed to
20 document production, and so that's why that oversight
21 happened in the preparation of the affidavit. But I
22 just want it to be clear that it should, for
23 completeness, say August 31, 2015 is when the final
24 Section 11 compliance was completed.

25 MR. GAY: All right. Thank you.

1 SWORN: LUCY ESPOSITO

2 CROSS-EXAMINATION BY MR. GAY:

3 1 Q. Now, Ms. Esposito, you've got your
4 affidavit in front of you?

5 A. I do.

6 2 Q. And you've been sworn in today, as
7 well?

8 A. Yes.

9 3 Q. And you are an employee or a paralegal
10 at Stikeman Elliott; is that correct?

11 A. Yes.

12 4 Q. And you hold the title of E-Discovery
13 case manager; is that correct?

14 A. Correct.

15 5 Q. Are you the only case manager on this
16 file?

17 A. Yes.

18 6 Q. And who preceded you before this?

19 A. I don't believe anyone.

20 7 Q. So, there was no paralegal charged
21 with managing documents prior to May of 2017?

22 A. Correct.

23 8 Q. So the production of Section 11 was
24 done only by what, by a private third-party
25 supplier?

1 A. I don't have any knowledge of who that
2 would be.

3 9 Q. Okay.

4 A. Or who that was. Sorry.

5 10 Q. I see. And as E-Discovery case
6 manager, what does that position currently entail?

7 A. It entails managing cases throughout
8 the discovery process.

9 11 Q. And one of the many cases you manage
10 is this one, is that it?

11 A. Correct.

12 12 Q. And as part of that you would be
13 managing documents and interacting with third-party
14 suppliers?

15 A. I would be interacting with the --
16 with our client, with the service provider which
17 would be the vender and also with my case team.

18 13 Q. Your case team, so there are other
19 individuals working on this file, as well, other
20 than yourself?

21 A. Counsel.

22 14 Q. Counsel. Fair enough. And certainly
23 as you are managing documents, do you physically
24 have the documents with you or are these documents
25 held by your third-party supplier?

1 A. They would be held with the vendor
2 that we engage.

3 15 Q. So, they wouldn't be physically in
4 your office?

5 A. Correct.

6 16 Q. And just so I understand correctly,
7 part of your job is to assess and come up with an
8 affidavit of documents; correct?

9 A. Part of my job is to oversee the
10 process.

11 17 Q. Right, and eventually come up with a
12 product namely an affidavit of documents; is that
13 correct or incorrect?

14 A. That would be incorrect.

15 18 Q. So, who does the affidavit of
16 documents? Who pulls that together and prints it?
17 Is it your third-party supplier?

18 A. It depends.

19 19 Q. Okay. All right. In this case, who
20 would have done the affidavit of documents and who
21 would have printed it?

22 MR. KOLERS: Just for the sake of clarity,
23 I mean counsel is also very involved in the
24 preparation of an affidavit of documents. So, when
25 you are talking about who would it involve in

1 pulling it together, what exactly are you referring
2 to?

3 BY MR. GAY:

4 20 Q. Well, we'll -- okay, let me back up a
5 little bit here.

6 So, in terms of assessing documents for
7 relevance, is that something you do?

8 A. No.

9 21 Q. So, who's doing that?

10 A. The contract vendors.

11 22 Q. In so doing, you would have provided
12 them with a copy of the Notice of Application?

13 A. Correct.

14 23 Q. And so if I understand correctly from
15 your affidavit, as well, you had no involvement
16 prior to May of 2017?

17 A. That's correct.

18 24 Q. So if I understand correctly, in terms
19 of your projections and the information you provide
20 here that predates May 2017 that would have been
21 based what, on your physical review of the file?

22 A. A review of the file and discussions
23 with counsel.

24 25 Q. Just so I understand correctly, the
25 inquiry would have commenced in March of 2014; is

1 that correct?

2 MR. KOLERS: That's what paragraph 3 of
3 the affidavit --

4 BY MR. GAY:

5 26 Q. That's what it says, yes.

6 A. Correct.

7 27 Q. Just so I understand correctly, and
8 just for my benefit, from March of 2014, from the
9 moment the inquiry was commenced up until May of
10 2017, of course you had no involvement in this file?

11 A. Correct.

12 28 Q. All right. Did you have any previous
13 involvement in the production or in producing
14 documents under Section 11 order, prior to your
15 involvement in this file?

16 MR. KOLERS: And the Section 11 order in
17 this case?

18 BY MR. GAY:

19 29 Q. Not in this case. In any case. Have
20 you ever had any involvement in producing documents
21 under a Section 11 order?

22 A. Can you rephrase the question please?

23 30 Q. Okay. Do you know what a Section 11
24 order is?

25 A. Yes.

1 31 Q. Have you ever been involved in the
2 production of documents, as it relates to a
3 Section 11 order?

4 A. No.

5 32 Q. But you know that there are orders
6 that are issued by the Federal Court; correct?

7 A. Correct.

8 33 Q. And you've appended a copy of the
9 order or the Section 11 order to your affidavit of
10 documents -- or your affidavit that's in front of
11 you and that's found at Exhibit A; is that correct?

12 A. Correct.

13 34 Q. And so you would know that a
14 Section 11 order has two elements to it. It has a
15 schedule 1 and a schedule 2; is that correct?

16 A. Correct.

17 35 Q. And you've reviewed schedule 1 and
18 schedule 2?

19 A. Correct.

20 36 Q. And schedule 1 relates to -- if you
21 want to turn to it, that's found at page 16. That
22 is schedule 1 in front of you?

23 A. Correct.

24 37 Q. It's entitled, "Records to be produced
25 pursuant to paragraph 11(1)(b) of the competition

1 act.

2 A. Correct.

3 38 Q. So, you are required to produce
4 records or documents as it relates to what's found
5 and described in schedule 1; correct?

6 A. Correct.

7 39 Q. Then you turn to schedule 2 and it
8 says, "Information to be returned, pursuant to
9 paragraph 11(1)(c) of the Competition Act.

10 MR. KOLERS: That's on page 20.

11 THE WITNESS: Correct.

12 BY MR. GAY:

13 40 Q. And so I guess the difference between
14 schedule 1 and schedule 2 is schedule 1 asks that
15 you produce documents, and schedule 2 it's asking
16 for you to provide information, as it relates to
17 very specific questions that have been put in the
18 order; is that correct?

19 MR. KOLERS: If you have an understanding.

20 BY MR. GAY:

21 41 Q. Sorry, can we go back to what page
22 schedule 1 was on?

23 MR. KOLERS: 16.

24 THE WITNESS: Correct.

25 BY MR. GAY:

1 42 Q. So schedule 2 is asking for you to do
2 some analysis and to provide some information in
3 respect of very specific questions that have been
4 asked by the commissioner.

5 MR. KOLERS: It speaks for itself,
6 Mr. Gay.

7 BY MR. GAY:

8 43 Q. I want to see what her understanding
9 is; is that correct?

10 A. That's correct.

11 44 Q. All right. Eventually you produce
12 documents or documents in your review, you would
13 know that documents were produced in respect of
14 schedule 1.

15 A. Correct.

16 45 Q. And those documents were eventually
17 rolled into the affidavit of documents? Those were
18 eventually produced after the Notice of Application
19 was filed; correct?

20 A. Correct.

21 46 Q. Now, turn to page 12 of the order and
22 that's the actual -- I'll give you time to pull it
23 up, page 12, paragraph 14; do you see that?

24 A. Yes.

25 47 Q. And you've reviewed that, have you, or

1 have you read that?

2 A. Yes.

3 48 Q. And paragraph 14 says that:

4 "All requirements are including the
5 returns, things, written documents of
6 information shall be completed within 90
7 calendar days of the service of this
8 order." [As read]

9 Correct?

10 THE WITNESS: Correct.

11 BY MR. GAY:

12 49 Q. So, is it your understanding that you
13 were required to produce the documents within 90
14 days; is that correct?

15 MR. KOLERS: Well, Ms. Esposito -- as I
16 already told you, she wasn't at the time at the firm
17 at the time this happened. She wasn't involved in
18 the preparation of this particular response.

19 MR. GAY: All right, well --

20 MR. KOLERS: But the order speaks for
21 itself.

22 BY MR. GAY:

23 50 Q. The order speaks for itself. But is
24 it your understanding that you are required to
25 produce the documents within 90 days?

1 MR. KOLERS: She can read the document,
2 Mr. Gay.

3 BY MR. GAY:

4 51 Q. Well, let her answer. Is that her
5 understanding. She's also sworn --

6 A. Yes.

7 52 Q. -- paragraph 6 of her affidavit --

8 A. Correct.

9 53 Q. -- which is otherwise, so let's get to
10 it. Okay. Fair enough. And you see in there it
11 says:

12 "Provided the production of records
13 things delivered, written returns ...
14 shall be conducted on a rolling basis
15 for the first production of records and
16 things delivered, written documents,
17 information taking place no longer than
18 30 days following the service of the
19 order." [As read]

20 Do you see that part of it, as well?

21 A. Yes.

22 54 Q. So there was essentially a requirement
23 for you to produce documents on a rolling basis
24 prior to the expiry of the 90 days; correct?

25 A. Yes.

1 55 Q. Let me just show you this here and
2 then we can mark this as an exhibit.

3 EXHIBIT NO. 1: Letter from
4 Stikeman Elliott, Ashley Pietrowski
5 to Andrew D. Little dated March 4, 2015

6 BY MR. GAY:

7 56 Q. In your review of the file, have you
8 seen this document?

9 MR. KOLERS: Do you know whether you've
10 seen it?

11 THE WITNESS: No.

12 BY MR. GAY:

13 57 Q. You didn't see the document. Okay.
14 It's a document dated --

15 MR. KOLERS: Sorry, you don't know whether
16 you've seen it?

17 THE WITNESS: I don't know if I've seen
18 this. I haven't completed a review on it so...

19 BY MR. GAY:

20 58 Q. You haven't completed a review of
21 what?

22 A. I'm reading it.

23 59 Q. Okay, fair enough. You can read it.

24 A. Again, can you ask the question?

25 60 Q. Right. so, this letter would have been

1 sent on March the 4th, 2015 and it would have been
2 in response to the requirement that you produce
3 documents by no later than 30 calendar days
4 following the service of the order.

5 And in it we have the response of schedule
6 1, spec 6, the response of schedule 1, spec 12, the
7 response of schedule 1, spec 15 and the response to
8 schedule 1, spec 16; do you see that?

9 A. Yes.

10 61 Q. So, in fact, you've produced documents
11 prior to the expiry of the 90 days and certainly
12 within the 30 days as required, pursuant to the
13 order; is that correct?

14 MR. KOLERS: Ms. Esposito was not involved
15 and has already told you she does not recall seeing
16 this document.

17 MR. GAY: All right.

18 MR. KOLERS: Okay.

19 BY MR. GAY:

20 62 Q. Do you have any reason to believe that
21 this is not accurate, this letter?

22 A. I have no reason to believe that's
23 inaccurate.

24 63 Q. Do you have any reason to believe that
25 the documents were not delivered to the Commissioner

1 prior to the expiry of the 30 days following the
2 issuance of the order?

3 A. No.

4 64 Q. Turn to paragraph 6 of your affidavit,
5 please. It says:

6 "With the assistance of transfer for HB
7 spanned (sic)approximately three months to
8 undertake and complete its document
9 collection and review in response to the
10 Section 11 order. HBC made its final
11 document production in response to
12 section 11 order on April 15th,(sic) 2015.
13 In total HBC provided approximately
14 27,000 documents in addition to its
15 written return of information."

16 And we've had some precision from your
17 counsel today saying that the amended certificate was
18 delivered on August 31, 2015. But certainly you
19 don't mention in this paragraph that you, in fact,
20 provided documents prior to the expiry of 90 days or
21 that you provided documents within 90 days because it
22 was required of you, pursuant to a court order.

23 You don't mention that in this.

24 A. That's correct.

25 65 Q. Is there any reason why you didn't

1 mention that?

2 A. Not that I'm aware of.

3 66 Q. Is it not important to mention, to
4 tell the court that you were required to produce
5 prior to the 90 days and that you, in fact, produced
6 prior to the 90 days --

7 MR. KOLERS: Don't answer that question.

8 BY MR. GAY:

9 67 Q. -- within 30 days?

10 MR. KOLERS: Don't answer that question.

11 Mr. Gay, you are bullying the witness and she's
12 included the Section 11 order as an exhibit to her
13 affidavit which speaks for itself.

14 BY MR. GAY:

15 68 Q. All right. Let's turn to schedule 1
16 of the order again. Let me ask you something: Have
17 you looked at the Notice of Application? Have you
18 read it?

19 A. Yes.

20 69 Q. Have you considered or in any way
21 assessed whether the documents that were required
22 under the Section 11 order in schedule 1 were
23 documents that would have been required to be
24 produced pursuant to the rules under the pleading,
25 that is the Notice of Application; have you

1 considered that?

2 MR. KOLERS: I don't understand that
3 question.

4 BY MR. GAY:

5 70 Q. Turn to page 16. You have that in
6 front of you?

7 MR. KOLERS: Uh-hmm.

8 BY MR. GAY:

9 71 Q. And maybe turn to items 1, paragraph
10 1(b)(ii); do you see that? The regular price, the
11 reduced price of comparable sleep sets offered by
12 competitor HBC; do you see that?

13 A. Yes.

14 72 Q. Have you looked at the Notice of
15 Application?

16 A. Yes.

17 73 Q. Have you read the notice of
18 application?

19 A. Yes.

20 74 Q. And you're able to assess what
21 documents would be required, pursuant to the Notice
22 of Application?

23 MR. KOLERS: Sorry, it's not her job to
24 make that assessment.

25 BY MR. GAY:

1 75 Q. All right. Is it --

2 MR. KOLERS: And she didn't make the
3 assessment in this case.

4 BY MR. GAY:

5 76 Q. All right. As you look at the regular
6 price, reduced price of comparable sleep sets
7 offered by competitor of HBC, in your opinion is
8 that something that would be required for you to
9 produce pursuant to the current Notice of
10 Application?

11 REF MR. KOLERS: Refusal. Her opinion on that
12 question, Mr. Gay, is completely irrelevant.

13 BY MR. GAY:

14 77 Q. All right. Let's mark this one as an
15 exhibit.

16 MR. KOLERS: What is it first?

17 MR. GAY: It's your document.

18 MR. KOLERS: That's fine. But what is it?

19 MR. GAY: Well, it's a document, Zellers
20 Clearance Outlets.

21 MR. KOLERS: Okay.

22 MR. GAY: And the number on the top is
23 HBC. And that's your number -- 50719, and it was a
24 document that was produced, pursuant to the
25 Section 11 order.

1 MR. KOLERS: Okay.

2 MR. GAY:

3 78 Q. Have you seen this document before?

4 A. No.

5 79 Q. And you agree with me the document is
6 in relation to Zellers; is that correct?

7 MR. KOLERS: The document is what the
8 document is, Mr. Gay.

9 BY MR. GAY:

10 80 Q. All right. Do you have any reason to
11 believe that it wasn't produced pursuant to the
12 Section 11 order?

13 MR. KOLERS: If you say it was produced
14 pursuant to the Section 11 order, we believe you.

15 We don't know every document that was
16 produced in accordance with the Section 11, sitting
17 here today.

18 BY MR. GAY:

19 81 Q. If you disagree, you'll let me know.

20 MR. KOLERS: Is the number that you've
21 cited for the document is that the record number in
22 the affidavit of documents or in the Section 11
23 response?

24 MS. ALEXANDER: It's in the -- it's from the
25 affidavit of documents.

1 MR. KOLERS: So, that's the affidavit of
2 documents number.

3 MS. ALEXANDER: Yeah, I think they're the
4 same though; the number's the same.

5 BY MR. GAY:

6 82 Q. All right.

7 MR. KOLERS: Sorry, you are not asking any
8 questions about it?

9 MR. GAY: Well you've confirmed that, in
10 fact, it was a document that was produced and if you
11 have any reason to believe that it isn't, you'll let
12 me know, but it was a document produced pursuant to
13 the Section 11 order.

14 MR. KOLERS: Well, I will say that I
15 haven't confirmed that; you've confirmed that.

16 MR. GAY: I've confirmed that is the
17 number, unless you have reason to dispute. She
18 doesn't seem to know whether it has or hasn't, but
19 she says that she's gone through the file, knows the
20 file and has been involved and reviewed all files
21 prior to 2017, so I'm assuming that she knows the
22 documents.

23 If she doesn't, then you'll let me know
24 whether it's not your document.

25 MR. KOLERS: I'll let you know if it's not

1 our document. We can mark it as Exhibit A for
2 identification purposes on this examination.

3 MR. GAY: Fair enough.

4 EXHIBIT A: Marked for
5 identification

6 BY MR. GAY:

7 83 Q. Turn to schedule 2, page 20 of the
8 document.

9 MR. KOLERS: That's schedule 2 of the
10 Section 11 order?

11 BY MR. GAY:

12 84 Q. Of the section 11 order.

13 MR. KOLERS: Page 20 of Exhibit A.

14 MR. GAY: Of Exhibit A of her affidavit.
15 Correct.

16 BY MR. GAY:

17 85 Q. All right. You would agree with me
18 that this isn't typically what one would go through
19 in producing an affidavit of documents. That is,
20 one doesn't necessarily answer questions; correct?

21 A. I'm sorry. Can you repeat the
22 question?

23 86 Q. In producing an affidavit of
24 documents, this isn't something that would be
25 required of you; is that correct?

1 MR. KOLERS: Sorry, what wouldn't be
2 required of her?

3 BY MR. GAY:

4 87 Q. Answering questions and the questions,
5 in particular, that are found here at Schedule 2; am
6 I correct?

7 MR. KOLERS: Do you understand the
8 question?

9 THE WITNESS: I don't understand the
10 question.

11 BY MR. GAY:

12 88 Q. You have questions in schedule 2.

13 A. Correct.

14 89 Q. And these are questions that have been
15 crafted by the Commissioner. This is not part of
16 the discovery or document discovery process that one
17 would generally see in a typical case, involving
18 only a pleading; is that correct?

19 MR. KOLERS: Do you know the answer to
20 that?

21 THE WITNESS: I don't. I don't...

22 BY MR. GAY:

23 90 Q. Okay, you're involved in processing
24 documents typically in a statement of claim, for
25 instance; correct?

1 A. No.

2 91 Q. You're not. You never process
3 documents or help and compile documents for a
4 statement of claim?

5 A. Correct, I do not.

6 92 Q. So you are unable to tell me that --
7 let me see if --

8 MR. KOLERS: Mr. Gay, let me just say one
9 thing.

10 MR. GAY: No, you know what?

11 MR. KOLERS: No, no, no, no.

12 MR. GAY: Let me finish. I've let you
13 interfere --

14 MR. KOLERS: No.

15 MR. GAY: -- a few too many times, Mr.
16 Kolers.

17 MR. KOLERS: No, you haven't let me
18 interfere at all. You are cross-examining a clerk
19 who swore an affidavit relating to some dates and
20 some costs.

21 MR. GAY: Correct.

22 MR. KOLERS: And you are trying to push
23 her around in a manner that is completely unfair.

24 MR. GAY: I don't --

25 MR. KOLERS: I would ask you to be fair to

1 the witness and ask proper questions, given the
2 evidence she's provided.

3 MR. GAY: I am asking her a proper
4 question and the question is what's found in
5 Schedule 2. That is a process that's very specific
6 to a Section 11 proceeding; is that correct?

7 MR. KOLERS: That's an argument you can
8 make and she's already told you she doesn't
9 understand your question as it relates to her job.

10 BY MR. GAY:

11 93 Q. Are you asked -- in compiling
12 documents for an affidavit of documents are you
13 asked to answer written interrogatories in preparing
14 a document?

15 A. No.

16 94 Q. Okay. And so this -- and what's found
17 at schedule 2 is not something that would typically
18 be found in a typical proceeding involving either a
19 notice of application or a statement of claim; is
20 that correct?

21 MR. KOLERS: You can answer whether you've
22 seen it in your experience.

23 THE WITNESS: I have not seen it, in my
24 experience.

25 BY MR. GAY:

1 95 Q. Fair enough.

2 MR. KOLERS: You are turning her into an
3 expert witness now, I think.

4 MR. GAY: Well, she swore the affidavit?

5 MR. KOLERS: There is no expertise in the
6 affidavit.

7 BY MR. GAY:

8 96 Q. Now, Transperfect was retained to
9 produce documents in respect of the Section 11
10 order; is that correct?

11 MR. KOLERS: No, Transperfect is a vendor;
12 the production was made by HBC.

13 BY MR. GAY:

14 97 Q. Oh, I see. But the cost that you've
15 identified in your affidavit of documents relate to
16 the vendor and the efforts they put into producing
17 and responding to the Section 11 order; is that
18 correct?

19 MR. KOLERS: You mean the affidavit? The
20 costs referred to in Ms. Esposito's affidavit?

21 MR. GAY: That's correct. Those are the
22 only costs --

23 MR. KOLERS: You refer to the affidavit of
24 documents.

25 MR. GAY: Those are the only costs that

1 are referred to.

2 MR. KOLERS: No, you referred to --

3 MR. GAY: Mr. Kolers, you are interfering.

4 MR. KOLERS: You referred to the affidavit
5 of documents.

6 MR. GAY: Those are the only costs that
7 are referred to.

8 MR. KOLERS: No, you referred to the --

9 MR. GAY: Mr. Kolers you are interfering.

10 MR. KOLERS: You referred to the affidavit
11 of documents.

12 (Unclear: multiple speakers)

13 MR. KOLERS: I'm clarifying it for the
14 witness.

15 MR. GAY: It's improper, okay. If she has
16 a problem, she will let me know if she doesn't
17 understand me. You've interfered with just about
18 every question I've put to her.

19 MR. KOLERS: That's not true at all.

20 BY MR. GAY:

21 98 Q. So my question again: The costs that
22 have been referred to in your affidavit of documents
23 as they relate to the production --

24 MR. KOLERS: Stop. You are referring to
25 the costs referred to in her affidavit?

1 MR. GAY: That is correct.

2 MR. KOLERS: Okay, you keep referring to
3 her affidavit of documents.

4 MR. GAY: No, it's her affidavit. It's an
5 affidavit.

6 MR. KOLERS: And you keep saying --
7 (Unclear: multiple speakers)

8 MR. GAY: For November 21st.

9 MR. KOLERS: -- affidavit of documents.
10 Okay.

11 (Unclear: multiple speakers)

12 MR. GAY: All right.

13 MR. KOLERS: You keep saying affidavit of
14 documents.

15 MR. GAY: All right. You know what,
16 you're --

17 MR. KOLERS: And I'm seeking
18 clarification.

19 MR. GAY: There's no clarification; it's
20 in front of her. She has it.

21 MR. KOLERS: You will see what the
22 transcript says when you read it.

23 BY MR. GAY:

24 99 Q. All right. Paragraphs 5 and 6 of her
25 affidavit. You refer to "costs."

1 A. Correct.

2 100 Q. And those costs that you mention --

3 MR. WALLI: Sorry, which affidavit are you

4 referring to right now?

5 MR. GAY: Are you here to ask me

6 questions? He is here.

7 MR. KOLERS: Mr. Gay --

8 MR. GAY: You are not going to ask

9 questions.

10 MR. KOLERS: You don't have hit the table.

11 MR. GAY: Is that understood?

12 MR. KOLERS: And you don't have raise your

13 voice.

14 BY MR. GAY:

15 101 Q. Fair enough. So, let's move on.

16 November 21st, 2017, that was your affidavit --

17 MR. KOLERS: Stop yelling.

18 MR. GAY: I am not yelling.

19 MR. KOLERS: You are.

20 MR. GAY: Okay.

21 MR. KOLERS: You are now talking about the

22 first affidavit.

23 BY MR. GAY:

24 102 Q. So, let's get on with this. I am

25 talking about the first affidavit and it's the only

1 one that's signed November 21st, 2017. You see
2 that.

3 MR. KOLERS: Hold on. Let's take a big
4 deep breath here.

5 MR. GAY: Yeah.

6 MR. KOLERS: Okay?

7 MR. GAY: I don't need to take a deep
8 breath.

9 MR. KOLERS: Yes, you do.

10 MR. GAY: Let's move on.

11 MR. KOLERS: No, take --

12 BY MR. GAY:

13 103 Q. Paragraph 5 and 6.

14 MR. KOLERS: Of which affidavit?

15 BY MR. GAY:

16 104 Q. The one that she signed. It's the
17 only one that's dated November 21st, the first one
18 she signed.

19 MR. KOLERS: Okay. So that's Exhibit C to
20 the affidavit on which you are cross-examining her.

21 BY MR. GAY:

22 105 Q. I'm asking her again, November 21st,
23 2017. You swore an affidavit, correct?

24 A. Correct.

25 106 Q. All right.

1 MR. KOLERS: So paragraphs 5 and 6.

2

3 BY MR. GAY:

4 107 Q. Now you say in paragraph 4:

5 "Transperfect invoiced this matter.

6 Transperfect expended more than 4,200

7 person hours over a three-month period

8 for the collection, review, production

9 of the approximately 27,000 documents."

10 [As read]

11 Correct?

12 A. Correct.

13 108 Q. Now, Transperfect's efforts would have

14 been in respect of all matters in relation to the

15 Section 11 order?

16 A. Can you rephrase that question?

17 109 Q. You were billed or someone --

18 Transperfect invoiced HBC US\$265,000.

19 A. Correct.

20 110 Q. And that was in order to respond to

21 the Section 11 order; is that correct?

22 A. Correct.

23 111 Q. And there are two component parts to

24 the Section 11 order, schedule 1 and schedule 2

25 which I've put to you; correct?

1 A. Correct.

2 MR. KOLERS: Mr. Gay, for the clarity of
3 the record, Transperfect has nothing to do with
4 schedule 2.

5 BY MR. GAY:

6 112 Q. Okay. Maybe you can help me: Is it
7 your understanding or -- and you may not have any
8 understanding, but that mattresses change from year
9 to year, the names of the mattresses change from
10 year to year; are you aware of that?

11 A. No.

12 113 Q. You're not aware of that. Okay. Have
13 you looked at the responses -- I'm going to give you
14 this document and we can mark that as an exhibit, as
15 well.

16 MR. KOLERS: What is it?

17 BY MR. GAY:

18 114 Q. They are the responses provided, I
19 believe, by yourself, Mr. Kolers, in response to the
20 written interrogatories and we can mark that as an
21 exhibit, as well.

22 MR. KOLERS: This is the response to the
23 notice of application.

24 BY MR. GAY:

25 115 Q. Sorry, sorry. Response to the notice

1 of application. All right. And 26:

2 "Hudson's Bay offers its particular
3 mattresses ... for sale for
4 approximately 12 months, as the mattress
5 manufacturers typically update or change
6 their mattress models and collections
7 each year. Accordingly, Hudson's Bay
8 will discontinue selling the
9 manufacturers' 'old' (previous year)
10 models and replace them with new current
11 [mattresses]."

12 So, what we're dealing with, really, is a
13 change of mattress and mattress lines from year to
14 year; is that your understanding or you have no
15 understanding of that or ...

16 A. I don't have any understanding of
17 that.

18 116 Q. Just for identification purposes, just
19 enter that, I think.

20 EXHIBIT B: Marked for
21 identification.

22 BY MR. GAY:

23 117 Q. Just so I understand correctly and are
24 you able to tell me are we -- so if we are you to
25 produce documents from 2/15 until today, that is

1 2/17 and beyond, you wouldn't necessarily have to go
2 back in time and look for documents; is that
3 correct?

4 A. No.

5 118 Q. So it's not correct?

6 A. Correct. It's not correct. We'd
7 still have to go back and look for documents.

8 119 Q. Why would you have to go back prior to
9 2/15 to look for documents for documents, that are
10 only -- or the only documents we are interested in
11 are documents that post-date 2/15?

12 A. Sorry, can you re --

13 120 Q. You've done your searches so far and
14 you've produced an affidavit of documents right up
15 until 2015; correct?

16 A. Correct.

17 121 Q. And so what we're asking for is that
18 which postdates 2015, that is the period from 2015
19 and right up until today; is that correct?

20 A. Correct.

21 122 Q. And so, as you're conducting your
22 searches, you would be searching, you wouldn't
23 necessarily have to go back in time and look at
24 anything that postdates or predates 2015; correct;
25 you've already done that?

1 A. Correct.

2 123 Q. And as it relates to the period 2015
3 until present, have you had any discussion with
4 Transperfect on the number of documents that are
5 involved?

6 A. No.

7 124 Q. So, you don't know how many documents
8 you'd have to search through?

9 A. Correct.

10 125 Q. And is there a reason why you haven't
11 communicated to Transperfect?

12 A. Transperfect would have no knowledge
13 about how much documents our clients would have.

14 126 Q. So, the client has the document from
15 2015 until present and they haven't given to
16 Transperfect?

17 A. We haven't identified the documents
18 that would be in scope.

19 127 Q. Okay, but do you physically know how
20 many documents you'd have to search through for the
21 period 2015 until today, in order to find the
22 documents that are relevant?

23 A. I do not.

24 128 Q. You haven't conducted that exercise?

25 A. Correct.

1 129 Q. And you haven't asked Transperfect to
2 conduct that exercise either?

3 A. Correct.

4 130 Q. So I'm just trying to understand then,
5 when you assess the period of four months in order
6 to complete your document production, you are basing
7 it only on what has occurred up to date; is that
8 correct?

9 A. I'm basing -- I'm basing my opinion on
10 what has happened previously up to date.

11 131 Q. And that would include the Section 11
12 process?

13 A. Correct.

14 132 Q. Just so I'm clear, we don't know the
15 data or the volume of data that would have to be
16 processed from 2015 right up until today?

17 A. Correct.

18 133 Q. But the raw data -- and maybe you've
19 answered this and forgive me if you have, but the
20 raw data that is the database that contains all the
21 documents, is that not with Transperfect at this
22 point in time?

23 A. It is.

24 134 Q. Okay.

25 MR. KOLERS: No, no, just to be clear.

1 What's with Transperfect is the database. And I'm
2 sorry if I've misunderstood your question.

3 MR. GAY: Mm-hmm.

4 MR. KOLERS: But what's with Transperfect
5 is the database of the documents that have been
6 collected, which is the set up to 2015.

7 BY MR. GAY:

8 135 Q. So, anything that postdates 2015 is
9 with HBC?

10 MR. KOLERS: Has not been collected,
11 correct.

12 THE WITNESS: Has not been collected.

13 MR. KOLERS: That was your question?

14 MR. GAY: That is the question. Yes.

15 BY MR. GAY:

16 136 Q. And just so I understand correctly,
17 you have no quotes or assessments from Transperfect
18 on what it would take in order to do the job, that
19 is produce the affidavit of documents. You have no
20 quotes from them?

21 A. I have no received no quotes from
22 them.

23 137 Q. And you haven't made any efforts to
24 obtain a quote from them?

25 A. Correct.

1 138 Q. Am I correct that on the last -- are
2 you aware of how many documents you had to go
3 through in order to produce the last affidavit of
4 documents, that is the affidavit of documents that
5 had 10,000 documents identified?

6 A. I do not recall.

7 139 Q. You don't know the volume of data that
8 you would have gone through in order to produce the
9 10,000 documents?

10 A. I have an approximate number.

11 140 Q. What is it?

12 A. 74 gigs.

13 141 Q. 74 gigs, in order to produce the
14 10,000 documents?

15 A. Correct.

16 142 Q. And those 74 gigs, how did you
17 identify those 74 gigs?

18 A. I'm not really understanding the
19 question.

20 143 Q. What was involved or how were you able
21 to isolate these 74 gigs? Were they all documents
22 for a given period of time? Is that what you were
23 looking at?

24 A. Right. It was for a specific time
25 period.

1 144 Q. Okay, and the time period would be
2 from when to when?

3 A. With respect to?

4 145 Q. The 74 gigs, so what period does that
5 cover?

6 A. From July 2013 to January 2015.

7 MR. KOLERS: I think we went back to 2012,
8 actually.

9 THE WITNESS: July 2012 to January 2015.

10 BY MR. GAY:

11 146 Q. Okay, fair enough. Have you been made
12 aware of Transperfect's capabilities in processing
13 documents and the volume of documents they can
14 process?

15 A. I'm not sure I understand the
16 question.

17 147 Q. Have they told you how many documents
18 they can process on a daily basis?

19 A. No.

20 148 Q. Have they told you how much data they
21 can process on a daily basis?

22 A. No.

23 149 Q. And you don't know because you haven't
24 asked the question; right?

25 A. Correct.

1 MR. GAY: Can I just give you this and we
2 can enter this as an exhibits as well.

3 MR. KOLERS: What is this?

4 MR. GAY: 3, please.

5 MR. KOLERS: What is this?

6 MR. GAY: Just give me a second. This is
7 their web page of Transperfect and the services they
8 offer.

9 EXHIBIT C: Marked for
10 identification

11 BY MR. GAY:

12 150 Q. Right. And it says, "Process up to
13 17TB per day."

14 "TB" means terabytes; is that correct?

15 A. Correct.

16 151 Q. And 17 terabytes is a lot more than --
17 how many did you say 700 and --

18 A. 74 gigs.

19 152 Q. 74 gigs; is that correct?

20 A. Correct.

21 153 Q. And on page 2 it says, "Early data
22 assessment," so they do provide some assessment of
23 what it would take to do something.

24 You don't dispute that they can provide an
25 assessment of what it would take in order to process

1 documents.

2 MR. KOLERS: After the collection is done?

3 BY MR. GAY:

4 154 Q. Both before and after the collection
5 is done.

6 A. That's not what early assessment is.

7 155 Q. Okay, so what is early data
8 assessment?

9 A. This is after collection is done it's
10 giving counsel the ability to look at the documents
11 or the type of documents that was collected.

12 156 Q. Okay. That's fine.

13 A. Can I take a break?

14 157 Q. Sure.

15 --- Recess taken at 11:45 a.m.

16 --- Upon resuming at 11:51 a.m.

17 BY MR. GAY:

18 158 Q. All right. Let's go back on the
19 record.

20 MR. KOLERS: Are you done with this
21 Transperfect document?

22 MR. GAY: I am, yes.

23 MR. KOLERS: So it was marked Exhibit C
24 for identification.

25 MR. GAY: Yes.

1 MR. KOLERS: Thank you.

2 BY MR. GAY:

3 159 Q. I'm just trying to understand now. In
4 terms of your -- turning to your affidavit of
5 documents, paragraph 14 --

6 MR. KOLERS: So, this is now the affidavit
7 --

8 MR. GAY: -- her affidavit. I keep saying
9 "affidavit of documents." Her affidavit and it's the
10 one that she swore, I think, on Friday and it's
11 paragraph 14.

12 MR. KOLERS: Okay.

13 BY MR. GAY:

14 160 Q. Fair enough. Now, let's see if I
15 understand correctly. You'd agree with me that in
16 terms of producing documents and producing an
17 affidavit of documents involves money, correct? You
18 don't disagree with that?

19 A. No, I don't disagree with that.

20 161 Q. And it's here in your affidavit,
21 paragraph 14, you talk about the duplication;
22 correct?

23 A. Correct.

24 162 Q. And I just want to understand, you
25 haven't actually provided a number for the

1 duplication; correct?

2 A. A number of...

3 163 Q. A dollar value law for how much --

4 A. Correct.

5 164 Q. And when you say that you duplicate or

6 it would involve a duplication and the duplication

7 because of, for instance, project management, you

8 don't actually tabulate your time and say "X number

9 of hours per data project management," do you?

10 A. Yes.

11 165 Q. So, when you enter your time sheets on

12 daily basis, you put in "project management"?

13 A. Correct.

14 166 Q. In this case, have you conducted an

15 exercise of what the dollar value would be in the

16 duplication?

17 A. I have not.

18 167 Q. You simply suspect, based on your

19 experience, that it would result in some

20 duplication?

21 A. Correct.

22 168 Q. Okay. Are you able to estimate what

23 that duplication would be, a dollar value?

24 A. I can't give you a dollar value.

25 169 Q. Uh-hmm.

1 A. But I can tell that you duplication
2 does come in as part of the collection of processing
3 and the project management, so that's where the
4 duplication would come in.

5 170 Q. Uh-hmm. Okay. Are you able to
6 estimate a number?

7 A. I am not able to estimate a number.

8 171 Q. On a percentage basis, do you know
9 generally what goes in or what percentage of your
10 overall cost of producing an affidavit of documents
11 would be project management?

12 A. It's very difficult to determine that.
13 There's very -- it's -- there's a lot of unknowns
14 here for me to speculate how much the cost would be.

15 172 Q. Now, in terms of just timelines and I
16 just want to see if I understand correctly. Your
17 affidavit says, "The inquiry commenced in March of
18 2014. We agree with that"

19 A. Correct.

20 173 Q. And the notice of application was
21 issued on February 22nd, 2017; is that correct?

22 A. Correct.

23 174 Q. And so the period between March, 2014
24 to February, 2017 is about two years and 11 months.

25 A. Correct.

1 175 Q. And that's about 35 months; correct?

2 A. Correct.

3 176 Q. As part of the processes, you knew

4 that, or you know because you've seen the Section 11

5 order, that there is a Section 11 that was an order

6 that was issued in what we call the Bs and Cs, that

7 is where you are asked to produce documents and also

8 answer questions, correct, the written returns?

9 A. Correct.

10 177 Q. And I can show you this document which

11 is the affidavit that was filed in support of the Bs

12 and Cs. When I refer to Bs and Cs, you will know

13 that I'm referring to Section 11(b) and (c)?

14 A. Okay.

15 178 Q. And this is the affidavit that was

16 filed in support of that and this is at paragraph

17 26.

18 MR. KOLERS: Oh, sorry, this is the

19 affidavit sworn to obtain the Section 11 order.

20 BY MR. GAY:

21 179 Q. Is that's correct, Adam? Yes. That's

22 correct?

23 A. And I'm looking at paragraph 26?

24 180 Q. 26. Right. You see that on there and

25 there is a date of January 12th, 2015; correct?

1 A. Correct.

2 181 Q. All right. And so you don't disagree
3 with me that there was a pre-issuance dialogue,
4 which is part of the process that's involved here
5 before the issuance of the order.

6 MR. KOLERS: She wouldn't know, but I can
7 confirm that there was a pre-issuance dialogue.

8 MR. GAY: Fair enough.

9 MR. KOLERS: I'm not sure we've actually
10 seen this affidavit before though. I can't recall.

11 BY MR. GAY:

12 182 Q. I imagine it would have been served on
13 you, but --

14 MR. ZIMMERMAN: I'm not sure that it would
15 have been.

16 MR. KOLERS: I think we only received the
17 order. I think it's filed under seal.

18 MR. ZIMMERMAN: Not sealed, but it is ex
19 parte applications.

20 BY MR. GAY:

21 183 Q. Anyways, okay, I can take it back.

22 There's no disagreement, I think, is
23 there, Mr. Kolers, that pre-issuance dialogue would
24 have occurred on or about January 12th?

25 MR. KOLERS: I don't know if it was

1 January 12th, but there was a pre-issuance dialogue.

2 BY MR. GAY:

3 184 Q. And the order was eventually issued on
4 January 30th, 2015 and you have a copy of that order
5 in front of you; correct?

6 A. That's exhibit --

7 MR. KOLERS: That's Exhibit A.

8 THE WITNESS: Correct.

9 BY MR. GAY:

10 185 Q. Fair enough. Okay, and based on what
11 your counsel told us today, the final certificate of
12 completion for this exercise would have been
13 completed some time in August; is that correct?

14 MR. KOLERS: Yeah, there was an initial
15 certificate, I think, on April 30th.

16 MR. GAY: Right.

17 MR. KOLERS: Some additional questions and
18 back and forth and then an amended final certificate
19 was delivered on August 31st, 2015.

20 BY MR. GAY:

21 186 Q. Fair enough. So, the period between
22 January 12th and ending in August would cover a
23 period of about 7 to 8 months; correct?

24 MR. KOLERS: That's fair.

25 BY MR. GAY:

1 187 Q. It's fair to say then that the Bs and
2 Cs under Section 11 would have taken about 8 months
3 to complete, correct, from the moment it started to
4 the end, that is when the certificate of completion
5 was issued in August?

6 MR. KOLERS: Certainly from the -- I mean,
7 I'm not going to debate the counting of months with
8 you.

9 MR. GAY: Right.

10 MR. KOLERS: Certainly between the initial
11 pre-issuance discussions and the completion of the
12 final certificate, that is seven and a half or so
13 months.

14 MR. GAY: Fair enough.

15 MR. KOLERS: I can't recall specifically
16 whether the hard work of responding to the
17 Section 11 order started in earnest before the order
18 was issued, as opposed to just a pre-issuance
19 discussion around the scope of the order.

20 BY MR. GAY:

21 188 Q. So, that's one of the Section 11s.

22 Fair enough. And then there was the
23 11(1)(a)s and those would have been the oral
24 discussions that would have been conducted.

25 A. Uh-hmm.

1 189 Q. So, when I refer to 11, you will know
2 what I'm referring to?

3 A. Mm-hmm.

4 190 Q. Yes?

5 A. Yes.

6 MR. GAY: Counsel, let me just give you
7 this. This was the affidavit that was filed in
8 support of it.

9 MR. KOLERS: I think he's now talking
10 about the thing that's in paragraph 7 here.

11 BY MR. GAY:

12 191 Q. Again, there would have been a
13 pre-issuance dialogue; you don't dispute that?

14 MR. KOLERS: I honestly don't recall about
15 this one, and I don't think we've seen this
16 affidavit either.

17 BY MR. GAY:

18 192 Q. So you're suggesting there wasn't a
19 pre-issuance dialogue or there was a pre-issuance
20 dialogue? Do you know or don't know?

21 MR. KOLERS: Ms. Esposito wouldn't know.

22 MR. GAY: Right.

23 MR. KOLERS: I'm not being cross-examined.
24 I can tell you, I don't remember.

25 BY MR. GAY:

1 193 Q. You don't remember.
2 An order was issued and the order was
3 issued an April 20th, 2016; you don't dispute that?
4 A. That's correct.

5 194 Q. And the 11(1)(a)s were completed some
6 time in June of 2016; is that correct?
7 A. Correct.

8 195 Q. Fair enough. So from beginning to
9 end, as part of the 11(1)(a) process that would have
10 been a period of anywhere between 3 to 4 months;
11 correct?
12 A. Correct.

13 196 Q. Without getting into the specifics
14 following June of 2016 are you aware of any
15 discussions that would have been had between the
16 bureau and Mr. Kolers?
17 A. I don't recall.

18 197 Q. You don't recall. You're not aware of
19 any?
20 A. I'm not aware of any.

21 198 Q. You're not suggesting that there
22 wasn't; you just don't know.
23 A. Correct.

24 199 Q. All right. Okay. Let me just pause
25 for a second.

1 MR. KOLERS: I'm going to give it back to
2 you. It is a confidential affidavit.
3 --- Off-record discussion
4 MR. GAY: I think we're done then. I
5 think those are my questions. Thank you.
6 MR. KOLERS: And I have no re-examination.
7 MR. GAY: I beg your pardon?
8 MR. KOLERS: I have no re-examination.
9 MR. GAY: Fair enough. Good.
10 --- Whereupon the cross-examination concluded at 12:02 p.m.
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I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately recorded by
Computer-Aided Transcription and transcribed
therefrom, the foregoing proceeding.

Lisa M. Barrett, RPR, CRR, CRC, CSR

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**PROTECTED UNDER s. 29 OF THE
COMPETITION ACT**

March 4, 2015
File No.: 012413.1067

Andrew D. Little
General Counsel
Department of Justice Canada
Competition Bureau Legal Services
50 Victoria, 19th floor
Gatineau, QC K1A 0C9

Dear Mr. Little:

We are writing pursuant to the Section 11 Order issued to Hudson's Bay Company ("HBC") on January 30, 2015 (the "Order"). In particular, we are writing with respect to the rolling production requirement pursuant to paragraph 14 of the Order, with the first production of records taking place no later than 30 calendar days following service.

Please find enclosed the complete responses for the following Specifications:

- The response to Schedule I, Specification 6;
- The response to Schedule I, Specification 12;
- The response to Schedule I, Specification 15;
- The response to Schedule I, Specification 16;
- The response to Schedule II, Specification 1;
- The response to Schedule II, Specification 2;
- The response to Schedule II, Specification 5;
- The response to Schedule II, Specification 7;
- The response to Schedule II, Specification 8;
- The response to Schedule II, Specification 9;

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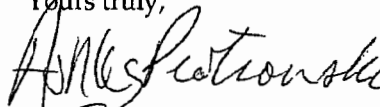
EXHIBIT NO 1
EXAM OF ESPOSITO
DATE JAN 29/2017
REPORTER U. Barrett
ASAP REPORTING SERVICES INC.

- The response to Schedule II, Specification 10;
- The response to Schedule II, Specification 17;
- The response to Schedule II, Specification 21;
- The response to Schedule II, Specification 22; and
- The response to Schedule II, Specification 23.

This letter and its enclosures contain information that HBC treats as confidential, the disclosure of which could result in a material financial loss and prejudice to the competitive position of HBC and interference in its contractual relations and negotiations with third parties. The information herein is subject to section 29 of the *Competition Act* and is provided in reliance on the *Information Bulletin on the Communication of Confidential Information Under the Competition Act* issued by the Commissioner of Competition (the "Commissioner") and the Competition Bureau (the "Bureau") on September 30, 2013. This information is being provided solely for the purpose of responding to the Order. HBC does not authorize the Commissioner to waive any applicable privilege and does not consent to the release of this submission or any information therein via the Commissioner to any third parties, and requests that the Commissioner assert public interest and all other applicable forms of privilege in response to any third party's attempts to gain access to such information from the Commissioner. Furthermore, the foregoing applies equally in respect of additional information that HBC may provide in connection with the Order. Finally, HBC requests that the Bureau notify its counsel of any request for disclosure of this submission or information therein that the Bureau may receive.

I trust the foregoing is satisfactory, however please let us know if you have any difficulties opening and reviewing the enclosed materials. Should technical personnel at the Bureau have questions in relation to opening the CD-ROM and documents, we would be pleased to assist.

Yours truly,



Ashley Piotrowski

CC: Eliot Kolers and Paul Collins, *Stikeman Elliott LLP*
David Pickwood and Stephen Lawson, *Hudson's Bay Company*

Encl
2015 MAR 3 - 3 AM 10:39

INDUSTRIE CANADA
INDUSTRY CANADA

HBC00000719



MHF - Zellers Clearance Outlets

March 27th, 2014

~~1~~ "A" for
100000

EXHIBIT NO _____

EXAM OF Esposito

DATE Jan 29/2017

REPORTED U Barnett ₁

ASAP REPORTING SERVICES INC.

MHF Review

Executive Overview

Store 2013 Results/2014 Forecast

Store Capacities/Managing dwell trailers

Clearance team activities

Support

Executive Overview

- In 2013 the 3 Zellers Clearance Stores moved 16,200 units (4,700 electronics) generating sales of \$3.2M, and flushed 231 Dwell Trailers. (@ 70 units/trailer)
- The stores achieved a 64% Recovery on the year.
- With just two active locations in 2014, we've generated sales of \$325K, moved 967 units, 14 Dwell Trailers with a 77% Recovery rate.
- 45% of our unit sales are in mattresses, 30% of the MHF sales space is dedicated to mattresses.
- 12-15% of the stores net selling space is dedicated to MHF.
- YTD recovery has improved by 13% over ly primarily due to electronics missing from the mix and partially due to Montreal closing.
- The Zellers locations have taken in 29 trailers so far in 2014.
- We will open our third location (to replace Montreal) in Nepean (Ottawa) next week.

2013 Results/2014 Forecast

2013 MHF Unit Performance in Zellers Clearance Outlets															
*DATA For Fiscal 2013:															
Location	BYR	Commodity	Sales Units YTD	# of Dwell Trailers Sold 2013	Sales \$'s YTD	AUR	COGS \$'s YTD	Recovery % YTD	GM \$'s YTD	GM % YTD	Mkdn \$'s YTD	2014 Forecast Sales Units Week	2014 Forecast Sales Units Year	2014 Forecast Year # of Dwell Trailers Sold	
1907	Montreal	515	Mattresses	2,706	39	\$ 437,429	\$162	\$ 780,599	56.0%	\$ (343,170)	-78%	\$2,647,381	53	2,277	33
1907	Montreal	501	Furniture	1,034	15	\$ 316,849	\$306	\$ 504,770	62.8%	\$ (187,921)	-59%	\$1,035,858	28	1,189	17
1907	Montreal	507	Case Goods	859	12	\$ 104,346	\$121	\$ 233,294	44.7%	\$ (128,948)	-124%	\$ 433,831	18	777	11
1907	Montreal	627	Appliances	576	8	\$ 249,639	\$433	\$ 434,034	57.5%	\$ (184,395)	-74%	\$ 324,167	16	701	10
1907	Montreal	681	Home Electronics	206	3	\$ 35,357	\$172	\$ 18,580	75.1%	\$ (4,618)	-13%	\$ 7,262			
1907	Montreal		Total	5,381	77	\$ 1,143,620	\$213	\$1,971,277	56.9%	\$ (849,052)	-74%	\$4,448,499	115	4,945	71
1910	Queensway	515	Mattresses	1,336	19	\$ 301,364	\$226	\$ 419,222	71.9%	\$ (117,858)	-39%	\$1,321,572	42	2,159	31
1910	Queensway	501	Furniture	1,122	16	\$ 357,527	\$319	\$ 482,476	74.1%	\$ (124,949)	-35%	\$ 903,656	35	1,813	26
1910	Queensway	507	Case Goods	696	10	\$ 111,913	\$161	\$ 196,290	57.0%	\$ (84,377)	-75%	\$ 355,644	22	1,125	16
1910	Queensway	627	Appliances	868	12	\$ 448,457	\$517	\$ 633,269	70.8%	\$ (184,812)	-41%	\$ 449,960	27	1,403	20
1910	Queensway	681	Home Electronics	2,690	38	\$ 81,632	\$ 30	\$ 216,017	37.2%	\$ (135,692)	-166%	\$ 216,017			
1910	Queensway		Total	6,712	96	\$ 1,300,893	\$194	\$1,947,274	66.7%	\$ (647,688)	-50%	\$3,246,849	125	6,500	93
1905	White Rock	515	Mattresses	1,252	18	\$ 301,600	\$241	\$ 416,805	72.4%	\$ (115,204)	-38%	\$1,299,525	57	2,973	42
1905	White Rock	501	Furniture	609	9	\$ 250,768	\$412	\$ 317,329	79.0%	\$ (66,561)	-27%	\$ 581,024	28	1,446	21
1905	White Rock	507	Case Goods	252	4	\$ 45,333	\$180	\$ 70,197	64.6%	\$ (24,865)	-55%	\$ 113,011	12	598	9
1905	White Rock	627	Appliances	186	3	\$ 103,055	\$554	\$ 122,211	84.3%	\$ (19,156)	-19%	\$ 74,175	8	442	6
1905	White Rock	681	Home Electronics	1,808	26	\$ 40,075	\$ 22	\$ 110,382	35.9%	\$ (70,772)	-177%	\$ 75,103			
1905	White Rock		Total	4,107	59	\$ 740,831	\$180	\$1,036,924	71.4%	\$ (296,558)	-40%	\$2,142,838	105	5,460	78
Zellers	Total	515	Mattresses	5,294	76	\$ 1,040,393	\$197	\$1,616,626	64.4%	\$ (576,232)	-55%	\$5,268,478	152	7,410	106
Zellers	Total	501	Furniture	2,765	40	\$ 925,144	\$335	\$1,304,575	70.9%	\$ (379,431)	-41%	\$2,520,538	90	4,449	64
Zellers	Total	507	Case Goods	1,807	26	\$ 261,592	\$145	\$ 499,781	52.3%	\$ (238,190)	-91%	\$ 902,486	51	2,501	36
Zellers	Total	627	Appliances	1,630	23	\$ 801,151	\$492	\$1,189,514	67.4%	\$ (388,363)	-48%	\$ 848,302	52	2,546	36
Zellers	Total	681	Home Electronics	4,704	67	\$ 157,064	\$ 33	\$ 344,979	38.8%	\$ (211,082)	-134%	\$ 298,382	-	-	-
Zellers	Total		Total	16,200	231	\$ 3,135,344	\$197	\$4,955,475	63.6%	\$ (1,793,298)	-56%	\$9,838,186	345	16,905	242

Data up to the end of Wk.

*Forecast the Stores for 2014: 1905(105 units/week), 1908(115 units/week), 1910 (125 units/week). Forecast based on 2013 Blend of Business, not including Home Electronics.

Zellers MHF Clearance - 2013 KPI's

2013 Zellers MHF Sales Metrics						
Str	# of Trans	Sales		AST	AUT	AUR
		Units	Sales \$'s			
1905	2,539	4,107	\$ 740,831	\$292	1.62	\$ 180
1907	3,524	5,381	\$1,143,620	\$325	1.53	\$ 213
1910	5,084	6,712	\$1,300,893	\$256	1.32	\$ 194
ALL	11,147	16,200	\$3,185,344	\$286	1.45	\$ 197

Store Capacity

GM's Manage Inventory

Major Home Fashions Optimal Capacity									
		Total		Mattress		Appliance		Furniture	
Str #	Str	SqFootage	Unit Capacity	SqFootage	Unit Capacity	SqFootage	Unit Capacity	SqFootage	Unit Capacity
1905	White Rock	7,000	1,250	2,500	500	1,250	100	3,250	650
1908	Nepean	7,000	1,250	2,500	500	1,000	100	3,500	650
1910	Queensway	12,500	1,650	3,000	700	1,500	200	8,000	750
Total	Total	26,500	4,150	8,000	1,700	3,750	400	14,750	2050

Managing to Capacity

Maximizing recovery

2014 MHF Unit Performance in Zellers Clearance Outlets																	
*DATA UP TO			2014 07	BIT Inventory													
Location	BYR	Commodity	Unit Capacity	OH Units	IT Units	OO Units	Total Inv Units	W/OH W/YTD Sales	Sales Units YTD	# of Dwell Trailers Sold 2014	Sales \$'s YTD	AUR	Recovery % YTD	GM % YTD	Mkdn \$'s YTD		
1908	Nepean	515	Mattresses	500	65	234	0	299		0		\$ -			\$ 4,536		
1908	Nepean	501	Furniture	300	109	0	0	109		0		\$ -			\$ 3,474		
1908	Nepean	507	Case Goods	250	27	0	0	27		0		\$ -			\$ -		
1908	Nepean	627	Appliances	250	28	0	0	28		0		\$ -			\$ 968		
1908	Nepean		Total	1,300	229	234	0	463				\$ -			\$ 8,978		
1910	Queensway	515	Mattresses	700	861	12	0	873	27.1	222	3	\$ 43,008	\$ 194	76.0%	-32%	\$ 196,985	
1910	Queensway	501	Furniture	350	385	190	0	575	23.4	115	2	\$ 53,165	\$ 462	92.9%	-8%	\$ 128,956	
1910	Queensway	507	Case Goods	200	229	0	0	229	26.7	60	1	\$ 11,957	\$ 199	72.6%	-38%	\$ 39,829	
1910	Queensway	627	Appliances	200	155	0	0	155	12.3	88	1	\$ 53,281	\$ 605	75.7%	-32%	\$ 52,811	
1910	Queensway		Total	1,450	1,630	202	0	1,832	23.8	485	7	\$ 161,411	\$ 333	80.4%	-24%	\$ 418,581	
1905	White Rock	515	Mattresses	475	450	7	0	457	15.6	202	3	\$ 48,872	\$ 242	78.3%	-28%	\$ 227,018	
1905	White Rock	501	Furniture	250	184	10	0	194	11.5	112	2	\$ 41,827	\$ 373	79.7%	-25%	\$ 101,509	
1905	White Rock	507	Case Goods	175	65	6	0	71	9.1	50	1	\$ 13,179	\$ 264	73.1%	-37%	\$ 33,807	
1905	White Rock	627	Appliances	100	90	1	0	91	5.3	118	2	\$ 59,620	\$ 505	66.2%	-51%	\$ 61,760	
1905	White Rock		Total	1,000	789	24	0	813	23.8	482	7	\$ 163,499	\$ 339	73.3%	-36%	\$ 424,095	
Zellers	Total	515	Mattresses	1,675	1,376	253	0	1,629	22.7	424	6	\$ 91,881	\$ 217	77.2%	-30%	\$ 428,539	
Zellers	Total	501	Furniture	900	678	200	0	878	20.9	227	3	\$ 94,991	\$ 418	86.6%	-15%	\$ 233,939	
Zellers	Total	507	Case Goods	625	321	6	0	327	20.4	110	2	\$ 25,136	\$ 229	72.9%	-37%	\$ 73,636	
Zellers	Total	627	Appliances	550	273	1	0	274	9.3	206	3	\$ 112,901	\$ 548	70.4%	-42%	\$ 115,540	
Zellers	Total		Total	3,750	2,648	460	0	3,108	23.8	967	14	\$ 324,909	\$ 336	76.7%	-30%	\$ 851,654	
Data up to the end of Wk:			2014 07														

Weekly flow of trailers

Zellers Outlets Dwell Trailers Received											
Str	2013 Total (Wk 19 to Wk52)	2013 Avg Week	2014 Total	2014 Avg Week	# of Trailers by Week						
					1	2	3	4	5	6	7
1905	49	1.5	9	1.3	1	1	2	1	2	1	1
1908	0		7	2.3	0	0	0	0	3	1	3
1910	63	1.9	13	1.9	2	2	2	1	3	1	2
1907	59	1.8									
Total Zel	171	5.2	29	4.1	3	3	4	2	8	3	6
Total Bay Dwell	12				19	26	27	24	29	29	27
Only have data for 2013 starting at Week 19											

Clearance Team Activities

- Investment in people – sales and stock. Dedicated leadership
- Advertising – small call out to MHF (mattresses) in weekly ROP's
- Weekly unit targets set by commodity – Aggressive goal of 100 mattresses (50 sets) per week.
- Managers empowered to take action on aged goods and merchandise that is damaged – price it to sell.
- Product knowledge held for mattresses in 2013. All stores will schedule vendor product knowledge refresher for spring 2014.
- All mattresses sold as sets and well stocked in A/R bedframes add value
- Nepean (April 3), Queensway combined will move 15 trailers per period
- Nepean will have a mobile sign for opening and ongoing
- White Rock location was closed ly from March to June – will move + 15 trailers during same time this year. (up against write off from fire)
- Current pricing strategy and all sales final is effective

Support

- Excellent relationship and partnership with team at DC
- DC to continue to be proactive and not send merchandise that is damaged beyond sale. Process in place to inter-org back is working.
- White Rock can't manage the dwell in the west. Will require ongoing support from Bay Stores to stay on top.
- Natuzzi – 4 - 6 select styles with systemic issues. Far too many.
- Stores require 12 sets of spare legs OH at all times for sofas
- **Advertising opportunity** – dedicated MHF ROP. Working with Shayne on costs and proposal.
 - Ideal: weekly in Nepean to start, then bi-weekly. Bi-weekly in White Rock and Queensway.
 - MHF – “wrap” in White Rock
- Other ideas to pursue:
 - Associate incentives, spiffs, contests
 - Sales and product knowledge training for Associates
 - Flyers, Business size cards for handouts

Appendix: Dwell Situation @ March 24th

VLC TY 18 trailers, LY 15 trailers

- VLC OH: 9 Mattress trailers, 9 Furniture/Appliance

EBTC TY 9 trailers, LY 34 trailers

- EBTC OH: 7 Mattress trailers, 2 Furniture/Appliance

Total Dwell TY 27 trailers, LY 49 trailers

CT-2017-008

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

RESPONSE

1. The Respondent, Hudson's Bay Company ("HBC") submits this Response to the Application of the Commissioner of Competition (the "Commissioner"), dated February 22, 2017 (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.

EXHIBIT NO. "B" for fact
 EXAM OF Esposito
 DATE Jan 29/2017
 REPORTED U Barnett
 APRA REPORTING SERVICES INC.

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 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 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. 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*.

7. 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".

8. 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.

9. 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.

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

II. ADMISSIONS/DENIALS

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

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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

18. 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.

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

20. 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

21. 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.

22. 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.

23. 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.

24. 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

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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

32. 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.

33. 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 euro-top, the fabric, ticking and other applicable features).

34. 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.

35. 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.

36. 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

37. 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*.

38. 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.

39. 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.

40. 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.

41. Hudson's Bay's advertising for mattresses takes place in-store, in flyers, via e-mail communications and/or over the radio. Hudson's Bay and many of its major competitors in the sale of sleep sets, including The Brick/Leon's, Sears, and Bad Boy, follow a "high-low" retail marketing strategy for mattresses.¹ That is, their promotions will offer 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 the Commissioner's application are similar to

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.

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

42. HBC has, and during the period of the advertising flyers challenged by the Commissioner in his Application had, a comprehensive advertising compliance manual (the "**Compliance Manual**") that applied 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.

43. 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 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."

44. 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.

45. 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, 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.

46. 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

47. 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.

48. 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.

49. 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.

50. 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.

IV. GROUNDS ON WHICH THE APPLICATION IS OPPOSED

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

52. As described below, Hudson's Bay's regular price and savings claims with respect to the advertisements of the four sleep sets identified 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".

53. 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*.

54. 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

55. 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.

56. 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.

57. 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”**

58. 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.

59. 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*.

60. 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.

61. 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. 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, and it was offered in good faith by Hudson's Bay.

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

62. 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.

63. 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.

64. 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.

65. 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.

66. 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*.

67. 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.

68. 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, 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

69. 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”.

70. 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. 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.

71. 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.

72. Moreover, the retail marketplace for mattresses in Canada was highly competitive, and consumers were 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.

73. 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

74. 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; [...]

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

76. 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.

77. 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.

78. 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.

79. 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*.

80. The Commissioner also impugns “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.

81. 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.

82. 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.

83. 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.

84. 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

85. 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.

86. 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.”

87. 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.

88. 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

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

90. 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).

91. 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.

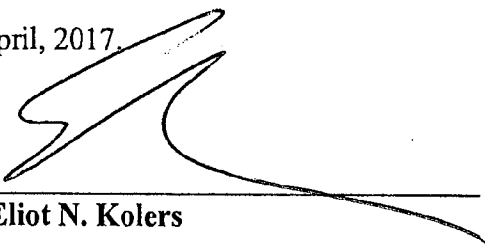
92. The Commissioner's investigation into sleep sets marketed by Hudson's Bay provides no basis for the broad prohibition order he is seeking in the Application.

V. ORDER REQUESTED

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

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

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



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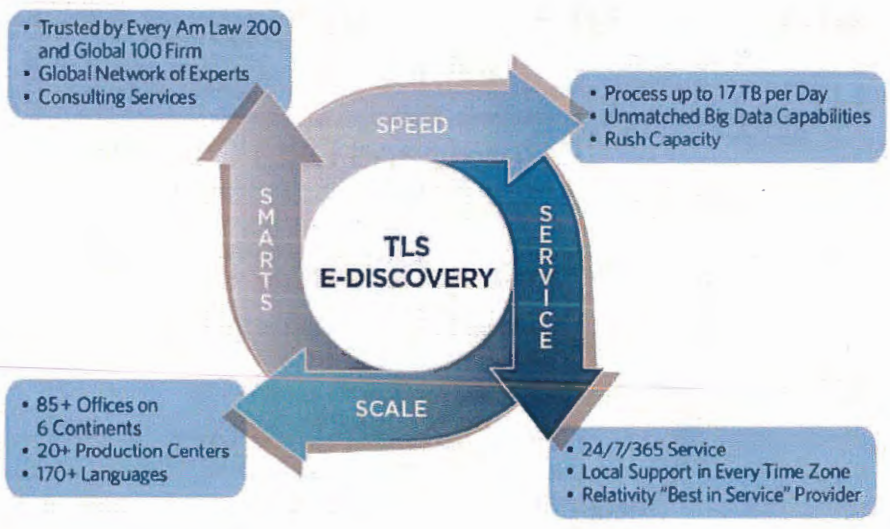
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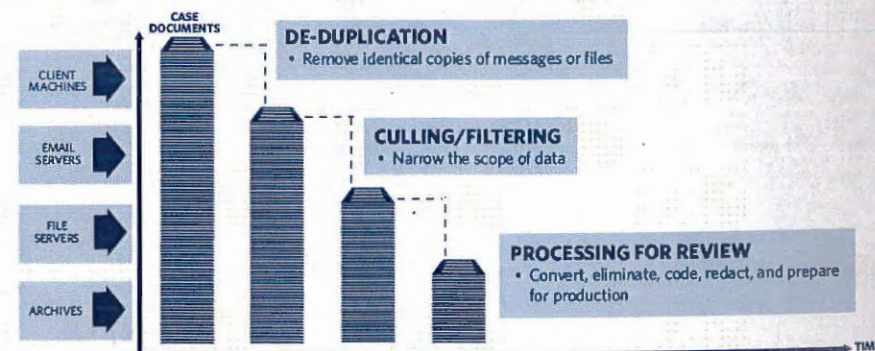
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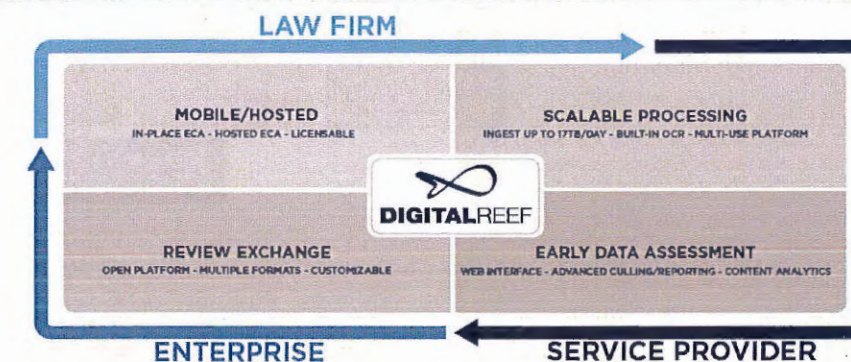
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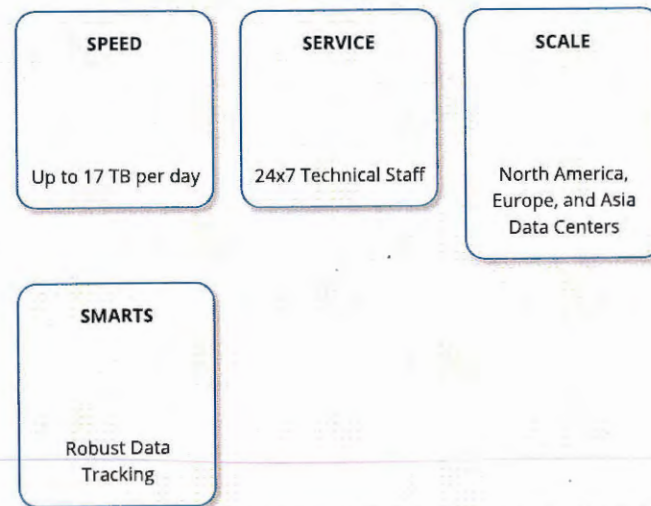
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CT-2017-008

THE COMPETITION TRIBUNAL

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

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

AMENDED NOTICE OF APPLICATION

TAKE NOTICE that the Commissioner of Competition (the "**Commissioner**") will make an application to the Competition Tribunal (the "**Tribunal**") for an order pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "**Act**"), as amended, in respect of conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the Act.

AND TAKE NOTICE that the Commissioner relies on the following Statement of the Grounds and Material Facts for this application.

TO: **Hudson's Bay Company**
401 Bay Street
Suite 500,
Toronto, Ontario
M5H 2Y4

APPLICATION

1. The Commissioner makes this application pursuant to section 74.1 of the Act for:
 - (a) a declaration that the Respondent, Hudson's Bay Company ("**HBC**"), is engaging or has engaged in reviewable conduct, contrary to paragraph 74.01(1)(a) and subsection 74.01(3) of the Act;
 - (b) an order prohibiting HBC from engaging in the reviewable conduct or substantially similar reviewable conduct for any product supplied by HBC in Canada, for a period of ten years from the date of such order;
 - (c) an order requiring HBC to pay an administrative monetary penalty;
 - (d) an order requiring HBC to publish or otherwise disseminate notices of the determinations made herein pursuant to paragraph 74.1(1)(b) of the Act, in such manner and at such times as the Commissioner may advise and this Tribunal shall permit;
 - (e) costs; and
 - (f) such further and other relief as the Commissioner may advise and this Tribunal may permit.

I. OVERVIEW

2. HBC has engaged and continues to engage in deceptive marketing practices by offering sleep sets at grossly inflated regular prices, and then advertising deep discounts off these deceptive regular prices in order to promote the sale of the sleep sets to the public. The regular prices of the sleep sets ~~were~~ are so inflated above what the market would bear that sales at the regular price ~~were~~ are virtually non-existent.

3. HBC markets many of the products it sells using a “high-low” pricing strategy. Under this strategy, HBC offers merchandise at a high regular price with frequent deep promotional discounts off that price.
4. As an example, for the period 25 April to 1 May 2014, HBC made the following representation in its “Bay Days” promotional flyer:



5. The deep discount off the almost \$2,000 regular price creates the impression of substantial savings. The promoted savings are illusory – HBC never sold a single Mount Royal tight top queen sleep set at the regular price prior to this representation. Since the regular price is not an actual regular price, the \$1,210 savings promoted by reference to the regular price are not actual savings.
6. The alleged savings in the representation are based on a deceptive regular price: namely, the regular price was not supported by substantial sales volume, was not set in good faith and was not offered as the selling price for a substantial period of time.
7. HBC also engages in deceptive marketing practices when offering its sleep sets as part of inventory “clearance” or “end of line” promotions. A “clearance” or “end of line” sale implies that the price has been permanently lowered with the object of selling any remaining on-hand inventory. Despite this, HBC continues to replenish from manufacturers by ordering new, factory fresh sleep sets during these sales.

8. HBC continues to offer sleep sets using both of these types of deceptive marketing practices. HBC has been making these types of representations throughout Canada to promote the sale of various products since at least 1 March 2013 until now.
9. The Commissioner brings this application to end the deceptive marketing practices described above and to obtain orders so as to ensure conformity with the deceptive marketing provisions of the Act.

II. THE PARTIES

10. The Commissioner is an officer appointed by the Governor in Council under section 7 of the Act and is responsible for the administration and enforcement of the Act.
11. HBC is a corporation incorporated pursuant to the laws of Canada that offers for sale products at the retail level in 90 stores across Canada as well as on its website. Its registered head office is located at 401 Bay Street, Suite 500, Toronto, Ontario, M5H 2Y4.

III. HBC PROMOTES SLEEP SETS USING DECEPTIVE ORDINARY PRICE REPRESENTATIONS

12. HBC has made and continues to make ordinary price claims containing deceptive regular prices to promote the sale of its sleep sets. As such, HBC has failed to comply with subsection 74.01(3) of the Act concerning the use of ordinary price claims.
13. Subsection 74.01(3) of the Act prohibits the making of any materially false or misleading representation to the public as to the ordinary selling price of a product. The ordinary selling price is determined by using one of two tests: either a substantial volume of the product was sold at that price or a higher price, within a reasonable period of time (the “**Volume Test**”); or the product was offered for sale, in good faith, for a substantial period of time at that price or a higher price (the “**Time Test**”).

14. HBC faileds to substantiate its regular prices under either of the Volume Test or the Time Test in representations promoting sleep sets. HBC used and continues to use fictitious regular prices to promote the sale of the sleep sets to the public.

A. Nature of the Product

15. The combination of a mattress and box spring is known as a “sleep set”. Consumers usually purchase a mattress and box spring together as a sleep set.
16. Sleep sets are available in a variety of sizes, for example: single, twin, double, queen and king. The queen is the most common size purchased by consumers, and it is also the most common size featured in advertisements by retailers, including HBC.
17. For each mattress, there are several matching box springs, including the standard matching box spring. For many mattresses, there is also a matching “low profile” box spring, a matching split box spring, and a matching “split low profile” box spring. Consumers can choose which box spring they would like to purchase as part of the sleep set.
18. Sleep set manufacturers distinguish between their sleep sets by collection name and model name. A collection typically includes several different models of mattresses each of which can be matched with several different models of box spring within the same collection. Each sleep set model is further differentiated by specific features and benefits, such as: comfort level (e.g., firm and plush); construction (e.g., innerspring, memory foam, hybrid); format (e.g., tight top, euro top and pillow top); and ticking (i.e., the external fabric encasing the mattress and box spring). These features and benefits are used to create unique sleep sets which are offered exclusively by the retailer marketing them. Since the same sleep set model is not offered for sale by more than one retailer, it is very difficult for consumers to comparison shop between retailers.
19. Sleep set retailers, including HBC, do not typically keep much inventory on-hand beyond floor models because the retail sleep set market operates on an on-demand delivery model. Once a consumer purchases a sleep set, the retailer orders the sleep set from the manufacturer, and the manufacturer builds the sleep set in order to fulfil the retailer’s

sale. The sleep set is typically delivered to the customer within a week or two of purchase.

20. Retailers typically change their sleep set offerings on an annual basis.
21. For HBC, sales peaks are typically experienced in fall/early winter, as well as in spring/early summer.
22. Consumers tend to replace a sleep set once every 10 years. Further, when consumers do shop for a sleep set, they are generally only in the market for about 10 days.
23. The sale of sleep sets accounts for approximately \$1.2 billion in annual sales in Canada.

B. Geographic Market

24. The relevant geographic market for the purpose of this application is Canada.

C. Representations as to Price

25. HBC has promoted and continues to promote sleep sets to consumers through representations in flyers delivered to millions of Canadians and also on its website.
26. From the various sleep sets offered by HBC, the Commissioner identified the following for review under subsection 74.01(3) of the Act as examples of the reviewable conduct HBC has engaged and continues to engage in with respect to sleep sets, contrary to subsection 74.01(3) (collectively the “**Specified Sleep Sets**”).
 - (a) Simmons Beautyrest TruEnergy Brooklyn tight top queen size sleep set (the “**Brooklyn**”);
 - (b) Sealy Posturepedic Reflex Mount Royal tight top queen mattress set (the “**Mount Royal**”);
 - (c) Simmons Beautyrest Recharge World Class Ashcroft tight top queen size sleep set (the “**Ashcroft**”); and

(d) Stearns & Foster Northampton tight top queen size sleep set (the “**Northampton**”).

27. Each of the Specified Sleep Sets consists of a specific queen size mattress model and one of several matching box springs from the same collection.
28. HBC frequently promotes the supply of sleep sets using ordinary selling price representations in which HBC’s regular prices are compared to promotional prices (“**OSP representations**”). The following representations, which are examples of HBC’s reviewable conduct, (collectively the “**Representations**”) were contained in advertisements in six different promotional flyers over six different time periods throughout the lifecycle of the Specified Sleep Sets. HBC’s reviewable conduct in respect of sleep sets is not limited to the example Representations. Rather, the Representations illustrate HBC’s ongoing practice of grossly inflating regular prices and representing substantial discounts off such deceptive regular prices for sleep sets.

(i) **Example – 19 July to 1 August 2013**

29. In a weekly flyer entitled “The Summer Sleep Guide” in effect from 19 July to 1 August, 2013, HBC used OSP representations to promote sleep sets. In the flyer, HBC made the following representations to the public with respect to the Brooklyn, the Mount Royal, the Ashcroft and the Northampton.

TIGHT TOP mattresses allow you to sleep closer to the pocket coil construction, maximizing conformability and support, and are less likely to retain body impressions over time. Although these mattresses often feel firmer and have a thinner construction, they can also be plush and feel very luxurious.

BEAUTYREST TruEnergy Brooklyn tight top queen mattress set
 Save \$1800
\$1298
 Reg. \$3098

SEALY Posturepedic Reflex Mount Royal tight top queen mattress set
 Save \$1200
\$798
 Reg. \$1998

BEAUTYREST Black Grace IV tight top queen mattress set
 Save \$2500
\$1798
 Reg. \$4298

BEAUTYREST Recharge World Class Ashcroft tight top queen mattress set
 Save \$1800
\$1198
 Reg. \$2998

SERTA iSeries Affirmation tight top queen mattress set
 Save \$1500
\$1198
 Reg. \$2698

STEARNS & FOSTER Northampton tight top queen mattress set
 Save \$1700
\$1198
 Reg. \$2898

Evolution non-flip pocketed coils for back support and motion separation. Breathable AirCool memory foam provides an ideal sleeping temperature.

Reflex pocket coils provide conforming back support, reduce motion transfer and prevent uncomfortable pressure points.

FREE DELIVERY AND SET-UP & NO INTEREST UNTIL JULY 20

Free local delivery and set-up on all mattress sets (\$69 value). See store for details.

On all furniture, major appliances, mattresses and home entertainment when you use your Hudson's Bay MasterCard® or your Hudson's Bay Credit Card. Minimum payable. See store.

Special Payment Plans are available on approval made with your Hudson's Bay MasterCard® or Hudson's Bay Credit Card on the identified items. Not available in Quebec. If you do not make your payment terms on under your Hudson's Bay Payment Agreement, then the terms and interest rates are set out therein. The full credit is extended by Capital One Bank (Canada Branch). Capital One® is a registered trademark of Capital One Financial Corporation. MasterCard and the MasterCard logo are trademarks of MasterCard International Inc. All other trademarks are the property of their respective owners.

(ii) Example – 29 November to 5 December 2013

30. In a weekly flyer entitled “Black Friday Weekend Sale” in effect from 29 November to 5 December 2013, HBC used OSP representations to promote sleep sets. In the flyer, HBC made the following representations to the public with respect to the Ashcroft and the Mount Royal.

SAVE \$1000
\$498
Reg. \$1498
BEAUTYSLEEP
Bellamy Euro top
queen mattress set

SAVE \$1100
\$698
Reg. \$1798
SERTA Perfect Sleeper
Caledon Euro top
queen mattress set

SAVE \$1270
\$728
Reg. \$1998
SEALY Posturepedic
Reflex Mount Royal tight
top queen mattress set

FREE DELIVERY AND SET-UP on all mattress sets (\$69 value).
PLUS, 60-night Comfort Guarantee. See store for details.

The image shows a stack of three mattresses. The top mattress is white with a gold pattern. The middle mattress is brown with a white pattern. The bottom mattress is grey with a white pattern. A red box highlights the bottom offer for the SEALY Posturepedic Reflex Mount Royal tight top queen mattress set.

Save \$1300
\$798
Reg. \$2098
SERTA Perfect Sleeper
Abberton II tight top
queen mattress set

Save \$1300
\$998
Reg. \$2298
SEALY Posturepedic
Reflex Hillsbridge
Euro top queen
mattress set

Save \$1800
\$1198
Reg. \$2998
BEAUTYREST Recharge
World Class Ashcroft
tight top queen
mattress set

The image shows two mattresses. The left mattress is brown with a white pattern. The right mattress is white with a blue pattern. A red box highlights the bottom offer for the BEAUTYREST Recharge World Class Ashcroft tight top queen mattress set.

(iii) **Example – 7 to 13 February 2014**

31. In a weekly flyer entitled “Love to Give” in effect from 7 to 13 February 2014, HBC used OSP representations to promote sleep sets. In the flyer, HBC made the following representations to the public with respect to the Mount Royal, the Northampton, the Ashcroft and the Brooklyn.

Save \$1300
\$798
Reg. \$2098
SERTA
Perfect Sleeper
Abberton II tight top
queen mattress set

Save \$1100
\$898
Reg. \$1998
SEALY
Posturepedic
Reflex Mount Royal
tight top queen
mattress set

Save \$1600
\$1298
Reg. \$2898
STEARNS & FOSTER
Northampton tight top
queen mattress set

THIS WEEKEND: February 7 to February 9

Save \$1800
\$1198
Reg. \$2998
BEAUTYREST
Recharge World Class
Ashcroft tight top
queen mattress set

Save \$1800
\$1298
Reg. \$3098
BEAUTYREST TruEnergy
Brooklyn tight top
queen mattress set

Save \$600
\$2298
Reg. \$2898
SERTA iComfort
Perceptive tight top
queen mattress set

Save \$400
\$2298
Reg. \$2698
TEMPUR-PEDIC
Tempur-Reflect Plus
queen mattress set

50% off Pillows and duvets by
LAUREN RALPH LAUREN
and GLUCKSTEINHOME
2569507852

Featured: GLUCKSTEINHOME
down-alternative duvet.
Reg. \$24999 Sale **\$124.99**

40% off Featured: ESPRIT Dune double/queen
duvet cover set. Reg. \$229 Sale **\$137**
bedding collection
5007850060

25% off bedding collections
by CALVIN KLEIN,
ESPRIT, NAUTICA and
HOTEL COLLECTION

30% off DISTINCTLY
HOME
bedding
collections

\$1.99
LAUREN
RALPH
LAUREN
Greenwich
towels Reg. \$20
79469285

25% off other towels
and bath mats by
LAUREN RALPH
LAUREN and
CALVIN KLEIN

THIS WEEKEND: February 7 to February 9
Buy 1, get 1 FREE sheets and towels
by DISTINCTLY HOME, GLUCKSTEINHOME and
HOTEL COLLECTION and pillows by HOTEL COLLECTION
Free item must be of equal or lesser value. See page 11 for exclusions.

(iv) Example – 11 to 24 April 2014

32. In a flyer entitled “Bay Days” in effect from 11 to 24 April 2014, HBC used OSP representations to promote sleep sets. In the flyer, HBC made the following representation to the public with respect to the Northampton.

UP TO 70% off
MATTRESS SETS BY SIMMONS, SERTA, SEALY AND MORE
PLUS FREE DELIVERY!

Free local delivery and set-up on all mattress sets (\$60 value). See store for details.

Save \$1000
\$498
Reg. \$1498
SIMMONS Beautysleep Muirfield queen mattress set

Save \$1500
\$698
After sale \$2198
New SEALY Posturepedic Titanium Bronze Champion tight top queen mattress set

OUR LOWEST PRICES OF THE SEASON

Save \$2010
\$1288
Reg. \$3298
SERTA Perfect Sleeper Wynnewood super pillow top queen mattress set

Save \$1710
\$1188
Reg. \$2898
STEARNS & FOSTER Northampton tight top queen mattress set

Save \$1800
\$798
After sale \$2398
New SEALY Posturepedic Titanium Bronze Champion Euro top queen mattress set

and home entertainment when you use your Hudson's Bay MasterCard® or your Hudson's Bay Credit Card.

(iv) Example – 25 April to 1 May 2014

33. In a weekly flyer entitled “Bay Days” in effect from 25 April to 1 May 2014, HBC used OSP representations to promote sleep sets. In the flyer, HBC made the following representations to the public with respect to the Mount Royal and the Brooklyn.

Free local delivery and set-up on all mattress sets (\$100 value). See store for details.

FREE DELIVERY ON MATTRESS SETS

ALL MATTRESS SETS UP TO 70% OFF

Save \$1410
\$888
Reg. \$2298
SEALY Posturepedic Reflex Hillsbridge Euro top queen mattress set

Save \$1510
\$988
Reg. \$2498
SEALY Posturepedic Reflex Savoy Euro pillow top queen mattress set

Save \$1210
\$788
Reg. \$1998
SEALY Posturepedic Reflex Mount Royal tight top queen mattress set

Save \$2110
\$988
Reg. \$3098
BEAUTYREST TruEnergy Brooklyn tight top hybrid queen mattress set

Save \$2810
\$1188
Reg. \$3998
BEAUTYREST TruEnergy Bailey Euro top hybrid queen mattress set

(v) **Example – 24 to 30 October 2014**

34. In a weekly flyer entitled “Bay Days” in effect from 24 to 30 October 2014, HBC used OSP representations to promote sleep sets. In the flyer, HBC made the following representations to the public with respect to the Brooklyn and the Ashcroft.

ALL MATTRESS SETS ON SALE UP TO 70% OFF
 Plus, protect your purchase with TotalGuard and receive free local delivery See store for details

Save \$1110 \$688 Reg. \$1798 SERTA Perfect Sleeper Caledon Euro top queen mattress set

Save \$1310 \$788 Reg. \$2098 SERTA Perfect Sleeper Abberton II tight top queen mattress set

Save \$1820 \$878 Reg. \$2698 SEALY Posturepedic Reflex Hillsbridge II Euro top queen mattress set

Save \$2200 \$898 Reg. \$3098 BEAUTYREST TruEnergy Brooklyn tight top queen mattress set

Save \$2600 \$1698 Reg. \$4298 BEAUTYREST Black Grayson tight top queen mattress set

Save \$1810 \$1188 Reg. \$2998 BEAUTYREST Recharge World Class Ashcroft tight top queen mattress set

OUR LOWEST PRICES OF THE SEASON

24 Shop mattresses in select stores or by phone: 1-888-257-6784

35. The following chart summarizes the launch date, the regular price and the promotional representation for the Specified Sleep Sets in the Representations. The “Launch Date” is the date on which the sleep set first became available for sale.

Table 1
The Specified Sleep Sets and the Promotional Representations in each flyer

	Brooklyn	Mount Royal	Ashcroft	Northampton
Launch Date	24 Feb/13	8 April/13	4 March/13	25 March/13
Regular Price	\$3098	\$1998	\$2998	\$2898
19 July to 1 Aug/13 “The Summer Sleep Guide”	Save \$1800 \$1298	Save \$1200 \$798	Save \$1800 \$1198	Save \$1700 \$1198
29 Nov to 5 Dec/13 “Black Friday Weekend Sale”	Not in flyer	Save \$1270 \$728	Save \$1800 \$1198	Not in flyer
7 to 13 Feb/14 “Love to Give”	Save \$1800 \$1298	Save \$1100 \$898	Save \$1800 \$1198	Save \$1600 \$1298
11 to 24 Apr/14 “Bay Days” “Up to 70% off Mattress Sets By Simmons, Serta, Sealy and More”	Not in flyer	Not in flyer	Not in flyer	Save \$1710 \$1188
25 Apr to 1 May/14 “Bay Days” “All Mattress Sets Up To 70% Off”	\$988 Save \$2110	Save \$1210 \$788	Not in flyer	Not in flyer
24 to 30 Oct/14 “Bay Days” “All Mattress Sets On Sale Up To 70% Off”	Save \$2200 \$898	Not in flyer	Save \$1810 \$1188	Not in flyer

36. This chart illustrates that the regular price of the Specified Sleep Sets is more than twice as high as the advertised promotional prices. The Representations offered enormous savings off of HBC’s regular prices, up to 70% off. The savings claims represented discounts as high as \$2200 off of the stated regular price.

D. The Volume Test

37. HBC did not sell a substantial volume of the Specified Sleep Sets at or above the advertised regular price within a reasonable period of time of making the Representations. The regular price of the Specified Sleep Sets remained the same from their launch until they were placed on clearance.
38. Given the nature of sleep sets, a reasonable period of time for evaluating whether a substantial volume of sleep sets were sold at the regular price is twelve months. If the sleep set was offered for sale for less than twelve months at the time of the OSP representation, a reasonable period of time would be the life of the sleep set until the date of the representation at issue.
39. HBC promotes sleep sets, as opposed to individual mattresses and box springs, in the Representations. However, HBC maintains volume data, not for sleep sets, but for each individual mattress model and each individual box spring model. HBC fails to track the number of complete sleep sets sold.
40. Each of the Specified Sleep Sets consists of a specific mattress model but not a specific box spring model. Given that HBC fails to track sales of sleep sets, the tables below contain the number of mattress units sold for each of the Specified Sleep Sets.
41. As shown in the tables below, HBC sold an almost non-existent volume of the mattresses which are part of the Specified Sleep Sets at the regular price prior to making the Representations. Almost every mattress was sold at a price below the regular price.

Table 2(a)
Sales of the Brooklyn
 Launch Date: 24 February 2013

	Time Period for Volume Assessment	Sales at the Regular Price	Total Sold at a Reduced Price	Percentage Sold at the Regular Price	Percentage Sold at a Reduced Price
19 July to 1 Aug/13 "The Summer Sleep Guide"	18 July 2013 back to 24 Feb 2013	Net : 0 (1 sale, 1 return)	159	0%	100%
7 to 13 Feb/14 "Love to Give"	6 Feb 2014 back to 24 Feb 2013	Net: 1 (2 sales, 1 return)	512	0.19%	99.81%
25 Apr to 1 May/14 "Bay Days" "All Mattress Sets Up To 70% Off"	24 Apr 2014 back to 25 Apr 2013	Net: 1 (2 sales, 1 return)	596	0.17%	99.83%
24 to 30 Oct/14 "Bay Days" "All Mattress Sets On Sale Up To 70% Off"	23 Oct 2014 back to 24 Oct 2013	0	920	0%	100%
Total period from last representation back to launch	23 Oct 2014 back to 24 Feb 2013 (607 days)	Net: 1 (2 sales, 1 return)	1227	0.08%	99.92%

42. For the purpose of illustration, HBC was only able to successfully sell one Brooklyn (queen) mattress at the regular price, for the total period from immediately prior to the last representation (23 October 2014) back to its launch.

Table 2(b)
Sales of the Mount Royal
Launch Date: 8 April 2013

	Time Period for Volume Assessment	Sales at the Regular Price	Total Sold at a Reduced Price	Percentage Sold at the Regular Price	Percentage Sold at a Reduced Price
19 July to 1 Aug/13 “The Summer Sleep Guide”	18 July 2013 back to 8 April 2013	0	258	0%	100%
29 Nov to 5 Dec/13 “Black Friday Weekend Sale”	28 Nov 2013 back to 8 April 2013	0	697	0%	100%
7 to 13 Feb/14 “Love to Give”	6 Feb 2014 back to 8 April 2013	0	1023	0%	100%
25 Apr to 1 May/14 “Bay Days” “All Mattress Sets Up To 70% Off”	24 Apr 2014 back to 25 Apr 2013	0	1159	0%	100%
Total period from last representation back to launch	24 Apr 2014 back to 8 April 2013 (382 days)	0	1164	0%	100%

43. For the purpose of illustration, HBC was unable to sell even one Mount Royal (queen) mattress at the regular price, for the total period from immediately prior to the last representation (24 April 2014) back to its launch.

Table 2(c)
Sales of the Ashcroft
Launch Date: 4 March 2013

	Time Period for Volume Assessment	Sales at the Regular Price	Total Sold at a Reduced Price	Percentage Sold at the Regular Price	Percentage Sold at a Reduced Price
19 July to 1 Aug/13 "The Summer Sleep Guide"	18 July 2013 back to 4 March 2013	Net: - 1 (1 return)	448	0% (-0.22%)	100%
7 to 13 Feb/14 "Love to Give"	6 Feb 2014 back to 4 March 2013	Net: -1 (1 sale, 2 returns)	1194	0% (-0.08%)	100%
25 Apr to 1 May/14 "Bay Days" "All Mattress Sets Up To 70% Off"	24 Apr 2014 back to 25 Apr 2013	Net: 0 (1 sale, 1 return)	1159	0%	100%
24 to 30 Oct/14 "Bay Days" "All Mattress Sets On Sale Up To 70% Off"	23 Oct 2014 back to 24 Oct 2013	Net: -1 (1 return)	968	0% (-0.1%)	100%
Total period from last representation back to launch	23 Oct 2014 back to 4 March 2013 (599 days)	Net: -1 (1 sale, 2 returns)	1722	0% (-0.06%)	100%

*How HBC arrived at the negative net sales at the regular price remains unexplained.

44. For the purpose of illustration, HBC only sold one Ashcroft (queen) mattress at the regular price, but did somehow manage to have two returns at the regular price, during the total period from immediately prior to the last representation (23 October 2014) back to its launch.

Table 2(d)
Sales of the Northampton
Launch Date: 25 March 2013

	Time Period for Volume Assessment	Sales at the Regular Price	Total Sold at a Reduced Price	Percentage Sold at the Regular Price	Percentage Sold at a Reduced Price
19 July to 1 Aug/13 "The Summer Sleep Guide"	18 July 2013 back to 25 March 2013	0	310	0%	100%
7 to 13 Feb/14 "Love to Give"	6 Feb 2014 back to 25 March 2013	1	994	0.1%	99.90%
11 to 24 Apr/14 "Bay Days" "Up to 70% off Mattress Sets By Simmons, Serta, Sealy and More"	10 April 2014 back to 11 April 2013	1	1114	0.09%	99.91%
Total period from last representation back to launch	10 April 2014 back to 25 March 2013 (382 days)	1	1117	0.09%	99.91%

45. For the purpose of illustration, HBC was able to sell only one Northampton (queen) mattress at the regular price, for the total period from immediately prior to the last representation (10 April 2014) back to its launch.
46. The volume of units of the Specified Sleep Set mattresses sold by HBC prior to the making of the Representations is grossly insufficient to satisfy the volume test.
- E. The Time Test**
47. There are two elements to the Time Test: the products must be offered at the regular price or higher in "good faith" for "a substantial period of time recently before" the making of the representation. If either the "good faith" element or the "substantial period of time" (the "**Frequency Element**") is not met, HBC is not in compliance with the Time Test.
48. HBC did not offer the Specified Sleep Sets at a regular price in good faith for a substantial period of time recently before making the Representations.

(i) **HBC did not have a good faith belief it would sell the Specified Sleep Sets at regular price**

49. HBC did not offer the Specified Sleep Sets in good faith. The regular prices of the Specified Sleep Sets were not ones that HBC honestly believed to be genuine and *bona fide*, set with the expectation that the market would validate those regular prices. HBC's regular prices were well in excess of what HBC expected and knew consumers would actually pay for the Specified Sleep Sets.
50. The HBC Mattress Buyer (the "**Mattress Buyer**") was responsible for setting the regular and promotional prices of sleep sets, including the Specified Sleep Sets. There were three consecutive Mattress Buyers employed while the Specified Sleep Sets were offered for sale by HBC. The decisions in setting the regular price received little critical review by HBC management.
51. Further, HBC did not employ sound pricing principles when setting the regular price of sleep sets, including the Specified Sleep Sets.
52. The pricing process utilized to set regular prices for sleep sets, including the Specified Sleep Sets consisted primarily of a general comparison of HBC's products and prices to those of competitors. In conducting this comparison, there was no systematic method employed to track competitors' regular prices on comparable sleep sets. There were no competitive profiles maintained that associate competitors' products with HBC's equivalents. HBC did not have an appropriate benchmark of their competitors' regular prices against which to assess their own regular prices. In addition, HBC's review of competitors' regular prices was not done on any sort of schedule, but rather only when there was time. In fact, no results from any competitive review are recorded anywhere. The regular price comparisons undertaken by the Mattress Buyers to competitors' products were at best arbitrary and informal.
53. HBC's regular prices for the Specified Sleep Sets were at least double their promotional prices. Therefore, HBC had no expectation that the market would validate the regular price of the Specified Sleep Sets, that is, that consumers would actually purchase the

Specified Sleep Sets at the regular price. Grossly inflated regular price representations were and continue to be made by HBC to the public about all or substantially all of its sleep sets, and HBC has no expectation that the market would validate any of its regular prices on sleep sets.

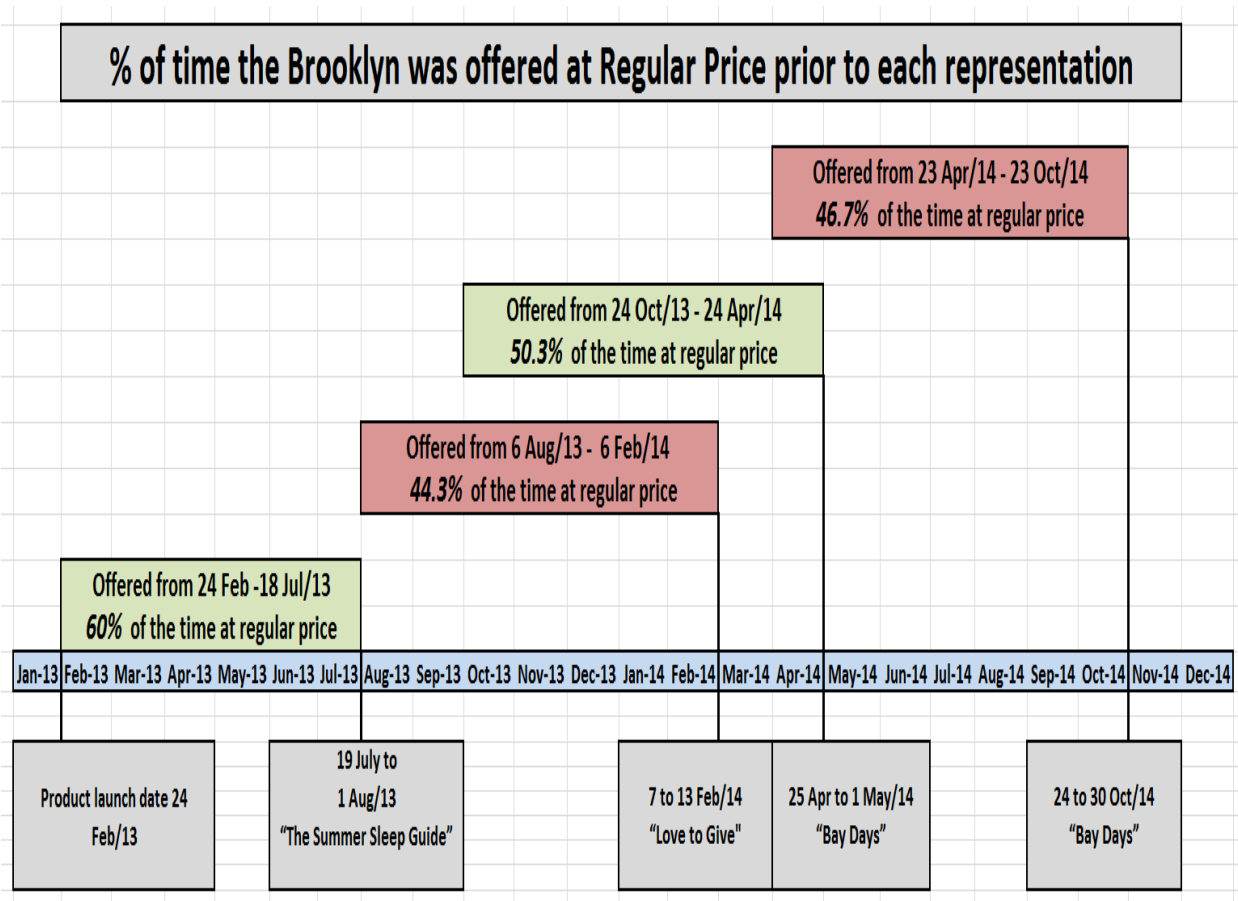
54. The Mattress Buyers themselves expected regular price sales would make up only 5% or less of overall sleep set sales annually. This expectation is based on previous years' regular price sales, which were *de minimis*.
55. There were almost no genuine sales of the Specified Sleep Set mattresses at the regular price as shown in Tables 2(a), (b), (c) and (d). Taking a universal view of total sales prior to the last representation back to the launch, only 0.0191% of total sales of the Specified Sleep Set mattresses were at the regular price.
56. Regular price sales are such an insignificant percentage of overall sales, the Mattress Buyers did not bother to find out to what extent consumers were actually purchasing sleep sets, including the Specified Sleep Sets at the regular price. The Mattress Buyers therefore could not verify whether the market was validating HBC's regular prices.
57. HBC knew they would not generate anything but an insignificant volume of regular price sales. HBC's own regular price fell well outside of what HBC knew to be a competitive regular price for sleep sets, including the Specified Sleep Sets.
58. HBC knew that, almost all of their sleep sets including the Specified Sleep Sets, were sold at a promotional price. HBC knew that the "out-the-door" price, that is the price consumers actually pay for sleep sets, is a promotional price.
59. HBC's planning and forecasting for sleep sets is based on sales at promotional prices. Gross profits and gross margins are based on the promotional prices of the sleep sets. Only the promotional prices are relevant as HBC knew it would not sell a significant percentage of sleep sets at the regular price and therefore did not conduct planning based on the regular price. In fact, the expectation, on a forward looking basis, was that sales of sleep sets would occur, as in the past, almost exclusively at the promotional price.

60. The Mattress Buyers efforts were focused on ensuring HBC's promotional prices were competitive and would generate sales as forecasted. Unlike with regular prices, the Mattress Buyers monitored and recorded competitors' promotional prices for sleep sets. Also, unlike with regular prices, the Mattress Buyers adjusted the promotional price of sleep sets in response to poor sales.
61. HBC employs a "set it and forget it" policy with respect to the regular prices of sleep sets. The regular prices of sleep sets, including the Specified Sleep Sets were set months prior to their introduction onto the HBC sales floor. Despite almost nonexistent regular price sales, the regular prices were never changed but instead continued to be represented to consumers as a "good faith" regular price.
62. HBC did not expect, nor were they trying to sell, the Specified Sleep Sets at the regular price. Rather, any expectation of achieving actual sales by HBC was at the promotional price and not at a "good faith" regular price. HBC's lack of good faith is therefore dispositive of the Time Test.
- (ii) HBC did not offer the Specified Sleep Sets for a "Substantial Period of Time" at regular price**
63. Further, HBC did not offer the Specified Sleep Sets at the regular price for a substantial period of time recently before the making of the Representations.
64. Given the nature of sleep sets, a reasonable period of time to evaluate whether the Specified Sleep Sets were offered in good faith recently before the making of a regular price comparison representation is six months prior to the Representation. If the sleep set had been offered for sale for less than six months at the time of the Representation, a reasonable period of time would be the life of the sleep set until the day prior to the Representation.
65. The following charts display the percentage of time each of the Specified Sleep Sets were offered at the regular price or higher in the six months prior to each of the Representations. None of the Specified Sleep Sets had been offered for six months prior

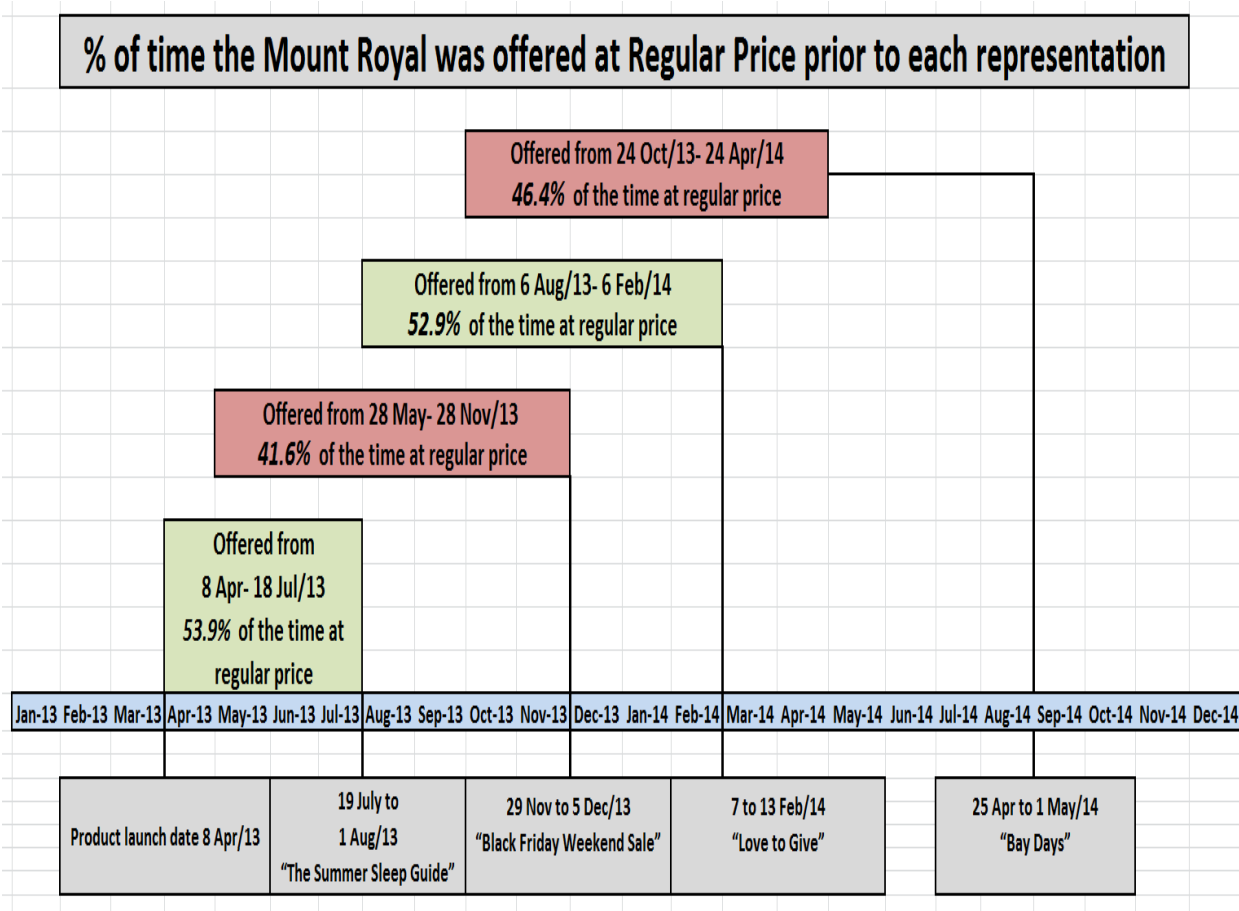
to the first representation; therefore the period of time assessed was from the launch date to the day prior to the first representation.

66. A Specified Sleep Set offered at the regular price less than 50% of the time prior to the Representation does not satisfy the requirement that the product be offered at the regular price or higher for a substantial period of time. Each red bar in the charts below indicates the Specified Sleep Set failed to meet this 50% threshold and therefore failed the Frequency Element for a particular representation. A green bar indicates the Specified Sleep Set satisfied the 50% Frequency Element for a particular representation.
67. Each red bar on the charts indicates a separate, specific failure of the Frequency Element of the Time Test. Each value under 50% represents a distinct violation.

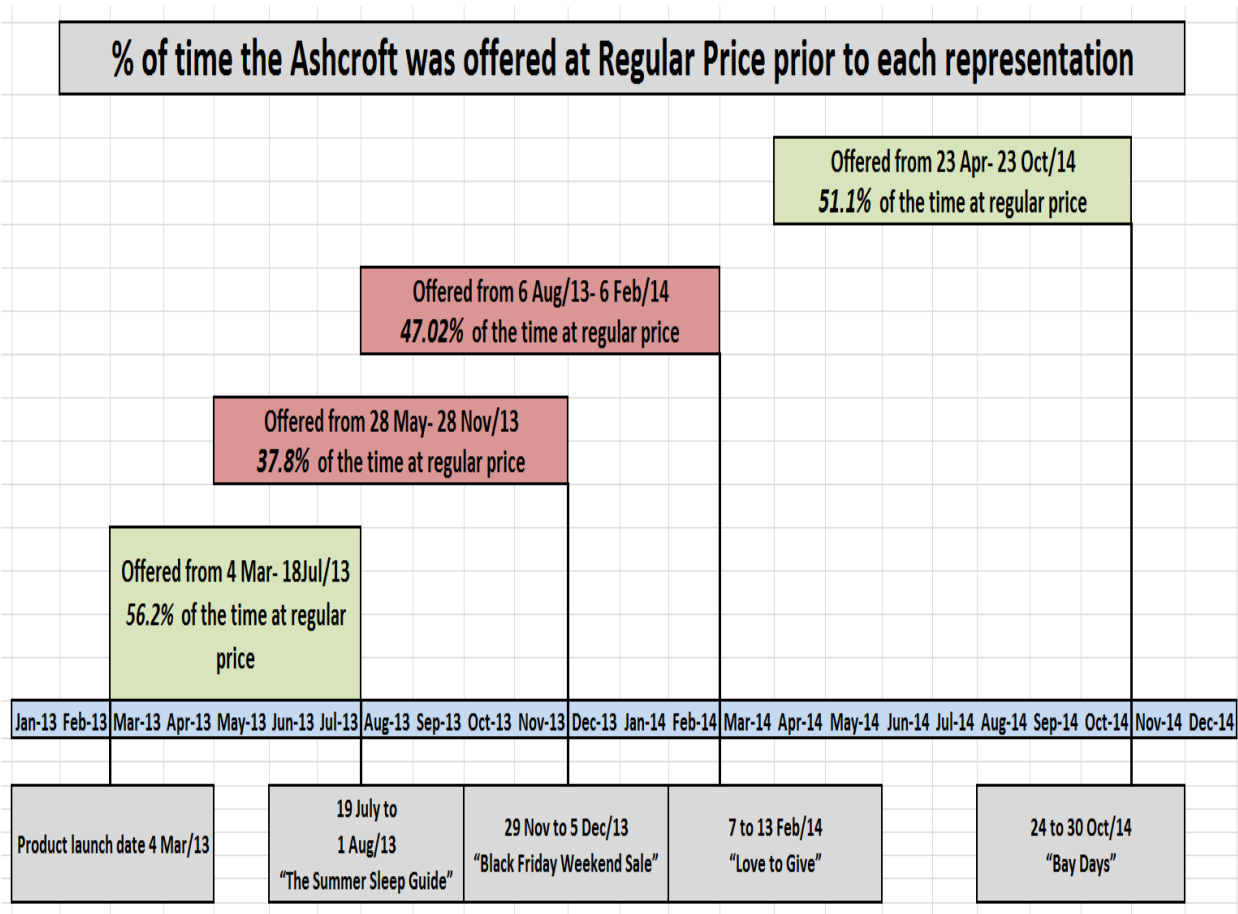
Table 3
Percentage of Time the Specified Sleep Sets were offered at Regular Price or higher
in the six months preceding the representation
 (or the sales period of the Specified Sleep Set if it was offered for less than six months prior to representation)



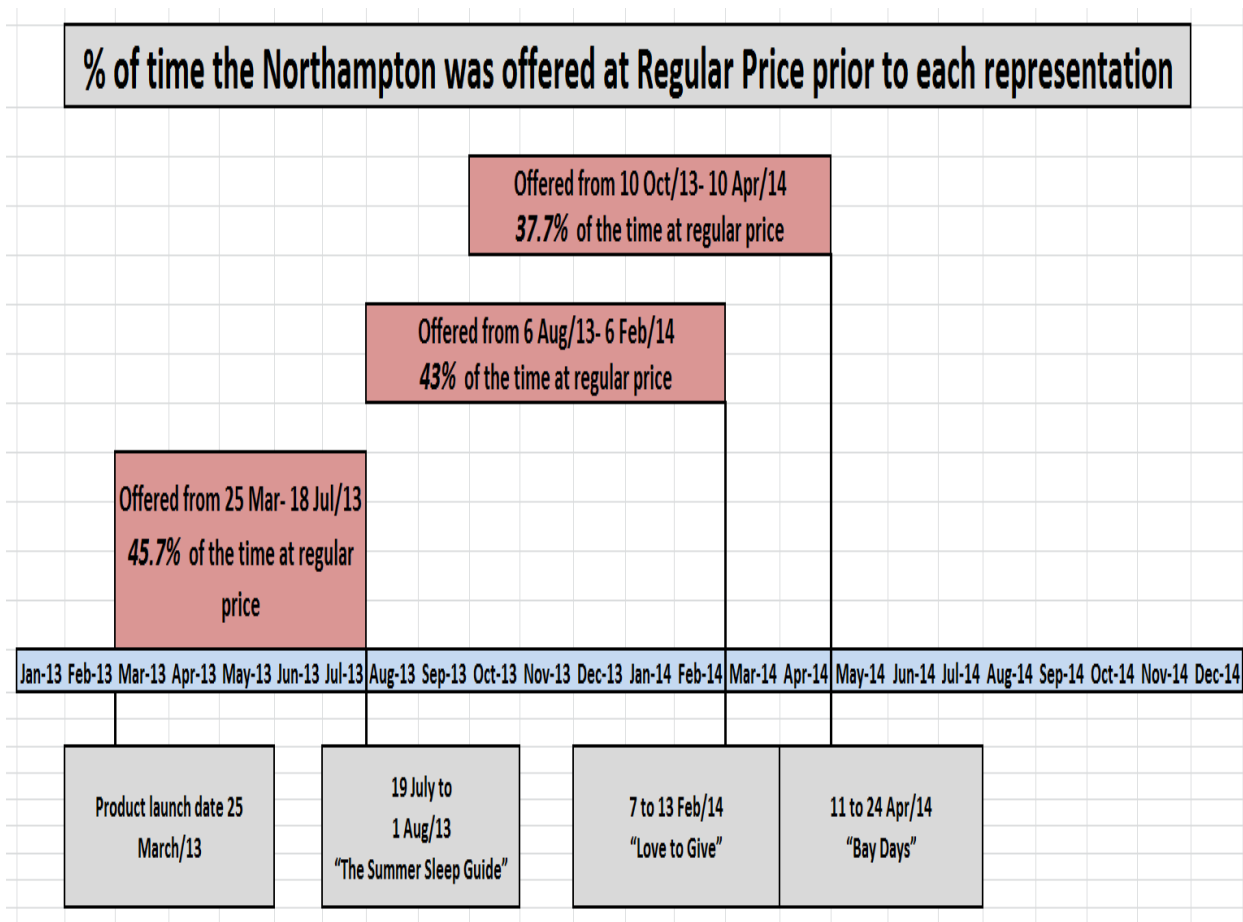
68. Therefore, HBC failed the Frequency Element of the Time Test for two of the four representations of the Brooklyn.



69. Therefore, HBC failed the Frequency Element of the Time Test for two of the four representations of the Mount Royal.



70. Therefore, HBC failed the Frequency Element of the Time Test for two of the four representations of the Ashcroft.



71. Therefore, HBC failed the Frequency Element of the Time Test for all three of the representations of the Northampton.
72. The charts demonstrate that, for the most part, HBC either failed to meet the 50% threshold or only managed to pass by a very insignificant margin. Each of the nine failures represents a separate instance of HBC failing to offer the Specified Sleep Sets at the regular price for a substantial period of time recently before the making of the representations.

F. HBC's Marketing Practices for the Specified Sleep Set Examples were and continue to be Reflective of its Practices for Sleep Sets More Generally

73. HBC's marketing practices for the specified sleep sets were and continue to be reflective of HBC's reviewable conduct for sleep sets more generally.

74. The Commissioner obtained information in the course of his inquiry from HBC with respect to the high-low promotional pricing of 18 sleep sets that were promoted to the public, including the Specified Sleep Sets. All 18 sleep sets were promoted to the public with deep discounts off of grossly inflated deceptive regular prices. HBC did not set the regular prices on any of these sleep sets in good faith with the honest belief that the market would validate the regular prices, and in fact sold few if any of the sleep sets at the regular price.
75. The Commissioner has continued to track HBC's marketing activities, a summary of which is set out in Table 4 below. HBC's conduct continues to follow the same practice particularized above of promoting sleep sets to the public with deep discounts off of grossly inflated regular prices.

TABLE 4
Summary of HBC's Representations for queen sized sleep sets
found in publicly available sources from 1 March 2103 to 24 December 2017
(excluding clearance and end of line representations)

<u>Year</u>	<u>Total Number of identified Sleep Sets promoted using OSP representations</u>	<u>Total number of individual OSP representations</u>	<u># of OSP representations with savings of 50% or more off the regular price</u>	<u>% of total number of OSP representations with savings of 50% or more off regular price</u>
<u>2013</u>	<u>35</u>	<u>118</u>	<u>115</u>	<u>97.5%</u>
<u>2014</u>	<u>48</u>	<u>161</u>	<u>156</u>	<u>96.9%</u>
<u>2015</u>	<u>55</u>	<u>172</u>	<u>162</u>	<u>94.2%</u>
<u>2016</u>	<u>56</u>	<u>191</u>	<u>186</u>	<u>97.4%</u>
<u>2017</u>	<u>48</u>	<u>203</u>	<u>199</u>	<u>98%</u>
<u>TOTALS</u>	<u>--</u>	<u>845</u>	<u>818</u>	<u>--</u>

76. As such, the Specified Sleep Sets and the Representations referred to above are reflective of HBC's deceptive OSP practices with respect to sleep sets in general.

IV. HBC'S FALSE OR MISLEADING REPRESENTATIONS IN CLEARANCE AND END OF LINE PROMOTIONS OF SLEEP SETS

77. In addition to making deceptive OSP representations, as set out above, HBC has also made deceptive clearance representations to consumers in order to further promote sales of sleep sets. HBC has failed to comply with paragraph 74.01(1)(a) of the Act concerning the making of false or misleading representations to the public. HBC has made and continues to make representations to the public that are false or misleading in a material respect in its clearance and end of line promotions of sleep sets.

A. HBC's False or Misleading Clearance Representations

78. HBC made clearance representations for the purpose of promoting sleep sets since at least 1 March 2013. HBC changed the language of its representations promoting sleep sets from "clearance" to "end of line" on or about 26 December 2014.

79. Clearance representations create the general impression that on-hand inventory is being 'cleared out', likely to make room for new merchandise.

80. HBC was not, in fact, clearing out their existing stock of the promoted sleep sets during clearance promotions. HBC carried very little on-hand sleep set inventory because the retail sleep set market operates on an on-demand delivery model. Sleep sets were produced by the manufacturer after the consumer purchased a sleep set from the retailer. HBC continued to order new inventory as customers purchased sleep sets promoted on clearance. HBC only began to sell strictly from on-hand inventory days and sometimes weeks after the end of a clearance promotion.

81. HBC's clearance representations were material to consumers' decision to purchase sleep sets. A clearance promotion implies scarcity of a product. In other words, if consumers believed there were a limited number of sleep sets available, they may have rushed their purchasing decision, limited the number of competing retailers they visited, or entered into purchases that they otherwise would not have made in the absence of the perceived savings.

82. **B. Examples of HBC's False or Misleading Clearance Representations**

(i) **10 to 16 January 2014**

83. For the period 10 to 16 January 2014, HBC made the following clearance representations in their promotional flyer entitled "Clearance". The flyer contains clearance representations for the following sleep sets (among others):

(a) Simmons Beautysleep Bellamy Euro top queen mattress set (the "**Bellamy**");

(b) Simmons Beautyrest Recharge Castlebridge tight top queen mattress set (the "**Castlebridge**");

(c) Simmons Beautyrest Recharge Wexford hi-loft pillow top queen mattress set (the "**Wexford**"); and

(d) Simmons Beautyrest Black Grace IV tight top queen mattress set (the "**Black Grace**").

84. The flyer makes the representation "Simmons Beautyrest Clearance" along with OSP representations for each of the sleep sets. The representations create the general impression that HBC is clearing out all of its on-hand inventory of certain Simmons sleep sets and that the sleep sets will not be replenished either during or following the promotion.

SIMMONS BEAUTYREST
CLEARANCE
UP TO
65% OFF

Save \$1000
\$498
Reg. \$1498
BEAUTYSLEEP
Bellamy Euro top
queen mattress set

Save \$1520
\$778
Reg. \$2298
BEAUTYREST Recharge
Castlebridge tight top
queen mattress set

Save \$1620
\$878
Reg. \$2498
BEAUTYREST Recharge
Wexford hi-loft pillow top
queen mattress set

Save \$1720
\$978
Reg. \$2698
BEAUTYREST
Vienna comfort top
queen mattress set

Save \$2600
\$1698
Reg. \$4298
BEAUTYREST
Black Grace IV tight top
queen mattress set

NO INTEREST FOR 24 MONTHS On all furniture, major appliances, mattresses and home entertainment when you use your Hudson's Bay MasterCard® or your Hudson's Bay Credit Card.
Minimum purchase \$200 (excluding taxes). Delivery charges and fees are payable up front. On approved credit only. Minimum monthly payment required. No additional fees. See below for details.

FREE DELIVERY AND SET-UP ON ALL MATTRESS SETS (\$69 value)
PLUS, 60-NIGHT COMFORT GUARANTEE. See store for details.

85. The representations are false or misleading in a material respect because HBC was not clearing out its on-hand inventory of sleep sets. In particular, the Bellamy, Castlebridge, Wexford and Black Grace all continued to be replenished by HBC from the manufacturer throughout the promotion.
86. Indeed, HBC continued to offer the sleep sets even after the conclusion of the clearance promotion. Despite this clearance representation, HBC continued to offer the promoted

sleep sets for weeks and sometimes months before selling only from its on-hand inventory.

(ii) 14 to 27 February 2014

87. For the period 14 to 27 February 2014, HBC made the following clearance representations in their promotional flyer entitled “Winter Home Sale”. The flyer contains clearance representations for the following sleep sets:
- (a) Sealy Posturepedic Newhaven euro top queen mattress set (the “**Newhaven**”);
 - (b) Sealy Posturepedic Titanium Gallantry tight top queen mattress set (the “**Gallantry TT**”);
 - (c) Sealy Posturepedic Titanium Gallantry pillow top queen mattress set (the “**Gallantry PT**”); and
 - (d) Sealy Posturepedic Titanium Southdale euro pillow top queen mattress set (the “**Southdale**”).
88. The flyer makes the representation “Sealy Posturepedic Clearance” along with OSP representations for each of the sleep sets. The representations create the general impression that HBC is clearing out all of its on-hand inventory of the promoted Sealy Posturepedic sleep sets and the sleep sets will not be replenished either during or following the promotion.

FEBRUARY 14 to FEBRUARY 27

HUDSON'S BAY

WINTER HOME SALE: Save on furniture, appliances and more for every room in the house

Save \$940
\$658
 Reg. \$1598
 SEALY Posturepedic Newhaven Euro top queen mattress set

Save \$1100
\$698
 Reg. \$1798
 SEALY Posturepedic Titanium Gallantry tight top queen mattress set

FREE DELIVERY
 Free local delivery and set-up on all mattress sets (\$69 value). See store for details.

Save \$1200
\$798
 Reg. \$1998
 SEALY Posturepedic Titanium Gallantry pillow top queen mattress set

Save \$2150
\$1148
 Reg. \$3298
 SEALY Posturepedic Titanium Southdale Euro pillow top queen mattress set

SEALY POSTUREPEDIC CLEARANCE

89. The representations are false or misleading in a material respect because HBC was not clearing out its on-hand inventory of sleep sets. In fact, all continued to be replenished by HBC from the manufacturer throughout the promotion.
90. HBC continued to offer the sleep sets even after the conclusion of the clearance promotion. Indeed, despite this clearance representation, HBC continued to offer the promoted sleep sets for days and sometimes weeks before selling only from its on-hand inventory.

C. HBC's False or Misleading End of Line Representations

91. Effective December 2014, HBC adopted a revised "Mattress Transition Pricing Policy". The policy states that no new orders for end of line sleep sets could be placed with the sleep set manufacturer after a predetermined date (known as the "D-Date"). Twenty-three days prior to the D-Date, the sleep set moves to end of line promotional pricing.
92. In line with the revised policy, HBC stopped making "clearance" representations with respect to sleep sets starting with the Boxing Week 2014 promotional materials and instead changed to "end of line" representations.
93. However, HBC continues to replenish sleep sets during end of line promotions. New orders do not stop until the end of line sale is over.
94. The terminology "clearance" and "end of line" give a comparable general impression and are material to consumers' decision to purchase sleep sets. Both terms imply that HBC will be selling specific inventory and it will not replenish what gets sold. Notwithstanding, HBC continues to purchase sleep sets from manufacturers on an on-demand basis for the duration of its end of line sleep set promotions. There is not a limitation on available stock during an end of line promotion.
95. While HBC has changed the language, it has nonetheless created a similar "clearance feel" to some of its end of line sleep set representations. In changing from "clearance" to "end of line" terminology, HBC made efforts to ensure that some of the new end of line representations paralleled the previous clearance representations by using the same font and graphic scheme. The end of line representations are meant in essence to be "clearance like".

D. Examples of HBC's False or Misleading End of Line Representations

(i) 9 to 15 January 2015

96. For the period 9 to 15 January 2015, HBC made the following end of line representations in their promotional flyer entitled "Up to 60% off Clearance". The flyer contains end of line representations for the following sleep sets:
- (a) Simmons Beautyrest World Class Ashcroft tight top queen mattress set (the "**Ashcroft**") (as previously identified in paragraph 26); and
 - (b) Simmons Beautyrest World Class Roslindale super pillow top queen mattress set (the "**Roslindale**").
97. The flyer makes the representation "\$10 million Inventory Clearance of discontinued furniture, mattresses and major appliances" alongside "end of line" representations and OSP representations for the promoted end of line sleep sets. The representations create the general impression that HBC is selling its remaining on-hand inventory of the promoted end of line sleep sets.

Save \$850
\$648
Reg. \$1498

BEAUTYSLEEP Muirfield
Euro top queen
mattress set

Save \$1200
\$898
Reg. \$2098

SERTA Perfect Sleeper
Abberton II tight top
queen mattress set

50% off select leather furniture Excludes EQA

50% off
\$1399
Reg. \$2799

THEO 85" Italian-tanned leather sofa
in Coriva Sandstone Made in Canada.
50% off other colours and custom
collection options.

END OF LINE

Save \$2000
\$998
Reg. \$2998

BEAUTYREST World Class
Ashcroft tight top
queen mattress set

END OF LINE

Save \$2500
\$1298
Reg. \$3798

BEAUTYREST World Class
Rosindale super pillow top
queen mattress set

Up to 25% off BOSCH major appliances

Save \$700
\$2399⁹⁸
Reg. \$3099.98

BOSCH 24"
compact
laundry pair

Save \$400
2.2 cu. ft.
front-load washer: #86514123.
Reg. \$1599.99 Sale **\$1199.99**

Save \$300
4.0 cu. ft. dryer:
#86514287. Reg. \$1499.99
Sale **\$1199.99**

\$10 MILLION INVENTORY CLEARANCE of discontinued furniture,
mattresses and major appliances

UP TO **35% OFF** CLEARANCE MAJOR APPLIANCES
Includes floor models. Selection varies by store. Prices as ticketed.

UP TO **70% OFF** CLEARANCE FURNITURE
Includes floor models. Selection varies by store. Prices as ticketed.

UP TO **65% OFF** END OF LINE MATTRESS SETS
Selection varies by store. Prices as ticketed.

98. However, both sleep sets promoted as end of line continued to be ordered by HBC from the manufacturer throughout the promotion. This is contrary to the general impression of the representation that HBC will not replenish what gets sold.
99. Sleep sets are the only product in the flyer promoted as end of line. The end of line sleep set representations in the flyer use the same yellow and black colour scheme as the clearance representations in the same flyer. Further, the same font and graphic scheme are used for both clearance and end of line representations.
100. Two banners appear at the bottom of the representation. The top banner refers to a "\$10 Million Inventory Clearance of discontinued furniture, mattresses and major appliances" (emphasis added). The bottom banner includes "end of line" sleep sets alongside several

other types of products which are promoted on clearance. The use of the words “clearance” and “end of line” after one another blurs any distinction between the terms. Further, the proximity of the wording, the typeface, the use of the same colour scheme all create the general impression that the words “clearance” and “end of line” are interchangeable.

V. HBC FAILED AND CONTINUES TO FAIL TO EXERCISE DUE DILIGENCE

101. HBC failed and continues to fail to exercise due diligence to ensure compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act.
102. HBC has an Advertising Compliance Manual (“**Compliance Manual**”) that provides direction to ensure that HBC promotions “tell the truth and not be misleading”.
103. However, HBC does not have a separate compliance department or an employee solely responsible for managing HBC’s compliance obligations. Further, HBC does not have a specific executive committee charged with overseeing HBC’s compliance structure.
104. It is the responsibility of the Mattress Buyer to ensure sleep set promotions adhere to the policies in the Compliance Manual and the Act, as well as to achieve sales targets. HBC’s legal department is responsible for providing compliance training to buyers, but it is the Mattress Buyer who is ultimately responsible for ensuring sleep set compliance.
105. HBC’s compliance monitoring, verification and reporting mechanisms are all ineffective. Three successive Mattress Buyers conducted ongoing monitoring of promotional representations and yet HBC continued to make deceptive representations during the tenure of all three. Further, HBC management continually failed to verify if monitoring was being done properly and instead relied entirely on the Mattress Buyers self-reporting on whether they were compliant. These failures are ongoing.

106. The Mattress Buyers were well aware that, in some instances, they were going to fall out of compliance by running certain promotional representations. However, these breaches were ignored. Instead, the Mattress Buyers attempted to compensate for breaches only after they had occurred. Mattress Buyers simply “sucked it up” if they were offside and adjusted promotions for the next month.
107. HBC management was aware and failed to take action or turned a blind eye to ongoing compliance failures. HBC management did not take reasonable steps that would have prevented or detected clear and obvious contraventions of the Act. HBC management has failed to demonstrate a clear, continuous and unequivocal commitment to compliance and that contraventions of the law are not acceptable under any circumstances. These failures are ongoing.
108. The Compliance Manual states that HBC “regards compliance with advertising laws [including those under the Act] as being of fundamental importance. Therefore, failure to comply with these Rules may result in disciplinary action, up to and including dismissal.” However, in practice, there was no penalty when the policies in the Compliance Manual were not followed to the extent that HBC management was even aware of any compliance failures.
109. Specifically, with respect to OSP representations, the Compliance Manual contains no direction concerning the volume of regular priced units required to be sold to comply with either the Volume Test or the “good faith” element of the Time Test. The actual number of regular priced units sold is an insignificant consideration for HBC in monitoring its own compliance.
110. As it relates to the false or misleading clearance and end of line representations, the Compliance Manual states that “a ‘clearance’ allows us [HBC] to dispose of remaining inventory. The word ‘clearance’ implies that...we will not replenish what gets sold.” Despite this specific direction in the Compliance Manual, HBC replenished sleep sets during clearance and end of line sales.

111. Deceptive OSP representations and false or misleading clearance and end of line representations promoting sleep sets occurred despite HBC's compliance mechanism. HBC's compliance mechanism ~~was~~ is completely ineffective in preventing contraventions of the law. The shortcomings in HBC's compliance program and its ineffectiveness regarding sleep sets are representative of the overall poor functioning of HBC's compliance mechanism. The egregious compliance failures with respect to sleep sets are the inevitable outcome of HBC's flawed compliance model.
112. Furthermore, the policies in the Compliance Manual apply not only to promotions of sleep sets, but to ALL products HBC offers for sale. With the exception of seasonal products and occasion-specific goods, the sections of the Compliance Manual which are meant to promote compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act apply to ALL the products HBC offers for sale.
113. The type of representations used to promote sleep sets are used extensively by HBC to promote other products. Sleep sets are but a subset of the larger "Major Home Division" which is responsible for furniture, sleep sets and major appliances. More specifically, the Major Home Division is part of the larger Home Division, which also includes three other divisions offering bed and bath linens, seasonal home products and housewares. All of these divisions, as well as many others, use OSP representations to promote the sale of HBC products. For example, in the 9 to 15 December 2016 flyer, HBC used OSP representations to promote the sale of luggage, women's clothing, men's clothing, small appliances, toys, footwear, cookware, jewellery, linen, towels, and glassware as well sleep sets.
114. The consequence of HBC's lack of a credible and effective compliance program is HBC's inability to ensure the numerous OSP and clearance representations it makes to the public are compliant with the Act.

115. HBC's internal compliance mechanism, which applies to ALL the HBC products it sells, is unable to ensure compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act.

IV. AGGRAVATING FACTORS

116. HBC has made, and continues to make, the foregoing false or misleading representations to the public for the purpose of promoting sleep sets and their business interests more generally.
117. Pursuant to subsection 74.1(5) of the Act, the deceptive conduct described herein is aggravated by the following:
- a. the national reach of the HBC's conduct;
 - b. HBC has made and continues to make the same or similar representations frequently and over an extended period of time;
 - c. HBC's false or misleading representations, described herein, are material;
 - d. self-correction is unlikely to remedy adequately or at all HBC's conduct; and
 - e. HBC had significant gross revenues on the five Specified Sleep Sets from 1 March 2013 to 31 January 2015.

VI. RELIEF SOUGHT

118. The Commissioner claims the relief set out in paragraph 1.

VII. PROCEDURAL MATTERS

119. The Commissioner requests that this proceeding be conducted in the English language.
120. The Commissioner requests that this application be heard in the City of Ottawa.

DATED AT Gatineau, Quebec, this 22nd day of February 2017.

John Pecman
Commissioner of Competition

For the purposes of the Application, service of all documents on the Commissioner may be served on:

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AND TO: The Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 584

CT-2017-008

THE COMPETITION TRIBUNAL

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

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

- and -

HUDSON'S BAY COMPANY

Respondent

Memorandum of Fact and Law of the Commissioner of Competition

Overview

1. The Commissioner of Competition (the “**Commissioner**”) seeks to amend his Notice of Application (the “**Original Application**”).¹ Hudson’s Bay Company (“**HBC**”) frequently promotes the supply of sleep sets using ordinary selling price representations (“**OSP**”

¹ *Commissioner of Competition v. Hudson’s Bay Company*, CT-2017-008, Notice of Application.

representations”) which contain grossly inflated regular prices and promotional prices of 50% or more off that price. HBC continues to use exactly the same type of OSP representation to promote its sleep sets. HBC’s marketing practices for the sleep sets identified in the Original Application were and continue to be reflective of HBC’s reviewable conduct for sleep sets more broadly.

2. HBC’s compliance program has failed completely to prevent contraventions of the *Competition Act* R.S.C. 1985, c. C-34 (the “**Act**”) with respect to OSP representations as applied to sleep sets. This same compliance program applies to all products HBC offers for sale.²

3. The remedy sought by the Commissioner remains the same. In order to ensure that HBC not engage in the reviewable conduct as demonstrated with sleep sets in respect of all other products it offers for sale, a prohibition order is sought to address any contraventions of the ordinary selling price provisions of the Act. This remedy aligns with the behavioral remedy ordered by Justice Dawson in respect of Sears Canada’s use of deceptive OSP representations.³

4. Allowing the amendment to the Notice of Application (the “**Amended Application**”) in no way prejudices HBC and puts it in exactly the same position it would have been had the Original Application contained the amended allegations. HBC has provided no evidence to suggest that it will be prejudiced by the amended pleading. The added costs identified by HBC and the alleged delays are a normal consequence of litigation and not a basis upon which to refuse the amendments. The amendments requested by the Commissioner should be allowed.

Part I – The Facts

5. The Commissioner alleges that HBC has engaged and continues to engage in conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the Act.

² *Ibid*, para. 8.

³ *Commissioner of Competition v. Sears Canada Inc.*, 2005 Comp.Trib.2, paras. 378-380.

6. On November 14, 2017, the Commissioner brought a motion seeking to require HBC to produce an Affidavit of Documents concerning the period after February 2015 on the basis that HBC's conduct is ongoing.

7. On December 7, 2017, the Competition Tribunal (the "**Tribunal**") granted the Commissioner's motion in part.⁴ HBC was ordered to produce records after 2015 in respect of the Commissioner's allegations pursuant to paragraph 74.01(1)(a) of the Act as the Commissioner's Original Application was clear in alleging that HBC's conduct was ongoing in respect of its allegedly deceptive clearance/end of line representations. HBC was not ordered to produce post-2015 records in respect of subsection 74.01(3) of the Act because the Commissioner's Original Application was found to give the erroneous impression that the allegations were limited to six⁵ sleep set advertisements from July 19, 2013 to October 30, 2014.

8. The proposed Amended Application clarifies the Commissioner's allegations in respect of subsection 74.01(3) of the Act. The proposed amendments are minor and are intended to capture HBC's ongoing conduct, which was not read into the Commissioner's current pleading.⁶ The proposed amendments also seek to correct the erroneous impression given by the Original Application that the Commissioner reviewed all of HBC's sleep set advertisements and was only able to identify six advertisements making allegedly deceptive ordinary sale price representations. In summary, with respect to HBC's conduct reviewable under subsection 74.01(3) of the Act, the Commissioner's proposed amendments:

- correct the use of past tense in the Notice of Application, which the Tribunal drew attention to in paragraph 26 of its December 7th decision; and
- clarify that HBC's reviewable conduct is not limited to a discrete number of allegedly misleading representations, namely the sleep sets referred to in the

⁴ *The Commissioner of Competition v Hudson's Bay Company*, 2017 Comp Trib 19.

⁵ "Six" refers to the number of flyers cited in the Commissioner's Notice of Application. The six flyers include a total of fifteen ordinary sale price representations.

⁶ *Supra*, note 4.

Original Application. These are mere examples of HBC’s ongoing promotional pricing practices with respect to sleep sets more generally.

9. This case is at the initial stages of the Tribunal process such that examinations for discovery have not yet commenced.

10. While HBC contends that it will be prejudiced if the Commissioner’s amendments are granted, the January 26, 2018 Affidavit sworn by Lucy Esposito (the “**Esposito Affidavit**”) lends little to no support to this contention. On cross-examination, the following admissions were made by Ms. Esposito:

Esposito Admissions	Reference
<p>Ms. Esposito acknowledged that she never obtained a quote/assessment from Transperfect, the third party supplier, on how much it would cost to produce an Affidavit of Documents for the period 2015-2017. Transperfect has been used for all document production exercises to date and yet no explanation was provided by Ms. Esposito as to why Transperfect was not contacted for a quote.</p>	<p>Page 38</p> <p>136 Q. And just so I understand correctly, you have no quotes or assessments from Transperfect on what it would take in order to do the job, that is produce the affidavit of documents. You have no quotes from them?</p> <p>A. I have no received no quotes from them.</p> <p>137 Q. And you haven't made any efforts to obtain a quote from them?</p> <p>A. Correct.</p>
<p>Ms. Esposito acknowledged that she never made an assessment on the number of HBC records that would have to be processed in order to produce an Affidavit of Documents for the period 2015-2017. She preferred to rely on the Commissioner’s bald statement that there may be “thousands of documents”.</p>	<p>Pages 36 – 37</p> <p>123 Q. And as it relates to the period 2015 until present, have you had any discussion with Transperfect on the number of documents that are involved?</p> <p>A. No.</p> <p>124 Q. So, you don't know how many documents you'd have to search through?</p> <p>A. Correct.</p> <p>125 Q. And is there a reason why you haven't communicated to Transperfect?</p> <p>A. Transperfect would have no knowledge about how much documents our clients would have.</p> <p>126 Q. So, the client has the document from 2015 until present and they haven't given to Transperfect?</p> <p>A. We haven't identified the documents that would be in scope.</p>

127 Q. Okay, but do you physically know how many documents you'd have to search through for the period 2015 until today, in order to find the documents that are relevant?

A. I do not.

128 Q. You haven't conducted that exercise?

A. Correct.

129 Q. And you haven't asked Transperfect to conduct that exercise either?

A. Correct.

130 Q. So I'm just trying to understand then, when you assess the period of four months in order to complete your document production, you are basing it only on what has occurred up to date; is that correct?

A. I'm basing -- I'm basing my opinion on what has happened previously up to date.

131 Q. And that would include the Section 11 process?

A. Correct.

132 Q. Just so I'm clear, we don't know the data or the volume of data that would have to be processed from 2015 right up until today?

A. Correct.

133 Q. But the raw data -- and maybe you've answered this and forgive me if you have, but the raw data that is the database that contains all the documents, is that not with Transperfect at this point in time?

A. It is.

134 Q. Okay.

MR. KOLERS: No, no, just to be clear. What's with Transperfect is the database. And I'm sorry if I've misunderstood your question.

MR. GAY: Mm-hmm.

MR. KOLERS: But what's with Transperfect is the database of the documents that have been collected, which is the set up to 2015.

BY MR. GAY:

135 Q. So, anything that postdates 2015 is with HBC?

MR. KOLERS: Has not been collected, correct.

THE WITNESS: Has not been collected.

MR. KOLERS: That was your question?

	MR. GAY: That is the question. Yes.
<p>Ms. Esposito would not be required to process records for the period 2013-2015 as these records have already been processed and included in the Affidavit of Documents. Only the records for the period 2015-2017 would need to be processed by Transperfect.</p>	<p>Pages 35 – 36</p> <p>120 Q. You've done your searches so far and you've produced an affidavit of documents right up until 2015; correct?</p> <p>A. Correct.</p> <p>121 Q. And so what we're asking for is that which postdates 2015, that is the period from 2015 and right up until today; is that correct?</p> <p>A. Correct.</p> <p>122 Q. And so, as you're conducting your searches, you would be searching, you wouldn't necessarily have to go back in time and look at anything that postdates or predates 2015; correct; you've already done that?</p> <p>A. Correct.</p>
<p>Ms. Esposito acknowledged that the cost of producing the Affidavit of Documents incurred thus far includes the cost of producing records under the Section 11 Order. The terms of the Section 11 Order are however far broader than what HBC is required to produce under the Rules of Procedure and are therefore not reflective of the cost of having to produce an Affidavit of Documents for the period 2015-2017.</p>	<p>Pages 26 – 33</p> <p>BY MR. GAY:</p> <p>93 Q. Are you asked -- in compiling documents for an affidavit of documents are you asked to answer written interrogatories in preparing a document?</p> <p>A. No.</p> <p>94 Q. Okay. And so this -- and what's found at schedule 2 is not something that would typically be found in a typical proceeding involving either a notice of application or a statement of claim; is that correct?</p> <p>MR. KOLERS: You can answer whether you've seen it in your experience.</p> <p>THE WITNESS: I have not seen it, in my experience.</p> <p>...</p> <p>BY MR. GAY:</p> <p>107 Q. Now you say in paragraph 4: "Transperfect invoiced this matter. Transperfect expended more than 4,200 person hours over a three-month period for the collection, review, production of the approximately 27,000 documents." [As read] Correct?</p> <p>A. Correct.</p> <p>108 Q. Now, Transperfect's efforts would have been in respect of all matters in relation to the Section 11 order?</p> <p>A. Can you rephrase that question?</p> <p>109 Q. You were billed or someone -- Transperfect invoiced HBC US\$265,000.</p>

	<p>A. Correct.</p> <p>110 Q. And that was in order to respond to the Section 11 order; is that correct?</p> <p>A. Correct.</p> <p>111 Q. And there are two component parts to the Section 11 order, schedule 1 and schedule 2 which I've put to you; correct?</p> <p>A. Correct.</p> <p>MR. KOLERS: Mr. Gay, for the clarity of the record, Transperfect has nothing to do with schedule 2.</p>
<p>The Esposito Affidavit contends that it took three months for HBC to produce the records in response to the Section 11 Order. Ms. Esposito uses this period to project the amount of time that it would take to produce an additional Affidavit of Documents. However, on cross-examination, she acknowledged that the three months that HBC took to produce the records in response to the Section 11 Order were in fact mandated by court order and that HBC actually produced a number of records on a rolling basis, within a period of 30 days. The suggestion that it "took" three months to produce the records in response to the Section 11 Order is less than true.</p>	<p>Pages 13 – 18</p> <p>BY MR. GAY:</p> <p>49 Q. So, is it your understanding that you were required to produce the documents within 90 days; is that correct?</p> <p>MR. KOLERS: Well, Ms. Esposito -- as I already told you, she wasn't at the time at the firm at the time this happened. She wasn't involved in the preparation of this particular response.</p> <p>MR. GAY: All right, well --</p> <p>MR. KOLERS: But the order speaks for itself.</p> <p>BY MR. GAY:</p> <p>50 Q. The order speaks for itself. But is it your understanding that you are required to produce the documents within 90 days?</p> <p>MR. KOLERS: She can read the document, Mr. Gay.</p> <p>BY MR. GAY:</p> <p>51 Q. Well, let her answer. Is that her understanding. She's also sworn --</p> <p>A. Yes.</p> <p>...</p> <p>54 Q. So there was essentially a requirement for you to produce documents on a rolling basis prior to the expiry of the 90 days; correct?</p> <p>A. Yes.</p> <p>55 Q. Let me just show you this here and then we can mark this as an exhibit. EXHIBIT NO. 1: Letter from Stikeman Elliott, Ashley Pietrowski to Andrew D. Little dated March 4, 2015</p> <p>BY MR. GAY:</p> <p>56 Q. In your review of the file, have you seen this document?</p>

MR. KOLERS: Do you know whether you've seen it?

THE WITNESS: No.

BY MR. GAY:

57 Q. You didn't see the document. Okay. It's a document dated --

MR. KOLERS: Sorry, you don't know whether you've seen it?

THE WITNESS: I don't know if I've seen this. I haven't completed a review on it so...

BY MR. GAY:

58 Q. You haven't completed a review of what?

A. I'm reading it.

59 Q. Okay, fair enough. You can read it.

A. Again, can you ask the question?

60 Q. Right. so, this letter would have been sent on March the 4th, 2015 and it would have been in response to the requirement that you produce documents by no later than 30 calendar days following the service of the order. And in it we have the response of schedule 1, spec 6, the response of schedule 1, spec 12, the response of schedule 1, spec 15 and the response to schedule 1, spec 16; do you see that?

A. Yes.

61 Q. So, in fact, you've produced documents prior to the expiry of the 90 days and certainly within the 30 days as required, pursuant to the order; is that correct?

MR. KOLERS: Ms. Esposito was not involved and has already told you she does not recall seeing this document.

MR. GAY: All right.

MR. KOLERS: Okay.

BY MR. GAY:

62 Q. Do you have any reason to believe that this is not accurate, this letter?

A. I have no reason to believe that's inaccurate

63 Q. Do you have any reason to believe that the documents were not delivered to the Commissioner prior to the expiry of the 30 days following the issuance of the order?

A. No.

64 Q. Turn to paragraph 6 of your affidavit, please. It says: "With the assistance of transfer for HB spanned (sic) approximately three months to undertake and

	<p>complete its document collection and review in response to the Section 11 order. HB made its final document production in response to section 11 order on April 15th (sic), 2015. In total HBC provided approximately 27,000 documents in addition to its written return of information." And we've had some precision from your counsel today saying that the amended certificate was delivered on August 21, 2015. But certainly you don't mention in this paragraph that you, in fact, provided documents prior to the expiry of 90 days or that you provided documents within 90 days because it was required of you, pursuant to a court order. You don't mention that in this.</p> <p>A. That's correct.</p> <p>65 Q. Is there any reason why you didn't mention that?</p> <p>A. Not that I'm aware of.</p> <p>66 Q. Is it not important to mention, to tell the court that you were required to produce prior to the 90 days and that you, in fact, produced prior to the 90 days –</p> <p>MR. KOLERS: Don't answer that question.</p>
<p>The Esposito Affidavit is silent on the prejudice to HBC from the amended pleading. No evidence was offered to suggest that the proceeding has caused or will cause the company financial loss. Beyond the inconvenience and costs that a party to litigation would have to incur, there no evidence of harm in the Esposito Affidavit.</p>	
<p>HBC's statement that the proceeding has been hanging over the heads of HBC for four years is incorrect. Ms. Esposito acknowledged that the period from the moment the inquiry was commenced to the moment the Notice of Application was filed was 35 months. During that 35 month period, HBC took approximately 12 months to fulfill its obligations under two separate Section 11 Orders (the first pursuant to paragraphs 11(1)(b) and (c) and the second pursuant to paragraph 11(1)(a) of the Act) issued by the Federal Court of Canada.</p>	<p>Pages 45 – 51</p> <p>172 Q. Now, in terms of just timelines and I just want to see if I understand correctly. Your affidavit says, "The inquiry commenced in March of 2014. We agree with that"</p> <p>A. Correct.</p> <p>173 Q. And the notice of application was issued on February 22nd, 2017; is that correct?</p> <p>A. Correct.</p> <p>174 Q. And so the period between March, 2014 to February, 2017 is about two years and 11 months.</p> <p>A. Correct.</p> <p>175 Q. And that's about 35 months; correct?</p> <p>A. Correct.</p>

176 Q. As part of the processes, you knew that, or you know because you've seen the Section 11 order, that there is a Section 11 that was an order that was issued in what we call the Bs and Cs, that is where you are asked to produce documents and also answer questions, correct, the written returns?

A. Correct.

177 Q. And I can show you this document which is the affidavit that was filed in support of the Bs and Cs. When I refer to Bs and Cs, you will know that I'm referring to Section 11(b) and (c)?

A. Okay.

178 Q. And this is the affidavit that was filed in support of that and this is at paragraph 26.

MR. KOLERS: Oh, sorry, this is the affidavit sworn to obtain the Section 11 order.

BY MR. GAY:

179 Q. Is that's correct, Adam? Yes. That's correct?

A. And I'm looking at paragraph 26?

180 Q. 26. Right. You see that on there and there is a date of January 12th, 2015; correct?

A. Correct.

181 Q. All right. And so you don't disagree with me that there was a pre-issuance dialogue, which is part of the process that's involved here before the issuance of the order.

MR. KOLERS: She wouldn't know, but I can confirm that there was a pre-issuance dialogue.

MR. GAY: Fair enough.

MR. KOLERS: I'm not sure we've actually seen this affidavit before though. I can't recall.

BY MR. GAY:

182 Q. I imagine it would have been served on you, but --

MR. ZIMMERMAN: I'm not sure that it would have been.

MR. KOLERS: I think we only received the order. I think it's filed under seal.

MR. ZIMMERMAN: Not sealed, but it is ex parte applications.

BY MR. GAY:

183 Q. Anyways, okay, I can take it back. There's no disagreement, I think, is there, Mr. Kolers, that pre-issuance dialogue would have occurred on or about

January 12th?

MR. KOLERS: I don't know if it was January 12th, but there was a pre-issuance dialogue.

BY MR. GAY:

184 Q. And the order was eventually issued on January 30th, 2015 and you have a copy of that order in front of you; correct?

A. That's exhibit --

MR. KOLERS: That's Exhibit A.

THE WITNESS: Correct.

BY MR. GAY:

185 Q. Fair enough. Okay, and based on what your counsel told us today, the final certificate of completion for this exercise would have been completed some time in August; is that correct?

MR. KOLERS: Yeah, there was an initial certificate, I think, on April 30th.

MR. GAY: Right.

MR. KOLERS: Some additional questions and back and forth and then an amended final certificate was delivered on August 31st, 2015.

BY MR. GAY:

186 Q. Fair enough. So, the period between January 12th and ending in August would cover a period of about 7 to 8 months; correct?

MR. KOLERS: That's fair.

BY MR. GAY:

187 Q. It's fair to say then that the Bs and Cs under Section 11 would have taken about 8 months to complete, correct, from the moment it started to the end, that is when the certificate of completion was issued in August?

MR. KOLERS: Certainly from the -- I mean, I'm not going to debate the counting of months with you.

MR. GAY: Right.

MR. KOLERS: Certainly between the initial pre-issuance discussions and the completion of the final certificate, that is seven and a half or so months.

MR. GAY: Fair enough.

MR. KOLERS: I can't recall specifically whether the hard work of responding to the Section 11 order started in earnest before the order was issued, as opposed to just a pre-issuance discussion around the scope of the order.

BY MR. GAY:

188 Q. So, that's one of the Section 11s. Fair enough. And then there was the 11(1)(a)s and those would have been the oral discussions that would have been conducted.

A. Uh-hmm.

189 Q. So, when I refer to 11, you will know what I'm referring to?

A. Mm-hmm.

190 Q. Yes?

A. Yes.

MR. GAY: Counsel, let me just give you this. This was the affidavit that was filed in support of it.

MR. KOLERS: I think he's now talking about the thing that's in paragraph 7 here.

BY MR. GAY:

191 Q. Again, there would have been a pre-issuance dialogue; you don't dispute that?

MR. KOLERS: I honestly don't recall about this one, and I don't think we've seen this affidavit either.

BY MR. GAY:

192 Q. So you're suggesting there wasn't a pre-issuance dialogue or there was a pre-issuance dialogue? Do you know or don't know?

MR. KOLERS: Ms. Esposito wouldn't know.

MR. GAY: Right.

MR. KOLERS: I'm not being cross-examined. I can tell you, I don't remember.

BY MR. GAY:

193 Q. You don't remember. An order was issued and the order was issued on April 20th, 2016; you don't dispute that?

A. That's correct.

194 Q. And the 11(1)(a)s were completed sometime in June of 2016; is that correct?

A. Correct.

195 Q. Fair enough. So from beginning to end, as part of the 11(1)(a) process that would have been a period of anywhere between 3 to 4 months; correct?

A. Correct.

	<p>196 Q. Without getting into the specifics following June of 2016 are you aware of any discussions that would have been had between the bureau and Mr. Kolers?</p> <p>A. I don't recall.</p> <p>197 Q. You don't recall. You're not aware of any?</p> <p>A. I'm not aware of any.</p> <p>198 Q. You're not suggesting that there wasn't; you just don't know.</p> <p>A. Correct.</p> <p>199 Q. All right. Okay. Let me just pause for a second.</p>
<p>Ms. Esposito disclosed on cross-examination that Transperfect processed 74 GB's of data to produce the Affidavit of Documents for the period ending in 2015. She has no knowledge of how much data would need to be processed for the period 2015-2017 and has not made inquiries. However, Transperfect is able to process 17 TB's of data, or 17,000 GB's, on a daily basis.</p>	<p>Pages 39 – 41</p> <p>138 Q. Am I correct that on the last – are you aware of how many documents you had to go through in order to produce the last affidavit of documents, that is the affidavit of documents that had 10,000 documents identified?</p> <p>A. I do not recall.</p> <p>139 Q. You don't know the volume of data that you would have gone through in order to produce the 10,000 documents?</p> <p>A. I have an approximate number.</p> <p>140 Q. What is it?</p> <p>A. 74 gigs.</p> <p>141 Q. 74 gigs, in order to produce the 10,000 documents?</p> <p>A. Correct.</p> <p>...</p> <p>146 Q. Okay, fair enough. Have you been made aware of Transperfect's capabilities in processing documents and the volume of documents they can process?</p> <p>A. I'm not sure I understand the question.</p> <p>147 Q. Have they told you how many documents they can process on a daily basis?</p> <p>A. No.</p> <p>148 Q. Have they told you how much data they can process on a daily basis?</p> <p>A. No.</p> <p>149 Q. And you don't know because you haven't asked the question; right?</p>

	<p>A. Correct.</p> <p>MR. GAY: Can I just give you this and we enter this as an exhibits as well.</p> <p>MR. KOLERS: What is this?</p> <p>MR. GAY: 3, please.</p> <p>MR. KOLERS: What is this?</p> <p>MR. GAY: Just give me a second. This is their web page of Transperfect and the services they offer.</p> <p>EXHIBIT C: Marked for identification</p> <p>BY MR. GAY:</p> <p>150 Q. Right. And it says, "Process up to 17TB per day." "TB" means terabytes; is that correct?</p> <p>A. Correct.</p> <p>151 Q. And 17 terabytes is a lot more than -- how many did you say 700 and --</p> <p>A. 74 gigs.</p> <p>152 Q. 74 gigs; is that correct?</p> <p>A. Correct.</p>
<p>On the issue of duplication of efforts, Ms. Esposito acknowledged that Stikeman's had no project manager assigned to the HBC file prior to May 2017. She acknowledged that she has not calculated the cost of duplication, which would include project management expenses, and that there are far too many variables to consider in coming up with a number. Her statement that there would be a duplication of costs was a subjective assessment, not an assessment anchored on actual numbers.</p>	<p>Pages 5 and 43 – 45</p> <p>[Page 5] Q. Are you the only case manager on this file?</p> <p>A. Yes.</p> <p>6 Q. And who preceded you before this?</p> <p>A. I don't believe anyone.</p> <p>7 Q. So, there was no paralegal charged with managing documents prior to May of 2017?</p> <p>A. Correct.</p> <p>...</p> <p>[Page 43 – 45] 162 Q. And I just want to understand, you haven't actually provided a number for the duplication; correct?</p> <p>A. A number of...</p> <p>163 Q. A dollar value law for how much --</p> <p>A. Correct.</p>

	<p>164 Q. And when you say that you duplicate or it would involve a duplication and the duplication because of, for instance, project management, you don't actually tabulate your time and say "X number of hours per data project management," do you?</p> <p>A. Yes.</p> <p>165 Q. So, when you enter your time sheets on daily basis, you put in "project management"?</p> <p>A. Correct.</p> <p>166 Q. In this case, have you conducted an exercise of what the dollar value would be in the duplication?</p> <p>A. I have not.</p> <p>167 Q. You simply suspect, based on your experience, that it would result in some duplication?</p> <p>A. Correct.</p> <p>168 Q. Okay. Are you able to estimate what that duplication would be, a dollar value?</p> <p>A. I can't give you a dollar value.</p> <p>169 Q. Uh-hmm.</p> <p>A. But I can tell that you duplication does come in as part of the collection of processing and the project management, so that's where the duplication would come in.</p> <p>170 Q. Uh-hmm. Okay. Are you able to estimate a number?</p> <p>A. I am not able to estimate a number.</p> <p>171 Q. On a percentage basis, do you know generally what goes in or what percentage of your overall cost of producing an affidavit of documents would be project management?</p> <p>A. It's very difficult to determine that. There's very -- it's -- there's a lot of unknowns here for me to speculate how much the cost would be.</p>
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11. Should the Tribunal grant the Commissioner's motion, the Commissioner requests that HBC should be made to produce a supplemental Affidavit of Documents and do so in a timely basis. However, in the alternative, to the extent that this Tribunal may have concerns relating to the schedule of the matter, the Commissioner is prepared to proceed to examinations for discovery based on HBC's existing Affidavit of Documents. Any additional documentary requests can be dealt with by way of undertakings during the discovery process (as required).

Part II – The Issue

12. The issue to be resolved is as follows:

Should the Tribunal permit the Commissioner to amend the Original Application?

Part III – Argument

13. The *Competition Tribunal Rules* are silent on the procedure for allowing pleading amendments, but Rule 34 provides that the Tribunal may have regard to the practice and procedure set out in the *Federal Court Rules* in these circumstances.⁷ Rule 75 of the *Federal Court Rules* provides that the Court may allow a party to amend a document, at any time, on such terms as will protect the rights of all parties.⁸ The *Federal Courts Rules* adopt a liberal approach allowing parties to amend their pleadings even if the effect of an amendment is to add or substitute a new cause of action so long as the amendment arises out of substantially the same facts as a previous pleading.⁹

14. Affidavit evidence in support of a pleading amendment is ordinarily not permitted, nor required: “Rather, the Court must assume that the facts pleaded in the amendments are true for the purposes of considering whether or not to grant leave to amend”.¹⁰

15. The “general rule is that an amendment should be allowed at any stage of a proceeding for the purpose of determining the real questions in controversy between the parties”.¹¹ To preclude an amendment, a party opposing leave must demonstrate that, allowing the amendment, would result in an injustice and that this injustice is not compensable by costs.¹²

⁷ *Competition Tribunal Rules*, SOR/2008-141, r. 34(1).

⁸ *Federal Courts Rules*, SOR/98-106, r. 75.

⁹ See *ibid.*, r. 201.

¹⁰ *Visx Inc. v. Nidek Co.* (1996), 72 C.P.R. (3d) 19 (F.C.A.) at paras. 15 and 16 (“the Court should not accept any evidence in support of an application for leave to amend pleadings ... unless evidence is required in order to clarify the nature of the proposed amendments.”).

¹¹ *Canderel Ltd. v. R.*, [1994] 1 F.C. 3 (C.A.) at para. 10 (“*Candarel*”).

¹² *Ibid.*

Absent proof of such an injustice, the amendment should be allowed “however negligent or careless the first amendment and however late the proposed amendment”.¹³

16. In assessing a party’s request to amend its pleading, a Court may ask: Would the respondent be in the same position after the amendment as it would have been in if the applicant had pleaded correctly in the first instance?¹⁴

17. It is appropriate in this case for the Tribunal to grant the amendment the Commissioner requests. The amendment clarifies the Commissioner’s original allegations and places the full issue in dispute between the parties before the Tribunal. The Commissioner’s position is that HBC’s marketing practices, as they relate to the sleep sets, currently specified in the Original Application were and continue to be reflective of HBC’s overall reviewable conduct for sleep sets more generally. It will be efficient for the amended allegations to be heard together with the rest of the Commissioner’s case rather than leaving the clearly connected issue of HBC’s ongoing conduct to the side to be brought forward by the Commissioner as a separate case or otherwise ignored.

18. The Commissioner has moved promptly to amend his Original Application upon receipt of the Tribunal’s decision interpreting the scope of the pleading as currently constituted. HBC was provided with a copy of the Commissioner’s Amended Application in mid-December 2017, and when consent to amend the Original Application could not be reached, the Commissioner moved to bring this motion. This case remains at an early stage and examinations for discovery have not commenced.

19. It is accordingly in the interests of justice for the amendment to be allowed.

20. The Commissioner’s amendment in no way prejudices HBC. The Esposito Affidavit lends little to no support to the contention that there are cost thrown away or that HBC will suffer prejudice from any delays to the schedule. The inconvenience that flows from litigation

¹³ *Visx Inc. v. Nidek Co.* (1998), 234 N.R. 94 at para. 1 (F.C.A.) (“*Visx*”).

¹⁴ *Candarel*, *supra* note 11 at para. 11; *Visx*, *supra* note 13 at para. 1; and *J2 Global Communications, Inc. v. Protus IP Solutions Inc.* 2009 FCA 42 at para. 4 (“*J2*”).

is not a basis to assert prejudice.¹⁵ As detailed below, a number of admissions were made on the cross-examination of Ms. Esposito that undermines any suggestion that HBC will suffer prejudice. These admissions are listed below (among others):

- Ms. Esposito never obtained a quote/assessment from Transperfect on how much it would cost to produce an Affidavit of Documents for the period 2015-2017. Transperfect has been used for all document production exercises to date and no explanation was provided by Ms. Esposito as to why Transperfect was not contacted for a quote.
- Ms. Esposito never made an assessment on the number of HBC records that would have to be processed in order to produce an Affidavit of Documents for the period 2015-2017. She preferred to rely on the Commissioner's bald statement that there may be "thousands of documents".
- Ms. Esposito would not be required to process records for the period 2013-2015 as these records have already been processed and included in the Affidavit of Documents. Only the records for the period 2015-2017 would need to be processed by Transperfect.
- The cost of producing the Affidavit of Documents incurred thus far includes the cost of producing records in response to the Section 11 Order. The terms of the Section 11 Order are however far broader than what HBC is required to produce under the Rules of Procedure and are therefore not reflective of the cost of having to produce an Affidavit of Documents for the period 2015-2017.
- The Esposito Affidavit contends that it took three months to produce the records in response to the Section 11 order. Ms. Esposito uses this period to project the amount of time that it would take to produce an additional Affidavit of Documents. However, Ms. Esposito acknowledged that the three months that it took to produce the records in response to the Section 11 Order were in fact mandated by court order and that HBC actually produced a number of records on a rolling basis, within a period of thirty days. The suggestion that it "took" three months to produce the records is untrue.
- The Esposito Affidavit is silent on the prejudice to HBC from the amended pleading. No evidence was offered to suggest that the proceeding has caused or will cause the company financial loss. Beyond the normal inconvenience and costs that a party to litigation would have to incur, there is no evidence of harm in the Esposito Affidavit.
- HBC's statement that the proceeding has been hanging over the heads of HBC for four years is incorrect. Ms. Esposito acknowledged that the period from the moment the

¹⁵ *Ibid*, J2.

inquiry was commenced to the moment the Notice of Application was filed was 35 months. During that 35 month period, the Commissioner sought, and the Federal Court of Canada issued, two separate Section 11 Orders (the first pursuant to paragraphs 11(1)(b) and (c) and the second pursuant to paragraph 11(1)(a) of the Act), and HBC that took more than 12 months to fulfill its obligations under those Orders.

- Ms. Esposito disclosed on cross-examination that Transperfect processed 74 GB's of data to produce the Affidavit of Documents for the period ending in 2015. She has no knowledge on how much data would need to be processed for the period 2015-2017 and has not made any inquiries. However, Transperfect is able to process 17 TB's of data, or 17,000 GB's, on a daily basis.
- On the issue of duplication, Ms. Esposito acknowledged that Stikeman's had no project manager assigned to the HBC file prior to May 2017. She acknowledged that she has not calculated the cost of duplication, which would include project management expenses, and that there are far too many variables to consider in coming up with a number. Her statement that there would be a duplication of costs was a subjective assessment, not an assessment anchored on actual numbers.

21. Should the Tribunal agree to grant the Commissioner's amendment, HBC will be in exactly the same position as it would have been had the Commissioner's Original Application contained the language of the Amended Application.

22. First, HBC collected a significant number of records in respect of sleep sets concerning the period before February 2015. In this regard, HBC produced approximately 27,000 records in response to the Section 11 Order and approximately 10,000 additional records in this action. Given these productions, if this Tribunal has concerns relating to the schedule, the Commissioner is not seeking that HBC conduct additional searches prior to proceeding to examinations for discovery in respect of the pre-February 2015 period. As acknowledged by Ms. Esposito, only the period 2015 to 2017 is at issue.

23. Second, HBC has also not expended any time, effort or expense in respect of the period after February 2015. HBC drew a line in the sand when it prepared its initial Affidavit of Documents and did not include *any* material from February 2015 until the present. Further, the Tribunal did not order HBC to produce records for this period concerning the Commissioner's allegations in respect of subsection 74.01(3) of the Act. HBC has therefore not expended any

time, effort or expense with respect to subsection 74.01(3) of the Act in respect of the post February 2015 period.

24. To be clear, responding to the amendment accordingly involves no overlap or duplication for HBC. There is no prejudice to HBC and the amendment should be allowed.¹⁶

25. The production obligations flowing from the Amended Application should not overly delay the hearing of this matter. HBC should be made to produce a supplemental Affidavit of Documents which would result in minor adjustments to the overall Scheduling Order. However, in the event that this Tribunal has concerns regarding the schedule, the Commissioner is prepared to proceed without a further and better Affidavit of Documents from HBC and is willing to proceed with examinations for discovery based on HBC's existing documentary disclosure. While it should be unnecessary for the Commissioner to make this concession, the Commissioner is prepared to make this concession so that there will be minimal delays to the schedule resulting from the amended pleading and in order to preserve the existing November 2018 hearing dates as set.

¹⁶ *Supra* note 14.

Part IV – Order Sought

26. The Commissioner seeks an Order:

- a) granting the Commissioner leave to amend the Original Application, as proposed;
- b) requiring HBC to pay the Commissioner's costs for this motion; and
- c) such further and other relief as counsel may request and the Tribunal may permit.

ALL OF WHICH IS RESPECTUFLLY SUBMITTED THIS 2nd DAY OF February, 2018.



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Part V – List of Authorities

Statutes and Regulations

Competition Tribunal Rules, SOR/2008-141, Rule 34 (1)

Federal Courts Rules, SOR/98-106, Rules 75, 201

Jurisprudence

Commissioner of Competition v. Hudson's Bay Company, 2017 Comp Trib 19

Her Majesty the Queen v. Candarel Limited, [1994] 1 F.C. 3 (C.A.)

j2 Global Communications Inc. v. Protus I.P. Solutions Inc., 2009 FCA 42

Visx Inc. v. Nidek Co., [1996] F.C.J. No. 1721

Visx Inc. v. Nidek Co., [1998] F.C.J. No. 1766

Commissioner of Competition v. Sears Canada Inc., 2005 Comp.Trib.2