

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

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

Date: November 14, 2017

CT-2017-008

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

- and -

Applicant

HUDSON'S BAY COMPANY

OTTAWA, ONT.

16

Respondent

MOTION RECORD

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THE COMPETITION TRIBUNAL

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- and -

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INDEX

TAB		PAGES
1	Notice of Motion, dated November 10, 2017	1 - 4
2	Affidavit of Beth Alexander, affirmed November 10, 2017	5 - 8
A	Exhibit A: Notice of Application, dated February 22, 2017	9 - 51
B	Exhibit B: Response of Hudson's Bay Company, dated April 10, 2017	52 - 82
C	Exhibit C: Reply of the Commissioner of Competition, dated April 24, 2017	83 - 90
D	Exhibit D: Scheduling Order: <i>Commissioner of Competition v Hudson's Bay Company</i> , 2017 Comp Trib 8, dated May 26, 2017	91 - 96

E	Exhibit E: Correspondence from the Commissioner of Competition, dated October 24, 2017	97 - 98
F	Exhibit F: Email from Hudson's Bay Canada, dated October 31, 2017	99 - 101
G	Exhibit G: Email from the Commissioner of Competition, dated November 6, 2017	102 - 103

Tab 1

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

NOTICE OF MOTION

TAKE NOTICE THAT the Commissioner of Competition (the "**Commissioner**") will make a motion to the Competition Tribunal ("**Tribunal**") on December 1, 2017.

THE MOTION IS FOR:

- (a) An order compelling the Hudson's Bay Company ("**HBC**") to comply with the Tribunal's Scheduling Order dated May 26, 2017 (the "**Scheduling Order**") and produce an Affidavit of Documents inclusive of the period from approximately February 2015 until now for which it has failed to produce, and deliver the omitted documents to the Commissioner within ten days of this motion;

- (b) To the extent HBC has failed to produce an Affidavit of Documents inclusive of the period from approximately February 2015 until now, an order compelling HBC to produce a further and better Affidavit of Documents and deliver the omitted documents to the Commissioner within ten days of this motion;
- (c) Costs of this motion, payable forthwith; and
- (d) 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;
- (b) The Notice of Application for this proceeding plainly states that HBC's conduct is ongoing until now and that HBC has engaged in deceptive marketing practices as it relates to a wide range of products. The Notice of Application provides examples of certain specific representations but is clear that HBC's conduct not limited to those examples;
- (c) The Respondent, HBC, has either refused or neglected to produce an Affidavit of Documents for the period from approximately February 2015 until now, leaving a very large period of HBC's conduct unaccounted for;
- (d) The Scheduling Order required HBC to produce an Affidavit of Documents and deliver the documents listed therein to the Commissioner by no later than September 29, 2017;
- (e) HBC has produced an Affidavit of Documents for the period up to February 2015, but has failed or neglected to produce documents for the period of approximately February 2015 until now;
- (f) Documents for the period from approximately February 2015 until now are relevant to the conduct at issue in this proceeding and must be produced by HBC;

- (g) HBC has not respected the terms of the Scheduling Order and has forced the Commissioner to bring this motion so that it may receive a further and better Affidavit of Documents from HBC;
- (h) The *Competition Tribunal Rules*, Rules 60-63 and the *Federal Court Rules*, Rules 222 – 227; and
- (i) 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 Affidavit of Beth Alexander, sworn on November 10, 2017; and
- (b) Such further or other documents as counsel may advise and this Tribunal may permit.

DATED AT GATINEAU, QUÉBEC, this 10th day, November, 2017.

SIGNED BY:



Alexander Gay
Derek Leschinsky
Katherine Rydel

Counsel to the Commissioner of Competition

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- 4 -

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K1P 5B4

Tab 2

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

AFFIDAVIT OF BETH ALEXANDER

I, **BETH ALEXANDER**, of the City of Ottawa, in the Province of Ontario **AFFIRM AS FOLLOWS:**

1. I am a Competition Law Officer with the Competition Bureau. I have been charged with the investigation of certain marketing practices of Hudson's Bay Company ("**HBC**"). I have personal knowledge of the matters hereinafter deposed to, except where it is based on information and belief. Where it is based on information and belief, I have identified the source of my information and believe it to be true.
2. Pursuant to an application by the Commissioner of Competition (the "**Commissioner**"), the Federal Court issued an order pursuant to paragraph 11(1)(b) of the *Competition Act*, R.S.C.

1985, c. C-34 (the “**Act**”) requiring HBC to produce records up to the date of issuance of that Order, January 30, 2015 (the “**Section 11 Order**”). HBC produced approximately 27,000 records in response to the Section 11 Order.

3. On February 22, 2017, the Commissioner filed a Notice of Application for an order pursuant to section 74.1 of the Act, in respect of conduct reviewable pursuant to paragraph 74.01(1)(a) and subsection 74.01(3) of the Act. The Notice of Application for this proceeding states that HBC’s conduct is ongoing and HBC has engaged in deceptive marketing practices as it relates to a wide range of products. The Notice of Application provides examples of certain specific representations but the remedy sought is not limited to those examples. A copy of the Notice of Application is attached as **Exhibit A**.
4. On April 10, 2017, HBC filed a Response in respect of the Application. A copy of HBC’s Response is attached as **Exhibit B**.
5. On April 24, 2017, the Commissioner filed a Reply in respect of HBC’s Response. A copy of the Commissioner’s Reply is attached as **Exhibit C**.
6. On May 25, 2017, a Case Management Conference was held during which the scheduling of the steps in these proceedings was discussed with counsel. HBC’s counsel indicated HBC required additional time to produce an Affidavit of Documents given the volume of documents that it had previously collected but not produced in response to the Section 11 Order. The time requested by counsel for HBC was agreed to by the Commissioner, but it was assumed that HBC would produce a complete Affidavit of Documents in due course and as provided for in the eventual Scheduling Order.
7. On May 26, 2017, the Competition Tribunal (the “**Tribunal**”) issued a Scheduling Order in which it ordered the parties to exchange Affidavits of Documents and produce the documents listed therein on or before September 29, 2017. A copy of the Scheduling Order is attached as **Exhibit D**.
8. By agreement of counsel, both HBC and the Commissioner agreed to list but not reproduce the documents already provided in response to the Section 11 Order in their respective Affidavits of Documents.

9. On September 29, 2017, HBC provided a copy of its Affidavit of Documents to the Commissioner. HBC produced approximately 10,000 documents with its Affidavit of Documents supplementing the approximately 27,000 documents previously produced pursuant to the Section 11 Order. HBC failed to list or produce any documents after February 9, 2015 in its Affidavit of Documents. HBC's production extends only 10 days beyond the issuance of the 2015 Section 11 Order.
10. HBC has not disclosed any documents after February 9, 2015. More than two years of HBC's conduct is unaccounted for in its documentary production notwithstanding that the Notice of Application for this proceeding plainly states HBC's conduct is ongoing.
11. On October 24, 2017, counsel for the Commissioner wrote to counsel for HBC to advise him of the serious deficiencies in HBC's Affidavit of Documents. Counsel for the Commissioner requested an explanation for the limited scope of HBC's production. A copy of the letter from the Commissioner's counsel to counsel for HBC is attached as **Exhibit E**.
12. On October 31, 2017, counsel for HBC responded and advised that "it **may** be appropriate [for HBC] to make **some** supplementary production" in due course [emphasis added]. Counsel for HBC went on to say "**Assuming** that HBC will make **some** supplementary production, we are **hoping** to be able to do so by mid-December" [emphasis added]. No firm time frame or commitment to produce the documents was communicated by counsel for HBC. A copy of the email from HBC's counsel is attached as **Exhibit F**.
13. On November 6, 2017, counsel for the Commissioner advised counsel for HBC that he required a commitment from HBC to produce the documents, with a date for the production of these documents. Further, counsel for the Commissioner requested a response from HBC, in order to avoid a motion before the Tribunal. A copy of the email from the Commissioner's counsel is attached as **Exhibit G**.

14. To date, a total of approximately 37,000 documents have been produced by HBC as part of these proceedings. Given the number of documents HBC already produced, HBC may be in possession of tens of thousands of additional documents relevant to this Application that it has not listed or produced.

Sworn before me at the City of Gatineau,
in the Province of Quebec on November
10, 2017



A Commissioner for taking Affidavits



BETH ALEXANDER

Tab A

K. Rydell

**This is Exhibit A to the Affidavit of
Beth Alexander
sworn November 10, 2017**

CT-2017-008

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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**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT CT-2017-008 February 22, 2017 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 2

Applicant**- and -****HUDSON'S BAY COMPANY****Respondent**

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 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.

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 PROMOTED SLEEP SETS USING DECEPTIVE ORDINARY PRICE REPRESENTATIONS

12. HBC has made 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 failed to substantiate its regular prices under either of the Volume Test or the Time Test in representations promoting sleep sets. HBC used 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 (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 (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.

(i) 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.

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

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

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.

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

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

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

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

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 book.

(ii) 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 one is white with a gold pattern, the middle one is brown with a white pattern, and the bottom one is grey with a white pattern. A red arrow points to the \$728 price tag.

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 one is brown with a white pattern, and the right one is white with a blue pattern. A red arrow points to the \$1198 price tag.

(iii) 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 \$400
\$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
25695/07852

**Featured: GLUCKSTEINHOME
down-alternative duvet.**
Reg. \$249.99 Sale \$124.99

40% off
ESPRIT Dune
bedding collection
2498/0000

Featured: ESPRIT Dune double/queen
duvet cover set. Reg. \$229 Sale \$137

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

30% off
DISTINCTLY
HOME
bedding
collection

\$1.99
LAUREN
RALPH
LAUREN
Greenwich
towels Reg. \$20
744/58289

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) 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 (\$50 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 \$1600
\$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) 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 (\$80 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 \$210
\$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) 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.



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 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 the Specified Sleep Sets.
52. The pricing process utilized to set regular prices for 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

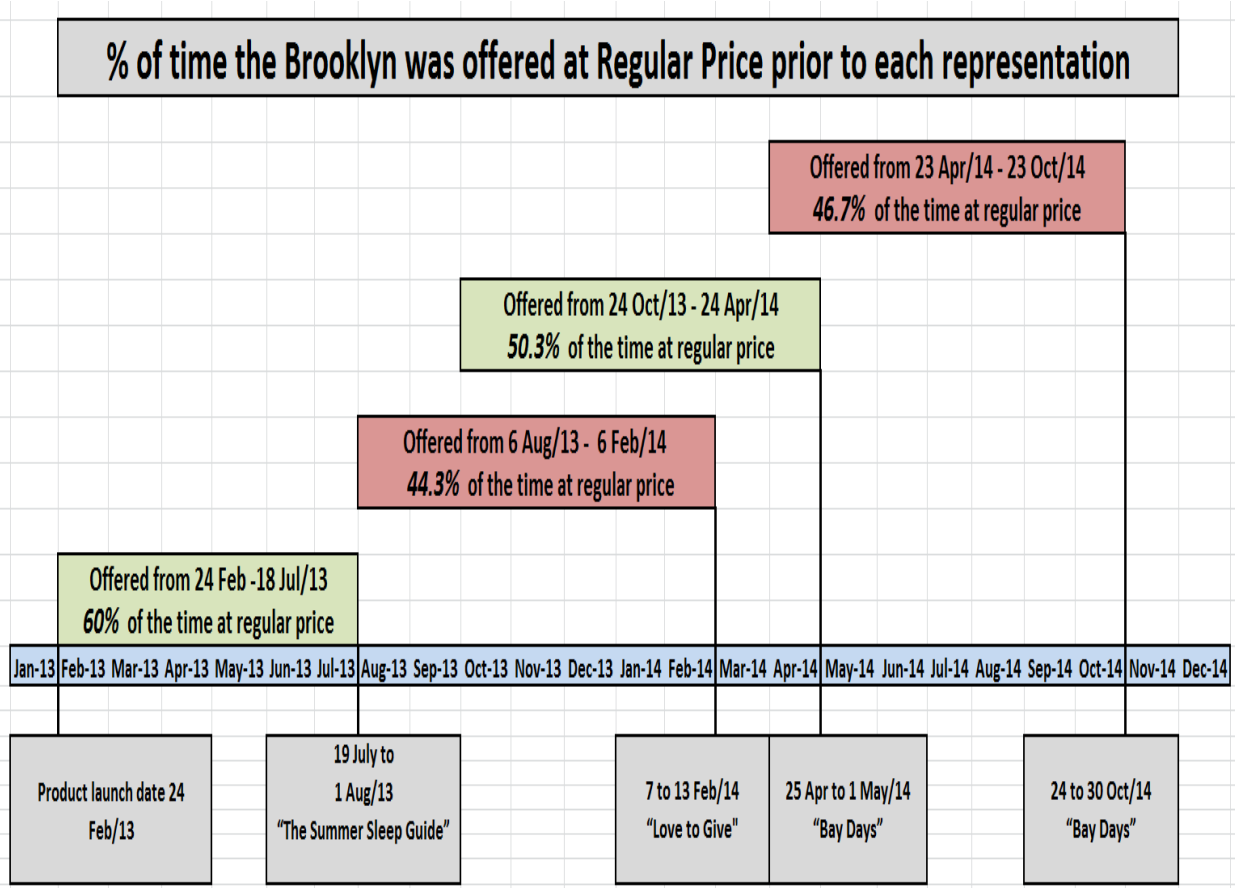
comparisons undertaken by the Mattress Buyers to competitors' products were at best arbitrary and informal.

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.
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 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 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.

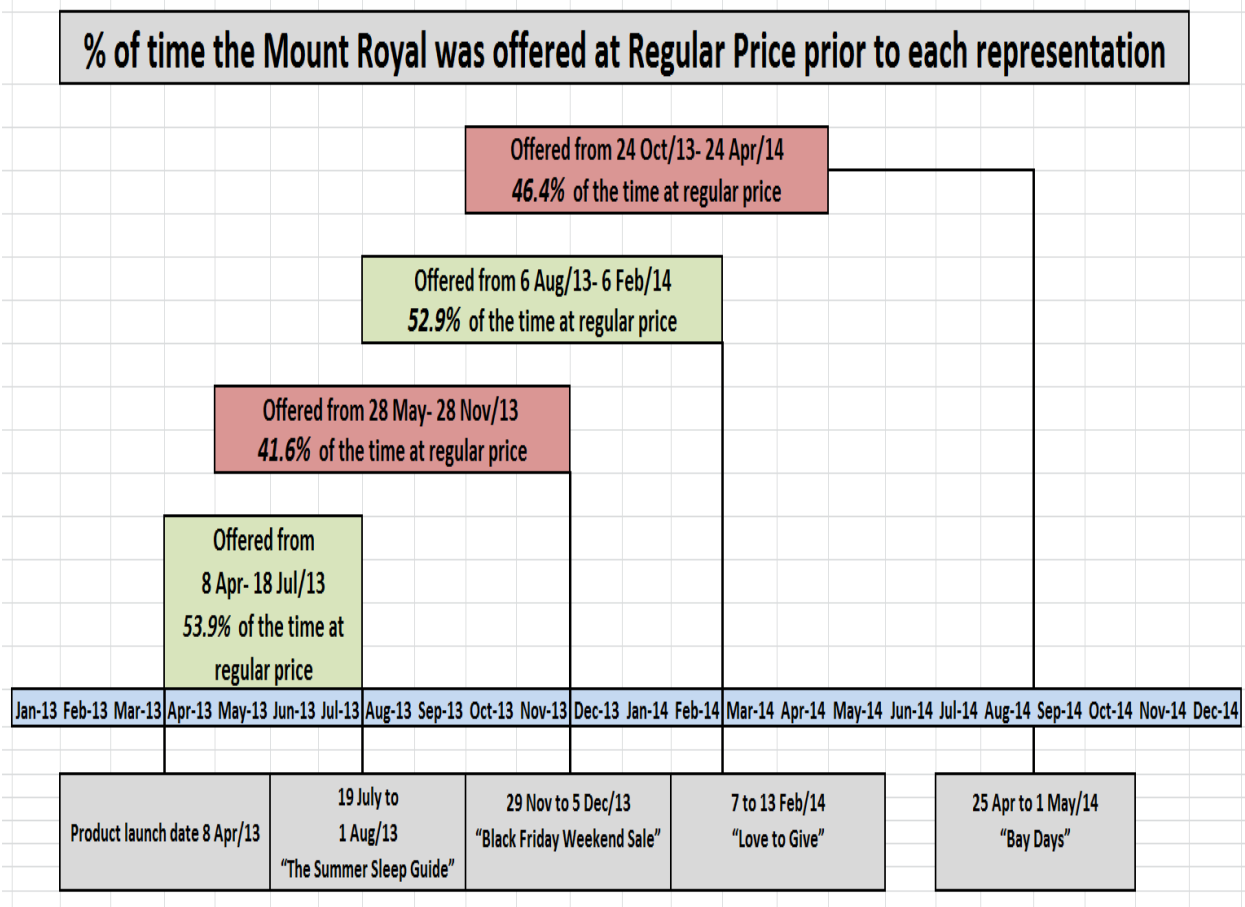
59. HBC's planning and forecasting for sleep sets is based on sales at promotional prices. Gross profits and gross margins are based on the promotional prices of the sleep sets. Only the promotional prices are relevant as HBC knew it would not sell a significant percentage of sleep sets at the regular 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 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.

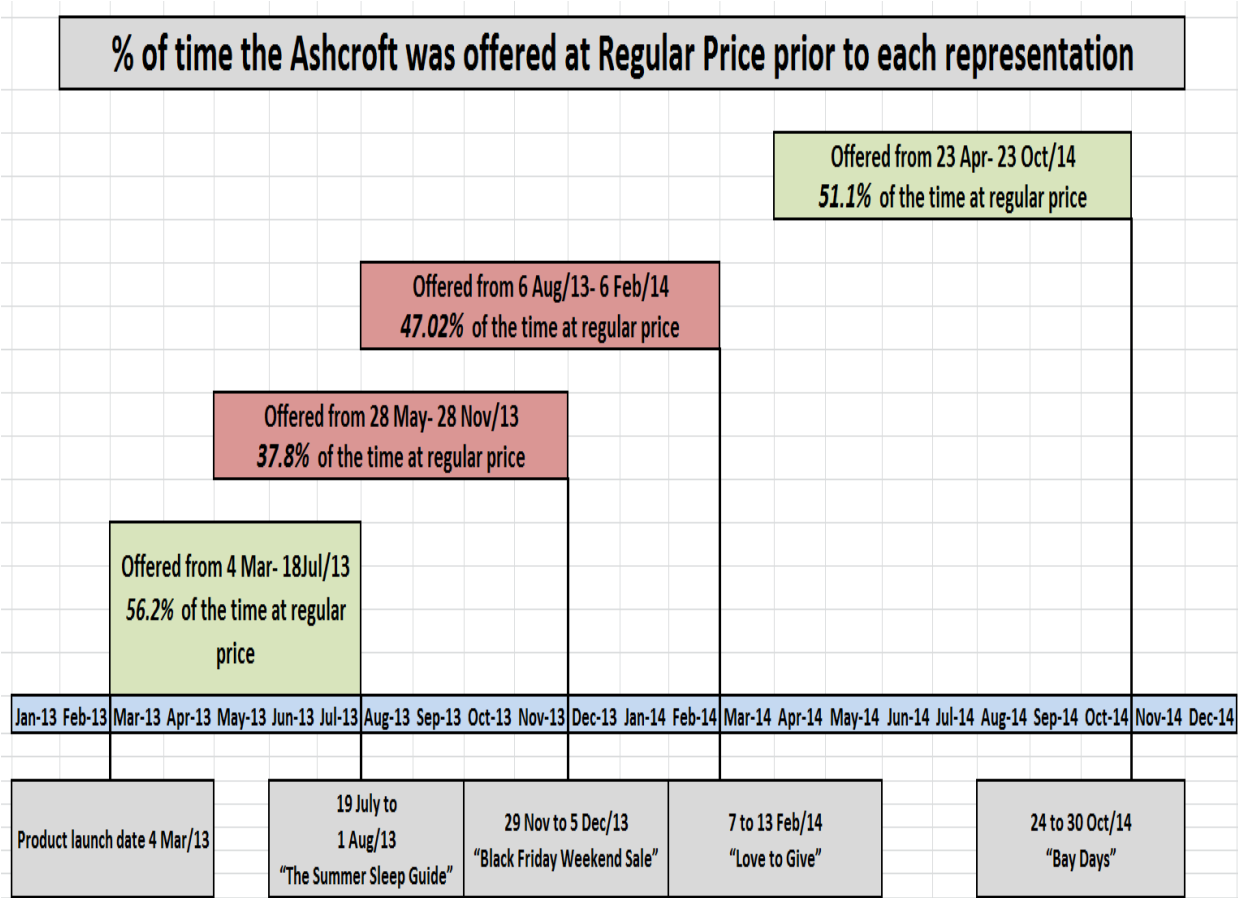
Table 3
Percentage of Time the Specified Sleep Sets were offered at Regular Price or higher
in the six months preceding the representation
 (or the sales period of the Specified Sleep Set if it was offered for less than six months prior to representation)



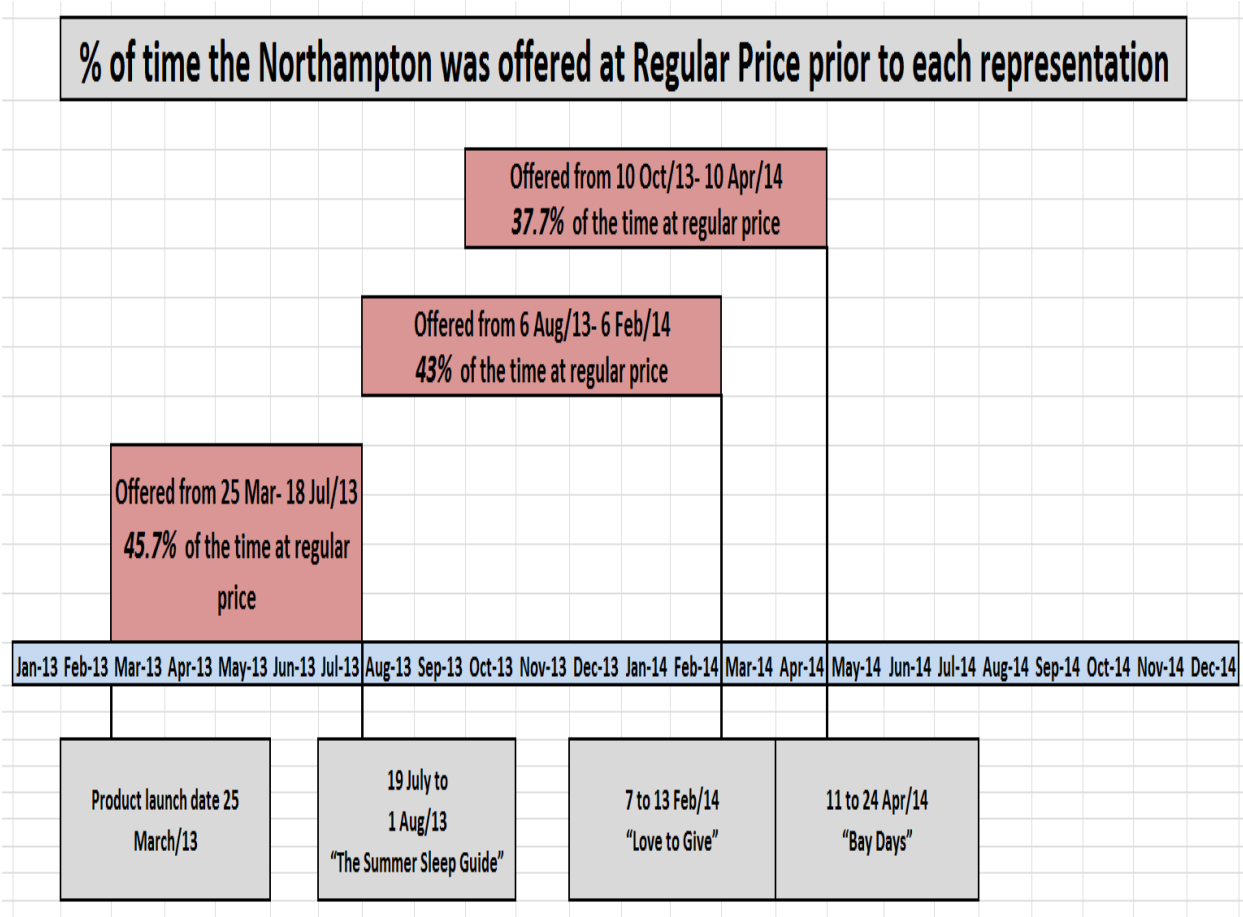
68. Therefore, HBC failed the Frequency Element of the Time Test for two of the four representations of the Brooklyn.



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.

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

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.

A. HBC's False or Misleading Clearance Representations

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.
75. Clearance representations create the general impression that on-hand inventory is being ‘cleared out’, likely to make room for new merchandise.
76. 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.
77. 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.

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

(i) 10 to 16 January 2014

78. 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**").
79. 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**

<p>Save \$1000 \$498 Reg. \$1498</p> <p>BEAUTYSLEEP Bellamy Euro top queen mattress set</p>	<p>Save \$1520 \$778 Reg. \$2298</p> <p>BEAUTYREST Recharge Castlebridge tight top queen mattress set</p>	<p>Save \$1620 \$878 Reg. \$2498</p> <p>BEAUTYREST Recharge Wexford hi-loft pillow top queen mattress set</p>	<p>Save \$1720 \$978 Reg. \$2698</p> <p>BEAUTYREST Vienna comfort top queen mattress set</p>	<p>Save \$2600 \$1698 Reg. \$4298</p> <p>BEAUTYREST Black Grace IV tight top queen mattress set</p>
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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.

80. 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.
81. 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

82. 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**”).
83. 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

84. 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.
85. 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

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.
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.
88. 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.
89. 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.
90. 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

91. 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**”).
92. 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 EQS.

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.

93. 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.
94. 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.
95. 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 TO EXERCISE DUE DILIGENCE

96. HBC failed to exercise due diligence to ensure compliance with subsection 74.01(3) and paragraph 74.01(1)(a) of the Act.
97. HBC has an Advertising Compliance Manual (“**Compliance Manual**”) that provides direction to ensure that HBC promotions “tell the truth and not be misleading”.
98. 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.
99. 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.
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.

101. 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.
102. 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 failed to demonstrate a clear, continuous and unequivocal commitment to compliance and that contraventions of the law are not acceptable under any circumstances.
103. 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.
104. 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.
105. 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.

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.
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.
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 sleep sets.
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.
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.

IV. AGGRAVATING FACTORS

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.
112. 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 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

113. The Commissioner claims the relief set out in paragraph 1.

VII. PROCEDURAL MATTERS

114. The Commissioner requests that this proceeding be conducted in the English language.
115. 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”

John Pecman
Commissioner of Competition

For the purposes of the Application, service of all documents on the Commissioner may be served on:

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Competition Bureau Legal Services
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AND TO: The Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 584

Tab B

A handwritten signature in blue ink, appearing to read "K. Rydel", is positioned above a horizontal line.

**This is Exhibit B to the Affidavit of
Beth Alexander
sworn November 10, 2017**

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

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
CT-2017-008
April 10, 2017

Andrée Bernier for / pour
REGISTRAR / REGISTRARE

OTTAWA, ONT.

4

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.

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 eurotop, 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 advertises 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 issues with “clearance” representations made by Hudson’s Bay in flyers that ran from January 10 to 16, 2014 and February 14 to 27, 2014.

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.

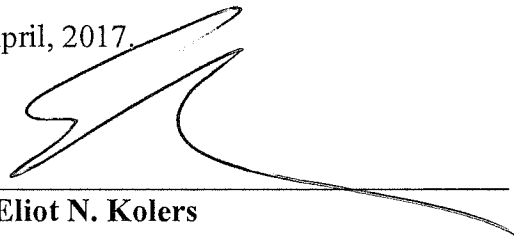
92. The Commissioner's investigation into sleep sets marketed by Hudson's Bay provides no basis for the broad prohibition order he is seeking in the Application.

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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Tab C

K. Rydel

**This is Exhibit C to the Affidavit of
Beth Alexander
sworn November 10, 2017**

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**

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

- and -

FILED / PRODUIT
Date: April 24, 2017
CT-2017-008

HUDSON'S BAY COMPANY

Andrée Bernier for / pour
REGISTRAR / REGISTRAIRE

Respondent

OTTAWA, ONT.

7

REPLY OF THE COMMISSIONER OF COMPETITION

1. The Commissioner of Competition (the "**Commissioner**") offers this Reply in respect of the Response filed by Hudson's Bay Company ("**HBC**") dated April 10, 2017 (the "**Response**").
2. The sleep set sample and the representations relied on in the Notice of Application are representative of HBC's overall business practices. The suggestion that the Commissioner selected sleep sets and representations only favourable to his case before the Competition Tribunal (the "**Tribunal**") or that other products offered for sale by HBC are not a cause for concern is untrue.

I. ADMISSIONS/DENIALS

3. The Commissioner repeats and relies on the allegations in the Notice of Application and, except as hereinafter expressly admitted, denies each of the allegations in the Response.

II. HBC'S DECEPTIVE ORDINARY PRICE REPRESENTATIONS**A. HBC did not exhibit good faith in setting regular prices**

4. HBC contends that its regular prices for the sleep sets identified by the Commissioner in his Notice of Application (the "**Specified Sleep Sets**") were set in relation to and were in line with the regular prices of sleep sets offered by HBC's main retail competitors. This contention is an over-statement and is not supported by the facts.
5. The high-low pricing strategy employed by HBC is used by some, but not all, HBC competitors. A number of HBC competitors instead rely on an everyday low price strategy ("**EDLP**"), which tends to result in significantly lower regular prices. These EDLP prices have been ignored by HBC when setting its regular prices. HBC's assertion that the regular prices of the Specified Sleep Sets are "manifestly actual prices offered in good faith" therefore does not take into account a significant portion of HBC's major competitors – namely its EDLP competitors.
6. As set out in the jurisprudence, good faith requires HBC to have honestly believed its regular prices for the sleep sets were genuine and *bona fide*, set with the expectation that the market would validate those regular prices.
7. HBC's singular reliance on its competitors' regular prices to validate its own regular prices renders "good faith" meaningless. HBC simply relied on the regular prices of its competitors, without any regard to whether the market actually validated its regular prices after they were set. Ultimately, the market, as represented by consumers, did not purchase the Specified Sleep Sets at HBC's regular prices and therefore did not validate HBC's regular prices.
8. HBC does not conduct an in-depth analysis of the regular prices at which sleep sets are offered for sale by competitors when setting its own regular prices. To the extent that HBC claims to rely

on guidance from sleep set manufacturers, this “guidance” is informal at best and does not absolve HBC of the need to independently verify it. The process of setting regular prices for sleep sets at HBC is best described as an undisciplined, cursory and random exercise where all efforts are focused on setting the promotional price and not the regular price of the sleep sets. The regular prices of the sleep sets are only important for the purpose of creating a save story of at least 50% off. As HBC admits in its Response, it “generally does not change the regular price of a sleep set, until the set is being discontinued.”

9. The volume of sales is used for multiple purposes under the *Competition Act* (the “**Act**”). It speaks to both the volume test as indicated in paragraph 74.01(3)(a) (the “**Volume Test**”) and the time test in paragraph 74.03(3)(b) of the Act (the “**Time Test**”). The volume of sales (a) informs whether HBC sold a substantial volume of the Specified Sleep Sets in line with the Volume Test and (b) is also an objective indicator of HBC’s good faith belief that the market would validate the regular price of the Specified Sleep Sets under the Time Test. The volume of sales of the Specified Sleep Sets sold by HBC at regular price is almost non-existent.
10. The Competition Bureau’s Ordinary Price Claim Guidelines (the “**Guidelines**”) provide guidance to the public with respect to the approach taken by the Commissioner when enforcing the ordinary price claims provisions of Act. HBC failed to mention that there are a number of other factors, beyond the two identified in its Response, that should also be considered when assessing good faith. Good faith is not a static concept. The assessment of good faith is contextual, taking into account a number of factors.
11. In paragraph 37 of the Response, HBC states that it establishes the regular price of sleep sets by offering them at that price for a period of four weeks prior to offering them at a promotional price. The fact that it offers them for sale during this period at the regular price is without legal significance to establishing a good faith belief.

B. HBC did not comply with the frequency element of the Time Test

12. HBC misunderstands the frequency element of the Time Test provided for in paragraph 74.01(3)(b) of the Act and suggests an approach to the frequency calculation that is not supported by the clear language of the Act.

13. In paragraph 62 of the Response, HBC posits that the same evaluation period should be used for both the Volume and Time Tests. However, paragraphs 74.01(3)(a) and (b) of the Act are worded differently and import different time considerations. The words “recently before” found in paragraph 74.01(3)(b) are not found in paragraph 74.01(3)(a) of the Act. In line with existing jurisprudence, “recently before” requires a “reasonable temporal proximity” to the making of the representations. It is the temporal proximity to the representations that necessitates a shorter timeframe when calculating frequency. The six month period cited by the Commissioner is anchored in the relevant jurisprudence.
14. HBC’s suggestion that the frequency element of the Time Test has been misapplied by the Commissioner is not supported by the wording of the Act. Subsection 74.01(3) of the Act requires retailers to assess how long a product has been offered for sale at, or above, its regular price in comparison to the amount of time it has been offered for sale at any lower prices. This is done in an effort to ensure the use of legitimate regular prices when promoting significant discounts off those prices. This concept is further enshrined in subsection 74.01(4) of the Act, which explicitly links the frequency calculation to the language used in a representation:

For greater certainty, whether the period of time to be considered in paragraphs 2(a) and (b) and (3)(a) and (b) is before or after the making of a representation depends on whether the representation relates to

- (a) the price at which products have been or are supplied; or
- (b) the price at which products will be supplied

As such, it is only appropriate to conduct a frequency analysis on a rolling basis, immediately before or after a representation is made.

C. The Representations made by HBC are false or misleading in a material respect

15. HBC cannot rely on the affirmative defence in subsection 74.01(5) of the Act. Subsection 74.01(5) states that subsection 74.01(3) does “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” [emphasis added]. HBC has failed to demonstrate that, irrespective of any potential deception, its price representations were not material to consumers.

16. In fact, in paragraph 72 of its Response, HBC admits that price is a material consideration for consumers:

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. [emphasis added]

Subsection 74.01(5) of the Act is therefore not applicable in the circumstances.

III. HBC'S CLEARANCE AND END OF LINE REPRESENTATIONS

17. HBC's use of the terms "clearance" and "end of line" is false or misleading. The terms are used to create the illusion of scarcity to attract consumers to purchase sleep sets. On occasion, even after the so called clearance promotions, HBC continued to order factory fresh sleep sets and offer them for sale at the regular price. Only after HBC had maximized sales with the misleading clearance promotions did it have a true clearance and actually sold off remaining on-hand inventory.

IV. HBC FAILED TO EXERCISE DUE DILIGENCE

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.

V. REMEDY

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 substantially similar reviewable conduct" [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.

DATED AT Gatineau, Quebec, this 21st day of April 2017.

“John Pecman”

John Pecman
Commissioner of Competition

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Tab D

K. Rydel

**This is Exhibit D to the Affidavit of
Beth Alexander
sworn November 10, 2017**

Competition Tribunal**Tribunal de la Concurrence**

Reference: *The Commissioner of Competition v. Hudson's Bay Company*, 2017 Comp. Trib. 8
File No.: CT-2017-008
Registry Document No.: 13

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:

Commissioner of Competition
(applicant)

and

Hudson's Bay Company
(respondent)



Date of case management conference: May 25, 2017
Before Judicial Member: Jocelyne Gagné
Date of Order: May 26, 2017

SCHEDULING ORDER

[1] **FURTHER TO** the notice of application filed by the Commissioner of Competition against the Respondent 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*;

[2] **AND FURTHER TO** the draft scheduling order provided by the parties on May 8, 2017 and to the discussions with counsel for both parties at a case management conference held on May 24, 2016;

[3] **AND WHEREAS** the Tribunal has examined the proposed scheduling order and is of the view that, with the various amendments agreed to by the parties at the case management conference, it is appropriate and respects the principles found in subsection 9(2) of the *Competition Tribunal Act*, RSC 1985, c 19 (2nd Supp.);

THE TRIBUNAL ORDERS THAT:

[4] The schedule for the pre-hearing steps shall be as follows:

September 29, 2017	Service of Affidavits of Documents and delivery of documents by all Parties
November 17, 2017	Last day to file motions arising from Affidavits of Documents and/or productions
December 1, 2017	Hearing of any motions arising from Affidavits of Documents and/or productions
January 10, 2018	Deadline for delivery of any additional productions resulting from any Affidavits of Documents/production motions
January 22- February 23, 2018	Examinations for discovery according to a schedule to be settled between counsel.
April 13, 2018	Deadline for fulfilling answers to discovery undertakings
May 4, 2018	Last day for filing of motions arising from answers to undertakings and refusals
May 14, 2018	Mediation briefs due
May 24, 2018	Hearing of any motions arising from answers to undertakings or refusals

May 31 – June 1, 2018	Mediation before the Honorable Justice Robert Barnes
June 15, 2018	Last day for follow-up examinations for discovery
July 27, 2018	Applicant to serve documents relied upon, witness and expert reports, if any.
August 10, 2018	Applicant to serve list of documents proposed to be admitted without further proof
September 28, 2018	Respondent to serve documents relied upon, witness statements, and expert reports, if any.
October 8, 2018	Deadline for delivering any Requests for Admissions
October 22, 2018	Applicant to serve list of reply documents, witness statements, and expert reports, if any. Last day to file motions for Summary Disposition and/or any motions related to the evidence
October 29, 2018	Deadline to provide documents to the Tribunal for use at the hearing (e.g., Briefs of Authorities, witness statements, expert reports and Agreed Books of Documents) Deadline for responding to any Requests for Admissions
November 9, 2018	Deadline for the hearing of any motions for Summary Disposition and/or any motions related to the evidence

[5] The hearing of the Application will commence at 10:00 am on November 19, 2018, in the Hearing Room of the Competition Tribunal located at 600-90 Sparks Street, Ottawa. The schedule shall be as follows:

November 19-23, 2018	First week of hearing
November 26-30, 2018	Second week of hearing

December 3-7, 2018	Third week of hearing
December 10-14, 2018	Fourth week of hearing
December 17-20, 2018	Fifth week of hearing

[6] The Tribunal will hear oral argument from January 14 to January 16, 2019.

DATED at Ottawa, this 26th of May, 2017.

SIGNED on behalf of the Tribunal by the Judicial Member

(s) Jocelyne Gagné

COUNSEL:

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The Commissioner of Competition

Alexander Gay
Katherine Rydel

For the Respondent:

Eliot Kolers
Mark Walli
William Wu

Tab E

K. Rydel

**This is Exhibit E to the Affidavit of
Beth Alexander
sworn November 10, 2017**



Department of Justice
Canada

Ministère de la Justice
Canada

Civil Litigation Section
500-50 O'Connor Street
Ottawa, Ontario
K1A 0H8

Telephone: (613) 670-8497
Fax: (613) 954-1920
Email: alexander.gay@justice.gc.ca

October 24, 2017

BY EMAIL

Our File Number: 7694476

Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario
M5L 1B9

Attn : Eliot N. Kolers

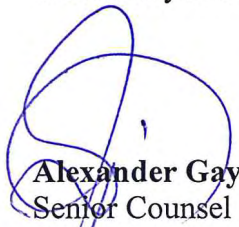
Dear Mr. Kolers:

Re: The Commissioner of Competition v. Hudson's Bay Company
CT-2017-008

We have now had an opportunity to review the affidavit of documents that you have produced in respect of this proceeding, with all its attachments.

We remain concerned with the scope of production. Our review indicates that no records have been produced for the period after the issuance of the s. 11(1)(b) and (c) Order to present. We remained puzzled with this omission and we would ask that you explain the missing records. Our expectation is that a certain number of records would have been produced for the period, for example, leading up to the issuance of the Notice of Application.

We await your reply and remain yours truly,



Alexander Gay
Senior Counsel
Civil Litigation Section

Tab F

K. Rydel

**This is Exhibit F to the Affidavit of
Beth Alexander
sworn November 10, 2017**

From: Gay, Alexander <Alexander.Gay@justice.gc.ca>
Sent: October-31-17 3:00 PM
To: Zimmerman, Adam (IC); Alexander, Beth (IC); Rydel, Katherine (IC)
Subject: Fw: The Commissioner of Competition v. Hudson's Bay Company- CT-2017-008
Attachments: October_24_letter.pdf

Sent from my BlackBerry 10 smartphone on the Rogers network.

From: Eliot Kolers <EKolers@stikeman.com>
Sent: Tuesday, October 31, 2017 2:47 PM
To: Gay, Alexander
Cc: Rydel, Katherine (CB); Mark Walli; William Wu
Subject: The Commissioner of Competition v. Hudson's Bay Company- CT-2017-008

Alex,
This is a reply to your letter of October 24 (a copy of which is attached for your ease of reference). Upon consideration of your letter, we consider that it may be appropriate for HBC to make some supplementary production. We are in the process of seeking to collect some additional documents and we anticipate making some supplementary production in due course. Assuming that HBC will make some supplementary production, we are hoping to be able to do so by mid-December and will let you know if there is any change to that expectation.
With respect to your October 26 email regarding privilege, we will be separately responding to that communication in a few days.
I trust the above to be satisfactory.
Regards,
Eliot

Eliot Kolers
Direct: +1 416 869 5637
Email: ekolers@stikeman.com

Stikeman Elliott

Follow us: [LinkedIn](#) / [Twitter](#) / stikeman.com

Stikeman Elliott LLP Barristers & Solicitors

5300 Commerce Court West, 199 Bay Street, Toronto, ON M5L 1B9 Canada

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Email: alexander.gay@justice.gc.ca

October 24, 2017

BY EMAIL

Our File Number: 7694476

Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, Ontario
M5L 1B9

Attn : Eliot N. Kolers

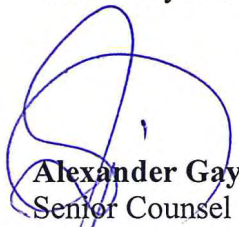
Dear Mr. Kolers:

**Re: The Commissioner of Competition v. Hudson's Bay Company
CT-2017-008**

We have now had an opportunity to review the affidavit of documents that you have produced in respect of this proceeding, with all its attachments.

We remain concerned with the scope of production. Our review indicates that no records have been produced for the period after the issuance of the s. 11(1)(b) and (c) Order to present. We remained puzzled with this omission and we would ask that you explain the missing records. Our expectation is that a certain number of records would have been produced for the period, for example, leading up to the issuance of the Notice of Application.

We await your reply and remain yours truly,



Alexander Gay
Senior Counsel
Civil Litigation Section

Tab G

K Pydel

**This is Exhibit G to the Affidavit of
Beth Alexander
sworn November 10, 2017**

From: Gay, Alexander <Alexander.Gay@justice.gc.ca>
Sent: November-06-17 2:54 PM
To: Rydel, Katherine (IC); Zimmerman, Adam (IC); Alexander, Beth (IC)
Subject: FW: Commissioner v. HBC

From: Gay, Alexander
Sent: Monday, November 06, 2017 2:35 PM
To: Eliot Kolers <EKolers@stikeman.com>
Subject: Commissioner v. HBC

Eliot,

I just had a chat with the team and they are worried about the deficiencies in your affidavit of documents. The Bureau would prefer to avoid a motion. As you know, documents for the period February 2015 to the filing of the Application and beyond are missing. While we acknowledge receipt of your email responding to our concerns, the language used in your last email is tentative and does not expressly acknowledge that documents are missing or that the period identified is relevant. If you could be a little more committal in your language and advise on a possible delivery date for the missing documents, we could avoid a motion which is in everyone's interest.

As for the privileged schedules, we continue to await an explanation.

If we could hear from you by mid-day tomorrow.

Thank you Eliot,

Alexander Gay

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

MOTION RECORD

DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

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Counsel to the Commissioner of Competition