

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

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

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

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

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 2013
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

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
714/58289

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 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. \$1198
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.

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

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

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

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

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

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

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

OUR LOWEST PRICES OF THE SEASON

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

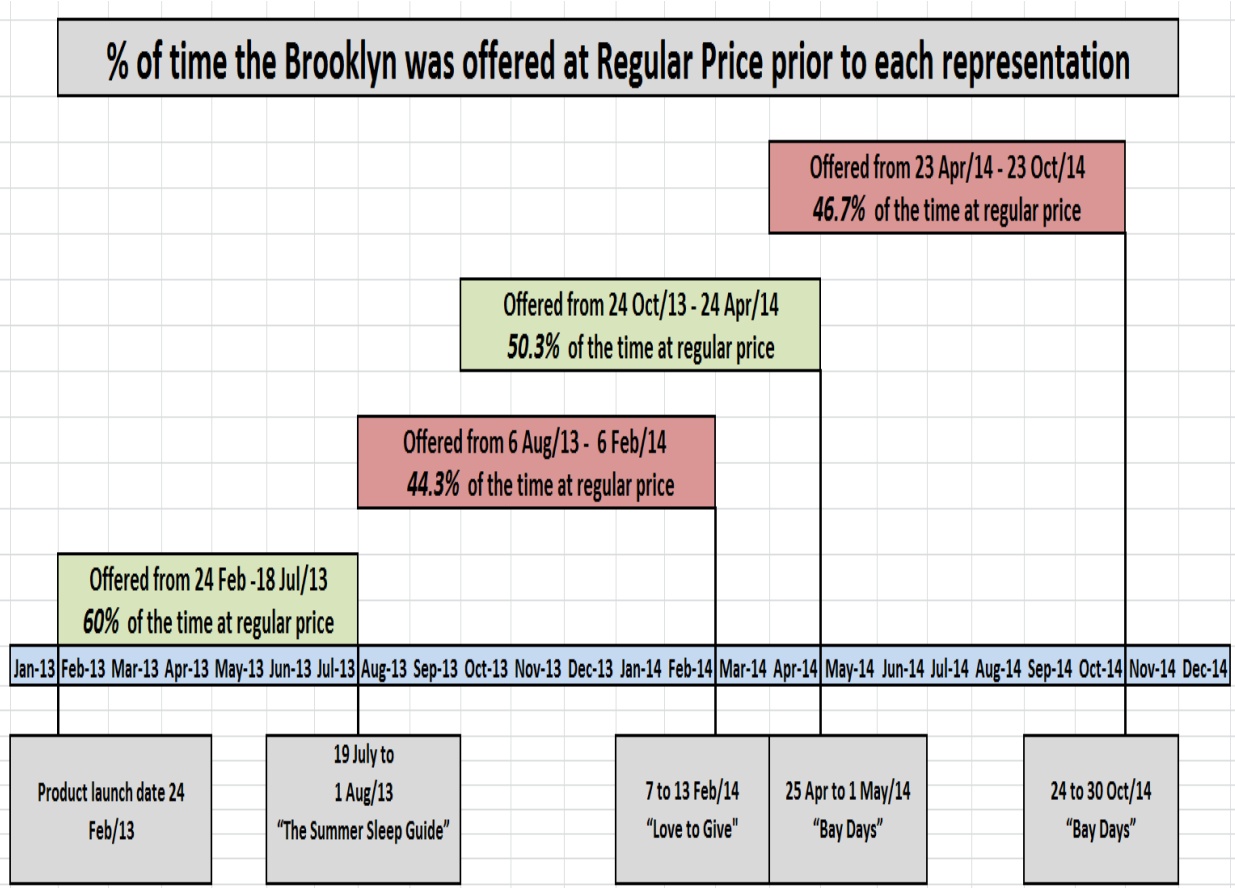
comparisons undertaken by the Mattress Buyers to competitors' products were at best arbitrary and informal.

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.

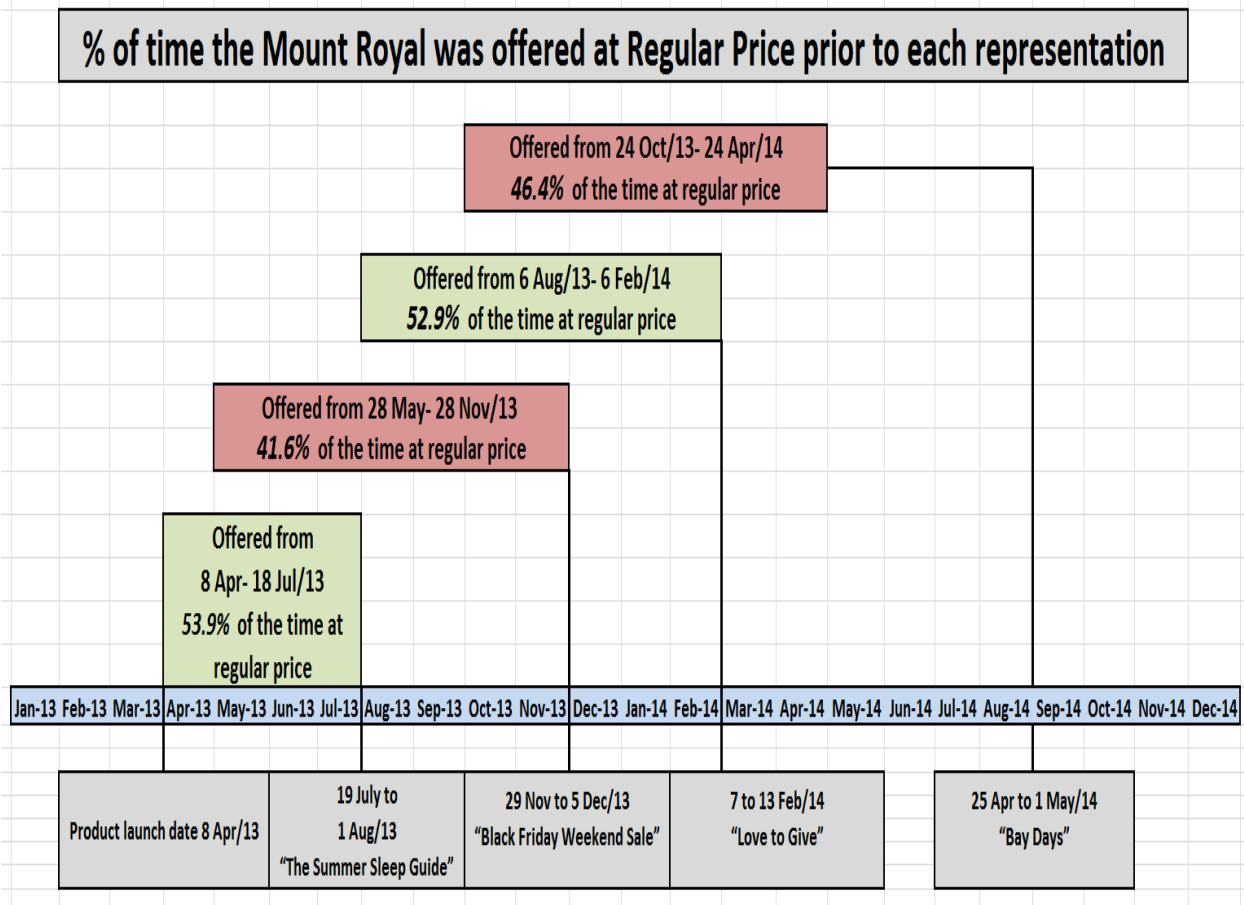
59. HBC's planning and forecasting for sleep sets is based on sales at promotional prices. Gross profits and gross margins are based on the promotional prices of the sleep sets. Only the promotional prices are relevant as HBC knew it would not sell a significant percentage of sleep sets at the regular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

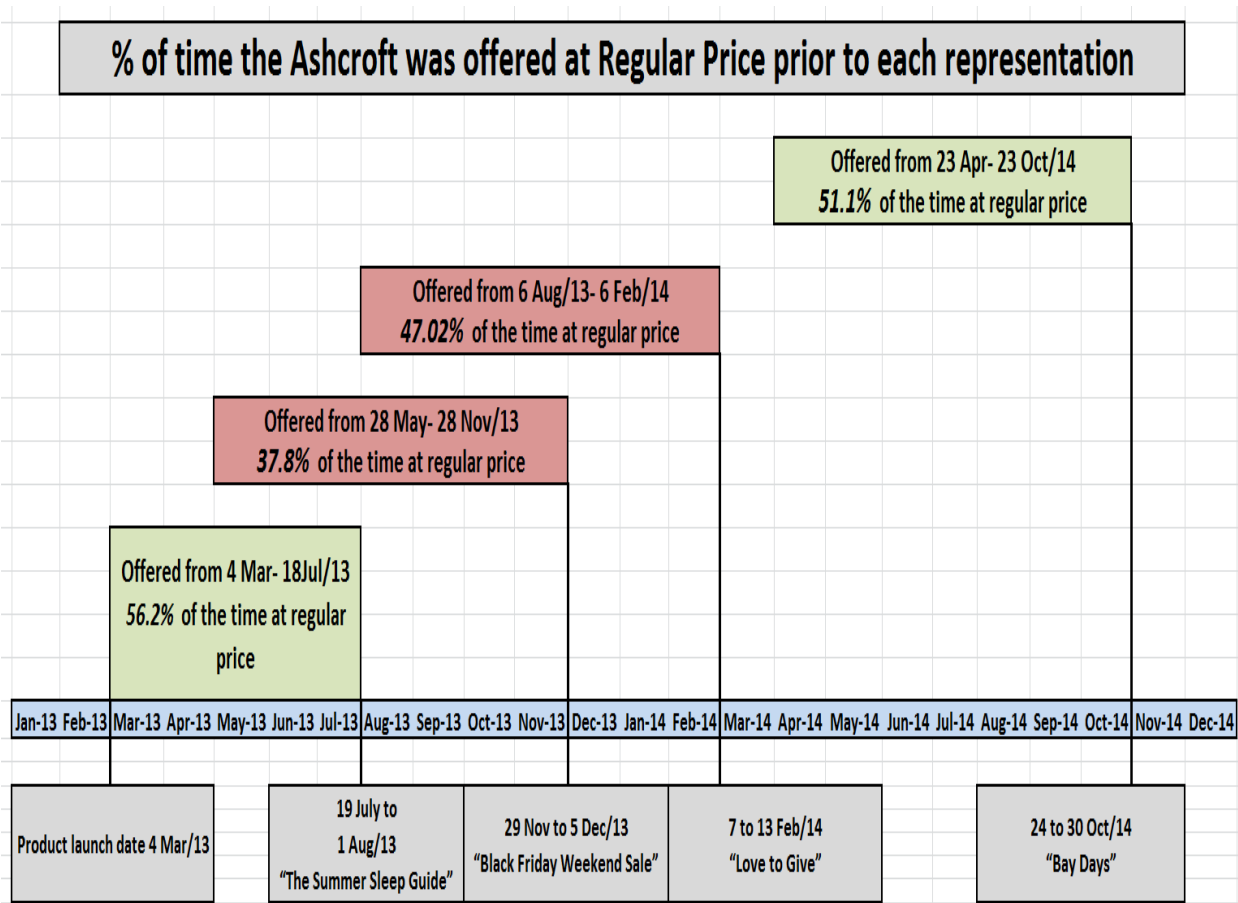
Table 3
Percentage of Time the Specified Sleep Sets were offered at Regular Price or higher in the six months preceding the representation
 (or the sales period of the Specified Sleep Set if it was offered for less than six months prior to representation)



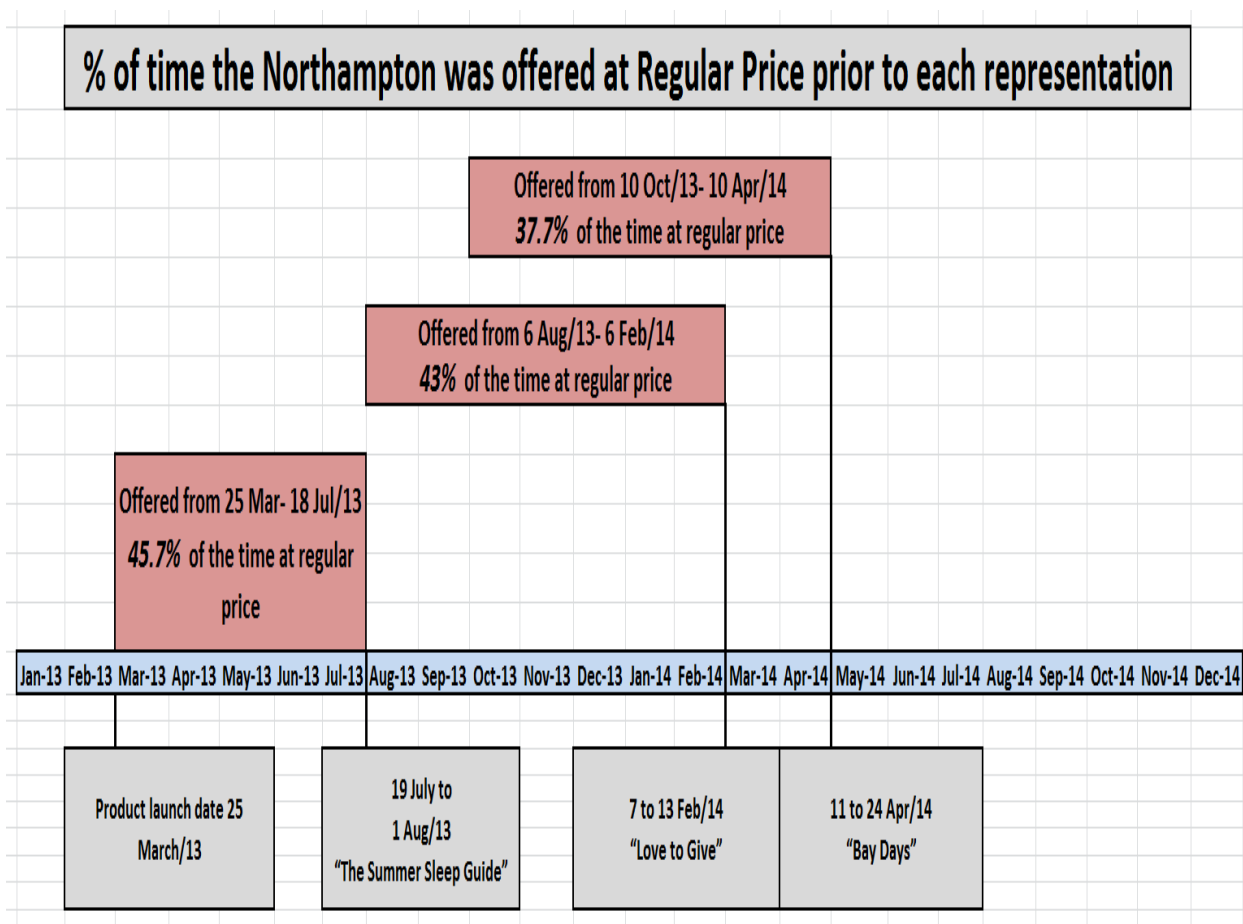
68. Therefore, HBC failed the Frequency Element of the Time Test for two of the four representations of the Brooklyn.



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

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

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

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

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

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

NO INTEREST FOR 24 MONTHS On all furniture, major appliances, mattresses and home entertainment when you use your Hudson's Bay MasterCard® or your Hudson's Bay Credit Card. Minimum purchase \$200 (excluding taxes). Delivery charges and fees are payable up front. On approved credit only. Minimum monthly payment required. No additional fees. See below for details.
FREE DELIVERY AND SET-UP ON ALL MATTRESS SETS (\$69 value)
PLUS, 60-NIGHT COMFORT GUARANTEE. See store for details.

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
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC K1A 0C9
Fax: (819) 953-9267

Alexander Gay (LSUC: 37590R)
Tel: (819) 994-3068
Alex.Gay@canada.ca

Katherine Rydel (LSUC: 58143I)
Tel: (819) 994-4045
Katherine.Rydel@canada.ca

Counsel to the Commissioner of Competition

AND COPIES

TO: STIKEMAN ELLIOT LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON
M5L 1B9

Eliot Kolers
Tel: (416) 869-5637
Fax: (416) 947-0866
ekolers@stikeman.com

AND TO: The Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 584