

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

FAIRVIEW DONUT INC. and BRULE FOODS LTD.

Plaintiffs

- and -

THE TDL GROUP CORP., ~~THE TDL GROUP LTD.,~~
~~TIM DONUT LIMITED~~ and TIM HORTONS INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and \$1500 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for costs and have the costs assessed by the court.

Date: June 12, 2008

Issued by _____
Local Registrar
Address of
Court office: 393 University Avenue
Toronto ON

TO: THE TDL GROUP CORP.
874 Sinclair Road
Oakville ON L6K 2Y1

AND

~~TO: THE TDL GROUP LTD.
874 Sinclair Road
Oakville ON L6K 2Y1~~

AND

~~TO: TIM DONUT LIMITED
874 Sinclair Road
Oakville ON L6K 2Y1~~

AND

TO: TIM HORTONS INC.
874 Sinclair Road
Oakville ON L6K 2Y1

CLAIM

1. The Plaintiffs claim, on behalf of themselves and all Class Members:
 - a. Special damages for breach of contract, negligent misrepresentation, and breach of the duty of good faith and fair dealing at common law and (where applicable) under section 3 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, as amended, and section 7 of the *Franchises Act*, R.S.A. 2000, c. F-23, as amended, in the amount of \$1,230,000,000.00;
 - b. General damages for breach of contract, negligent misrepresentation, and breach of the duty of good faith and fair dealing at common law and (where applicable) under section 3 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, as amended, and section 7 of the *Franchises Act*, R.S.A. 2000, c. F-23, as amended in the amount of \$720,000,000.00;
 - c. In the alternative to the claims for special and general damages for negligent misrepresentation and breach of the duty of good faith and fair dealing, an order that the Defendants pay their profits realized from the Always Fresh conversion to the Plaintiffs and Class A Members or that the Defendants hold their profits realized from the Always Fresh conversion in a constructive trust for the Plaintiffs and Class A Members; and an order that the Defendants pay their profits realized from the lunch menu to the

Plaintiffs and Class B Members or that the Defendants hold their profits realized from the lunch menu items in a constructive trust for the Plaintiffs and Class B Members; a. and b., damages for breach of the duty of good faith and fair dealing at common law and (where applicable) under section 3 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3, as amended, and section 7 of the *Franchises Act*, R.S.A. 2000, c. F-23, as amended, in the amount of \$1,950,000,000.00;

~~d. In the further alternative to a., b., and c., special damages in the amount of \$1,230,000,000.00 and general damages in the amount of \$720,000,000.00 for negligent misrepresentation;~~

d. In the alternative to a., b., and c., a declaration that the Defendants have been unjustly enriched, to the deprivation of the Plaintiffs and other Class A Members, by the Always Fresh conversion and by the imposition of a lunch menu, both of which resulted in unreasonably low margins for the franchisees; an order for an accounting of all such profits; an order requiring the Defendants to disgorge to the Plaintiffs and Class A Members their profits earned by reason of the Always Fresh conversion equivalent to the losses of the Plaintiffs and Class A Members; and an order requiring the Defendants to disgorge to the Plaintiffs and Class B Members their profits earned by reason of the lunch menu equivalent to the losses of the Plaintiffs and Class B Members;

- ~~e. In the further alternative to a., b., c. and d., a declaration that the Defendants have been unjustly enriched, to the deprivation of the Plaintiffs and other Class Members, by the Always Fresh conversion and by the imposition of a lunch menu, which both resulted in unreasonably low margins for the franchisees; an order requiring the Defendants to disgorge to the Plaintiffs and Class A Members all profits earned by the Defendants by reason of the Always Fresh conversion and to disgorge to the Plaintiffs and Class B Members all profits earned by reason of the lunch menu; and an order for an accounting of all such profits;~~
- e. Prejudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- f. Costs on a substantial indemnity basis; and
- g. Such further and other relief as this Honourable Court may deem just.
- ~~f. Prejudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;~~
- ~~g. Costs on a substantial indemnity basis; and~~
- ~~h. Such further and other relief as this Honourable Court may deem just;~~

“Tim Hortons”

2. Tim Hortons is the trade name under which a chain of quick serve restaurants and kiosks selling donuts, coffee, and other food items operates in Canada, the

United States and, to a limited extent, internationally. The trade name “Tim Hortons” and related names and trademarks are owned by the Defendant, The TDL Group Corp. The TDL Group Corp. licenses the use of the name and related trademark and system for the operation of the quick serve restaurants and drive-through and walk-up kiosks (the “Tim Hortons stores”), primarily by means of franchising.

The Parties

The Representative Plaintiffs

3. The Plaintiff, Fairview Donut Inc. (“Fairview”), is a corporation incorporated under the laws of Ontario which carries on business as a Tim Hortons franchisee operating a Tim Hortons store (store no. 593) in Burlington, Ontario. Fairview operated another Tim Hortons store (store no. 368) in the period 1988 to 2008.
4. The Plaintiff, Brule Foods Ltd. (“Brule”), is a corporation incorporated under the laws of Ontario which carries on business as a Tim Hortons franchisee operating one Tim Hortons store as a franchisee (store no. 750) and one store on a contract basis (store no. 2267). Both stores are located in Burlington, Ontario. Brule operated a third store in Burlington (store no. 737) as a franchise in the period 1994 to 2007.

The Class

5. The Plaintiffs are members of and bring this action on behalf of the following classes:

- a. “Class A Members”, being all persons, including corporations, carrying on business or who carried on business in Canada as a Tim Hortons store under a license agreement with The TDL Group Corp. or its predecessors, having executed such license agreement prior to the conversion of their Tim Hortons store from the full production model to the Always Fresh frozen product model (as described in paragraph 15 below), including those persons, including corporations, whose license agreement(s) with The TDL Group Corp. have since ended; and
 - b. “Class B Members”, being all persons, including corporations, carrying on business in Canada as a Tim Hortons store under a license agreement with The TDL Group Corp. or its predecessors, who have been forced by The TDL Group Corp. to sell lunch menu items resulting in unreasonably low margins, as more particularly described in paragraph 48 below, including those persons whose license agreement(s) with The TDL Group Corp. have ended following the introduction of the lunch menu.
6. There are currently approximately 500 to 800 potential Class Members operating approximately 2400 Tim Hortons stores in Canada.

The Defendants

7. The Defendant The TDL Group Corp. (“TDL”) is a corporation incorporated pursuant to the laws of Nova Scotia, with its head office located in Oakville,

Ontario. TDL carries on business throughout Canada as the franchisor of the Tim Hortons stores. Through a series of amalgamations, TDL is a successor corporation to the TDL Group Ltd., which, in turn, is a successor to Tim Donut Limited. As such, TDL possesses all the property, rights, privileges and franchises and is subject to all liabilities and all contracts, disabilities and debts of its predecessor corporations.

~~8. The Defendant Tim Donut Limited and The TDL Group Ltd. are corporations which previously carried on business in Canada as franchisors of the Tim Hortons stores. Tim Donut Limited is a predecessor of TDL, having amalgamated with Dim Sum Holdings Ltd. in 1992 to create The TDL Group Ltd., which entity later, as a result of a series of subsequent amalgamations with other entities, formed TDL.~~

8. The Defendant Tim Hortons Inc. is a Delaware U.S.A. corporation listed on the New York Stock Exchange whose principal headquarters is located in Oakville, Ontario. It was incorporated in 1995 and has operated as a stand alone public company since September 30, 2006. Tim Hortons Inc. is the parent company of The TDL Group Corp.

9. Tim Hortons is Canada's largest chain of quick serve restaurants and kiosks with annual revenue in 2007 of \$1.9 billion and annual net income in 2007 of \$269.6 million.

The Claim: Damages suffered due to Always Fresh Conversion

Tim Hortons Background

10. Tim Hortons was founded by NHL player Tim Horton in 1964 in the City of Hamilton. In 1966, Horton partnered with Ronald Joyce, under whose leadership the chain grew from three to over 2000 stores by 2000.
11. From the time of its founding in 1964 until approximately 2002, all donuts and most other baked goods were prepared and baked onsite in the Tim Hortons stores, with the exception of pastries, bagels and buns, which were received frozen and baked in convection ovens at the Tim Hortons stores. Each store was equipped with high-volume baking equipment and the store owners employed bakers who worked through the night to produce baked goods for sale the next day. The predecessor corporations of TDL Defendants designated the distributors from whom the franchisees could purchase approved refrigerated and frozen ingredients and in addition the predecessor corporations of TDL sold the majority of certain ingredients and supplies directly to the franchisees. One of the key components of this distribution system was that the supplies and ingredients were to be sold by the predecessor corporations of TDL Defendants to the franchisees at lower prices than the franchisees could obtain for the same product in the marketplace due to their volume buying power.
12. At the time the Plaintiffs and Class A Members entered into license agreements with the predecessor corporations of TDL Defendants, the Tim Hortons chain was operating under this “full baking” model.

The Always Fresh Conversion

13. Following the departure of Joyce from management in January 2001, the TDL Group Ltd. Defendants began to implement fundamental changes to the manner in which the chain of Tim Hortons stores operated, the most significant of which was the conversion of all Tim Hortons stores to the so-called “Always Fresh” system (the “Always Fresh conversion”).
14. The Always Fresh conversion occurred as follows:
- a. In or around 2001 to 2002, a manufacturing plant was built in partnership with an Irish company, IAWS Group plc, in Brantford, Ontario, for the production of donuts and Timbits (and later, sandwich buns and pastries) to be supplied to all Tim Hortons stores in Canada and the United States. At the Brantford plant, the product is baked and then frozen (“par-baked”), to be shipped frozen via refrigerated transport to all North American Tim Hortons stores, which microwave such frozen products prior to finishing and sale. ~~The Defendants~~ TDL and IAWS Group plc each have a 50% interest in the Brantford plant.
 - b. With respect to all baked goods other than donuts and Timbits (and later, sandwich buns and pastries), most baked goods (i.e., muffins, cookies and biscuits) were baked from ingredients onsite in the Tim Hortons stores. The Defendants now designate the distributors from whom the Plaintiffs and Class A Members must purchase these frozen products,

which, in turn, are baked or thawed onsite in convection ovens in the Tim Hortons stores.

- c. Commencing in September 2002, ~~the Defendants~~ TDL Group Ltd. required the Plaintiffs and Class A Members to convert their full-baking Tim Hortons stores to the Always Fresh system by disposing of their baking equipment and purchasing and installing freezers and microwave equipment and to thereafter purchase frozen product from the Brantford plant through their selected distributor, to be microwaved and finished in-store before sale to customers.

15. The Plaintiffs converted their respective stores in September and October 2002.

16. Prior to conversion, ~~the Defendants~~ TDL Group Ltd. made the following representations to the Plaintiffs and Class A Members with respect to the Always Fresh conversion:

- d. The par-bake system would cause product quality to improve, which would in turn cause sales to increase;
- e. The cost to the franchisees of producing a donut utilizing the par-baked system would increase modestly from 8 or 9 cents to 12 cents per donut;
- f. The par-baked system's increase in the cost to produce a donut would be offset by a significant reduction in operating costs, as the franchisees would avoid the expense of employing highly paid or expensive baking

staff in addition to other savings such as reduced “throws” (i.e. discarded unsold product); and

- g. The franchisees’ lives would be less stressful because they would not have to worry about the baking staff.

17. These representations were made by Paul House, then President and Chief Operating Officer (now Executive Chairman) of TDL Group Ltd., and by David Clanachan, also a TDL Group Ltd. executive, at a Regional Meeting held in Toronto at the Westin Harbour Castle in or around November 27 and 28, 2001. At this meeting, franchisees were shown the new product and oven. Taste tests were conducted. The meeting was designed to garner support for the Always Fresh conversion and all of the speakers advised the store owners that they would benefit from the conversion. At that meeting the franchisees were not advised of the cost of the Always Fresh conversion.

18. In fact, the Always Fresh conversion has resulted in an increase in costs to produce donuts with a corresponding decrease in profits of the Plaintiffs and Class A Members. Contrary to ~~the Defendants’~~ TDL Group Ltd.’s representations enumerated in paragraph 47 16 above, the cost of producing a donut has risen from 8 or 9 cents per donut to 20 cents per donut, largely because of the inflated price at which the Brantford plant sells the frozen product to the franchisees. The cost of producing certain other baked goods has also increased. The prices charged to the franchisees for many products and supplies have increased and the prices charged are often significantly above market price

for comparable products and supplies. The transportation costs from the Brantford plant to all Tim Hortons stores across Canada, which is passed on to the franchisees as part of the costs of the par-baked product, is such that these product costs are not competitive and exceed the marketplace costs for such product.

19. Following the Always Fresh conversion, the Plaintiffs' and Class A Members' income as a percentage of sales has decreased by 3.5%. The Plaintiffs and Class A Members have sustained damages in the period May 25, 2002, to date of approximately \$100,000,000.00 per year, entitling the Plaintiffs and Class A Members to special damages of \$600,000,000.00. In the alternative, the Defendants have been unjustly enriched by the "Always Fresh" program since its inception to date at the expense of the Plaintiffs and Class A Members in the amount of \$600,000,000.00.
20. The Always Fresh conversion has not only hurt franchisees' year to year profitability, but it also came at substantial capital expense to the Plaintiffs and Class A Members, who were forced to invest approximately \$35,000.00 to \$50,000.00 per store for the new equipment package with no compensation from TDL Group Ltd. or the Defendants for such capital expense, and received minimal compensation for the existing kitchen equipment they were forced to divest. In total the Plaintiffs and Class A Members were forced to spend approximately \$75,000,000.00 to purchase the new equipment and were forced to discard existing kitchen equipment worth approximately \$75,000,000.00,

entitling the Plaintiffs and Class A Members to \$150,000,000.00 in special damages.

21. While the Plaintiffs and Class A Members have suffered a loss in profit, the Defendants experienced an increase in profits as a result of the Always Fresh conversion. The Defendants own 50% of the Brantford plant and thus earn profit on all frozen product and supplies (which are sold to the franchisees at a marked-up price). This is in addition to the revenue the Defendants earn from royalties of 3.5 to 4.5% on all product sold at Tim Hortons stores, as well as franchising and real estate fees.
22. Franchisees who carefully tracked the effect of the Always Fresh conversion on the franchisees' bottom line have made this information known to the Defendants through conversations with TDL executives and by memos since January 2004, such conversations and memos had with and addressed to David Clanachan (Divisional Executive VP of TDL) and Roland Walton (Executive VP of Operations of TDL), and copied to Paul House. The Defendants have made no effort to reverse the ongoing losses suffered by the Plaintiffs and Class A Members.

Breach of Contract

23. The relationship between Tim Hortons and each of the Class Members is governed in part by written license agreements executed by TDL as franchisor, the individual Plaintiffs and Class Members as franchisees, and often by the principal owner(s) of each franchisee as indemnifier(s) or covenantor(s).

24. The Plaintiffs have entered into license agreements with the Defendants for the following terms:

Plaintiff	Store No.	Term
Fairview	368	1988 to 2008
	593	2001 to 2021
Brule	737	1994 to 2007
	750	1994 to 2007
	2267	2000 to 2008

25. The license agreements between TDL and the Plaintiffs and other Class Members are standard form agreements which are substantially similar but vary in some minor respects. These agreements are franchise agreements within the meaning of section 1 of the *Arthur Wishart Act, 2002* and section 1 of the *Franchises Act (Alberta)*.

26. The language of the license agreements is clear that a franchise is granted for a full-baking store. The preamble of each license agreement describes the “TIM HORTONS SYSTEM” as relating to:

...shops involving the production, merchandising and sale of donuts, muffins, tarts, cakes, pies, cookies, coffee and other related products utilizing a specially designed building with specified equipment, equipment layouts, interior and exterior accessories...
[emphasis added]

27. While the license agreements do permit the Defendants to implement certain changes, the Defendants are limited to only introducing changes that constitute an improvement of the existing system, which provide a benefit to the franchisees, and which do not unreasonably alter the franchisee's rights or obligations under the agreement. The Always Fresh conversion does not fit under any of these exceptions. The Plaintiffs and other Class Members plead and rely upon the following provisions contained in the license agreements:

h. The license agreements all contain express language that restricts the Defendants' right to impose changes unless such changes constitute an improvement:

WHEREAS the Licensor ... has acquired experience and skill in the development, opening and operating of shops involving the production, merchandising and sale of donuts, muffins, tarts, cakes, pies, cookies, coffee and other related products ... **all of which may be improved**, further developed or otherwise modified from time to time...
[emphasis added]

i. The license agreements permit changes to the store-wide operating manual but only as a service to the franchisees to provide for new developments in standards, specifications, procedures and techniques:

Section 3.00 – Initial and Continuing Services Furnished by Licensor

During the term of this License, the **Licensor shall provide the following services to the Licensee:**

...
to provide a Confidential Operating Manual which contains the standards, specifications, procedures and techniques of the "TIM HORTON SYSTEM" and **to revise, from time to**

time, the content of the manuals to incorporate new developments regarding standards, specifications, procedures and techniques; [emphasis added]

- j. The license agreements provide that the Defendants may impose changes to the store-wide operating manual, but those changes must involve *improved* methods, procedures and techniques:

Section 7.03 – Changes in Confidential Operating Manual

(a) **In order that the Licensee may benefit** from new knowledge gained by the Licensor as to **improved methods, procedures and techniques** in the preparation, merchandising and sale of donuts and other food items, and in the operation of the Tim Hortons Shop, **the Licensor may from time to time revise the contents of the Confidential Operating Manual and such other manuals and materials** ... [emphasis added]

- k. Certain license agreements provide under section 7.03 that changes to the store-wide operating manual must not unreasonably alter the franchisee's rights or obligations:

Section 7.03 – Changes in Confidential Operating Manual

(a) ... the Licensor may from time to time revise the contents of the Confidential Operating Manual and such other manuals and materials ... **provided that such changes shall not unreasonably alter the Licensee's rights or obligations under this Agreement.** [emphasis added]

28. The foregoing provisions have been breached by the TDL Group Ltd. and the Defendants in their forced conversion of the Tim Hortons stores from full baking to microwaved product stores.

29. The Plaintiffs and Class A Members contracted for a full-baking store. The imposition of the Always Fresh conversion which required the Plaintiffs and Class A Members to convert to an off-site frozen supply/onsite microwave store is so fundamental a change that it constitutes a breach of each of the license agreements. While the clauses set out in paragraph 27 ~~28~~ above permit the Defendants to implement certain changes, they may only do so where it is an improvement or benefit to the franchisees, which is not the case with regard to the Always Fresh conversion. Furthermore the language used in these clauses is not specific enough to permit the Defendants to impose so fundamental a change as the Always Fresh conversion.

30. In forcing the Plaintiffs and Class A Members to convert to the Always Fresh system, the Defendants breached the license agreements and therefore are liable for damages.

Breach of Duty of Fair Dealing

31. In the alternative, if TDL Group Ltd. ~~the Defendants~~ did have the right to impose the Always Fresh conversion on the Plaintiffs and Class A Members, which is not admitted but is specifically denied, ~~the Defendants~~ TDL Group Ltd. failed to exercise that right in good faith. The Always Fresh conversion has led to food cost increases that have forced the Plaintiffs and Class A Members to sell some products at a loss while the Defendants earn increased revenue on the sale of the product from the Brantford plant to the Plaintiffs and Class A Members. This and the other conduct particularized in the paragraphs above breach the

requirement at common law and (where applicable) pursuant to section 3 of the *Arthur Wishart Act, 2002* and section 7 of the *Franchises Act* (Alberta), that franchisors are to act fairly, in good faith and in a commercially reasonable manner towards franchisees.

32. Prior to imposing the Always Fresh conversion, ~~the Defendants~~ TDL Group Ltd. ~~were~~ was either aware of the effect that the conversion would have on the revenues of the franchisees or ~~were~~ was reckless in failing to undertake the financial analysis necessary to obtain such information. After the devastating effect of the conversion was clear to TDL Group Ltd. and, subsequently, the Defendants, their blatant disregard for the interests of the Plaintiffs and Class A Members is a clear breach of the duty of good faith and fair dealing, entitling the Plaintiffs and Class A Members to special and general damages. In the alternative to their claim for damages, the Plaintiffs and Class A Members plead that they are entitled to “waive the tort” claim for breach of the duty of good faith and fair dealing and instead, can elect to claim payment of the profits realized by the Defendants as a result of the Always Fresh Conversion or to be the beneficiaries of a constructive trust imposed upon such profits.

Negligent Misrepresentation

33. Prior to the Always Fresh conversion, ~~the Defendants~~ TDL Group Ltd. made the express representations set out in paragraph 16 ~~47~~ above, knowing that the Plaintiffs and Class A Members would rely upon such representations and

knowing that such representations would induce the Plaintiffs and Class A Members to agree to the Always Fresh conversion.

34. By proceeding with the Always Fresh conversion, including having to incur the necessary capital expenditure required to convert their stores, the Plaintiffs and Class A Members relied, in a reasonable manner, on the representations of ~~the Defendants~~ TDL Group Ltd. set out in paragraph 16 ~~17~~ above.

35. Such representations were inaccurate and misleading. As a result of the Always Fresh conversion, the Plaintiffs and Class A Members experienced a marked reduction in their profits as more fully described in paragraph 19 ~~20~~ above.

36. ~~The Defendants~~ TDL Group Ltd. owed the Plaintiffs and Class A Members a duty of care as it was reasonably foreseeable that the Plaintiffs and Class A Members would rely upon the representations made by ~~the Defendants~~ TDL Group Ltd. regarding the consequences of the Always Fresh conversion. Furthermore, at all relevant times a special relationship existed between TDL Group Ltd. and subsequently, the Defendant TDL as franchisor and the Plaintiffs and Class A Members as franchisees by reason of:

l. The disparate bargaining power between TDL Group Ltd. and subsequently, TDL and the Plaintiffs and Class A Members;

m. The knowledge imbalance between TDL Group Ltd. and subsequently, TDL and the Plaintiffs and Class A Members, for at all reasonable times TDL Group Ltd. and subsequently, TDL possessed special information

and knowledge as to the Always Fresh system that was not available to the franchisees; and

- n. The fact that TDL Group Ltd. and subsequently, TDL as franchisor owes a duty of good faith and fair dealing to the Plaintiffs and Class A Members both in statute (where applicable) and at common law.

37. It was reasonably foreseeable to TDL Group Ltd. and subsequently, TDL that the Plaintiffs and Class A Members would rely upon TDL Group Ltd.'s and subsequently, TDL's superior expertise, knowledge and information.

38. The Plaintiffs plead that TDL Group Ltd. and the Defendants breached their duty of care owed to the Plaintiffs and Class A Members by failing to disclose the true effect that the Always Fresh conversion would have on the Plaintiffs and Class A Members in the nature of reduced profits.

39. In the alternative, the Plaintiffs plead that ~~the Defendants were~~ TDL Group Ltd. was reckless and/or negligent in failing to undertake the investigation necessary to appreciate the true consequences of the Always Fresh conversion before making the representations set out in paragraph 16 17 above.

40. By reason of TDL Group Ltd.'s and subsequently, the Defendant's misrepresentations and the Plaintiffs' and Class A Members' reasonable reliance thereon, the Plaintiffs and Class A Members are entitled to special and general damages. In the alternative to their claim for damages, the Plaintiffs and Class A Members plead that they are entitled to "waive the tort" claim for negligent

misrepresentation and instead, can elect to claim payment of the profits realized by the Defendants as a result of the Always Fresh Conversion or to be the beneficiaries of a constructive trust imposed upon such profits.

Unjust Enrichment

41. By imposing the Always Fresh conversion, the Defendants have fundamentally and unilaterally altered their license agreements and franchise relationship with the Plaintiffs and Class A Members. Through these unilateral changes, the Defendants have realized significant additional revenue on the marked-up products sold to the Plaintiffs and Class A Members as from the Brantford plant, in addition to the retention of a 3 to 4.5% royalty on all products sold in the Tim Hortons stores.
42. Thus as a direct result of imposing the Always Fresh conversion, the Defendants have realized an unwarranted windfall of profit. The precise amount by which the Defendants have been unjustly enriched to the detriment of the Plaintiffs and Class A Members is not known to the Plaintiffs but is within, or should be within, the exclusive knowledge of the Defendants.
43. Over the same period, the profits of the Plaintiffs and Class A Members have markedly declined as described in paragraph 20 above. The Plaintiffs and Class A Members have thus suffered a corresponding deprivation as a result of the imposition of the Always Fresh conversion.

44. There is no juristic reason or justification for the Defendants' enrichment and the Plaintiffs' and Class A Members' corresponding deprivation. As pleaded in paragraphs 23 ~~24~~ to 30 ~~31~~ above, the Always Fresh conversion constitutes a breach of the license agreements between the Defendants and the Plaintiffs and Class A Members and constitutes a separate actionable wrong based on a breach of the duty of fair dealing and good faith owed at common law and in statute.
45. Accordingly, the Plaintiffs and Class A Members are entitled to compensation and restitution for unjust enrichment.
46. The Plaintiffs and Class A Members are entitled to an order requiring the Defendants to disclose, account for and pay to the Plaintiffs and Class A Members all additional profits realized as a result of the Always Fresh conversion.

The Claim: Damages suffered due to Lunch Menu

47. In the 1980s, Tim Donut Limited ~~TDL~~ introduced a limited ~~under~~ number of luncheon items to the menu at the Tim Hortons stores. More recently, TDL has introduced a more extensive lunch menu consisting of a variety of soups and sandwiches. The Plaintiffs and Class B Members are required by the Defendants to sell all of the lunch menu items in their stores at prices determined by the Defendants. The Plaintiffs and Class B Members are also required by the Defendants to purchase all products, supplies and ingredients necessary to produce the lunch menu items from TDL or Sysco Canada, a distributor

designated by TDL. The cost to the Plaintiffs and Class B Members of purchasing the products, supplies and ingredients for the lunch menu items from TDL or Sysco and the pricing of certain lunch menu items, such as soup and sandwich combos and certain sandwiches, is such that the Plaintiffs and Class B Members have only earned a minimal profit, and in some cases no profit at all, on such items (“the lunch menu items”).

48. Since their introduction in the 1980s, the popularity of the lunch menu items has increased such that these items now constitute, on average, approximately 8% of the franchisees’ sales. The lack of profitability of the lunch menu items was not problematic when first introduced because the volume of sale of such items was low. As the volume of the lunch menu items increased, the Defendants failed to adjust the prices of such items so that the Plaintiffs and other Class B Members could earn a reasonable profit.

49. The Defendants have emphasized the lunch menu items in their marketing campaigns. Such emphasis on the lunch menu items, which has led to increased sales of such items, has also increased the operating costs of the Plaintiffs and Class B Members due to the additional time and labour required to receive orders for and prepare the lunch menu items. The Plaintiffs and Class B Members are now required to hire more staff to service the same number of customers.

50. As a result of the Defendants’ imposition of the lunch menu, which has resulted in unreasonably low margins for the franchisees, and the Defendants’ aggressive

marketing of the lunch menu items, and the corresponding reduction in the profits of the franchisees, the Plaintiffs and Class B Members have suffered damages in the period June 1, 2002, to date of approximately \$80,000,000.00 per year, entitling the Plaintiffs and Class B Members to special damages of \$480,000,000.00. In the alternative to their claim for damages, the Plaintiffs and Class B Members plead that they are entitled to “waive the tort” claim for breach of the duty of good faith and fair dealing and instead, can elect to claim payment of the profits realized by the Defendants as a result of the lunch menu or to be the beneficiaries of a constructive trust imposed upon such profits. In the alternative, the Defendants have been unjustly enriched by the imposition of the lunch menu at the expense of the Plaintiffs and Class B Members in the amount of \$480,000,000.00.

51. The Defendants are aware of the decrease in franchise profitability as a result of the lunch menu items, which have resulted in unreasonably low margins, and have refused requests from the Plaintiffs and other Class B Members that such decreased profitability be addressed, either by increasing the prices of the lunch menu items or by other means.

52. The Plaintiffs and Class B Members continue to lose money on the lunch menu items, as the Defendants earn profits from these items, both by way of the sale of products, ingredients and supplies from the Brantford plant, and by way of royalties which the Defendants earn on all items sold in the Tim Hortons stores.

Breach of Contract

53. The language of the license agreements is clear that the Defendants granted a franchise for a store that sells coffee, baked goods and other related product. The preamble in the license agreements describes the “TIM HORTONS SYSTEM” as consisting of:

... shops involving the production, merchandising and sale of donuts, muffins, tarts, cakes, pies, cookies, coffee and other related products...

54. This provision has been breached by the Defendants in forcing the Plaintiffs and Class B Members to sell the lunch menu items, which not only lowers the profits of the Plaintiffs and Class B Members but changes the mode of operation of their stores.

55. The Defendants have also breached the provisions of the license agreements listed in paragraph 27 ~~28~~ above which only permit the Defendants to implement changes that constitute an improvement to the existing system, which provide a benefit to the franchisees, and which do not unreasonably alter the franchisees’ rights or obligations under the agreement.

56. Furthermore, the following provision of the license agreements only permits the Defendants to develop new products which are compatible with the “TIM HORTONS SYSTEM” (which, as stated in the preamble, consists of a coffee and baked goods store):

Section 3.00 – Initial and Continuing Services Furnished by Licensor

During the term of this License, the Licensor shall provide the following services to the Licensee:

... to use reasonable efforts to develop **new products compatible with the “TIM HORTONS SYSTEM”**; [emphasis added]

The lunch menu items are not compatible with the TIM HORTONS SYSTEM as it is described in the preamble of the licensee agreements.

57. By reason of the foregoing breaches, the Plaintiffs and Class B Members are entitled to special damages in the amount of \$480,000,000.00 for the period June 12, 2002, to present, and general damages in the amount of \$320,000,000.00.

Breach of Duty of Fair Dealing

58. In requiring the Plaintiffs and other Class B Members to sell the lunch menu items at a cost to the franchisees such that the franchisees cannot earn a profit on such items, the Defendants also breached their duty of fair dealing and good faith owed to the Plaintiffs and Class B Members at common law and (where applicable) by virtue of section 3 of the *Arthur Wishart Act, 2002* and section 7 of the *Franchises Act (Alberta)*, that franchisors are to act fairly, in good faith and in a commercially reasonable manner towards franchisees.
59. Prior to and after imposing the lunch menu items and their associated high costs, the Defendants were either aware of the effect that the lunch menu program would have on the revenues of the franchisees, or were reckless in failing to undertake the financial analysis necessary to obtain such information. After the

devastating effect of such unfair pricing was clear to the Defendants, their blatant disregard for the interests of the Plaintiffs and Class B Members is a clear breach of the duty of good faith and fair dealing, entitling the Plaintiffs and Class B Members to special and general damages. In the alternative to their claim for damages, the Plaintiffs and Class B Members plead that they are entitled to “waive the tort” claim for breach of the duty of good faith and fair dealing and instead, can elect to claim payment of the profits realized by the Defendants as a result of the lunch menu or to be the beneficiaries of a constructive trust imposed upon such profits.

Unjust Enrichment

60. By requiring the Plaintiffs and Class B members to sell the lunch menu resulting in unreasonably low margins, the Defendants have fundamentally and unilaterally altered their license agreements and franchise relationship with the Plaintiffs and Class B Members. Through these unilateral changes, the Defendants have realized significant additional revenue through the receipt of profits on marked-up products sold to the Plaintiffs and Class B Members as part of the lunch menu, in addition to the retention of a 3 to 4.5% royalty on all products sold in the Tim Hortons stores.
61. Thus as a direct result of the imposition of the lunch menu, the Defendants have realized an unwarranted windfall of profit. The precise amount by which the Defendants have been unjustly enriched to the detriment of the Plaintiffs and

Class B Members is not known to the Plaintiffs but is within, or should be within, the exclusive knowledge of the Defendants.

62. Over the same period, the profits of the Plaintiffs and Class B Members have declined as described in paragraph 50 ~~54~~ above. The Plaintiffs and Class B Members have thus suffered a corresponding deprivation as a result of the requirement to sell the lunch menu resulting in unreasonably low margins.
63. There is no juristic reason or justification for the Defendants' enrichment and the Plaintiffs' and Class B Members' corresponding deprivation. As pleaded in paragraphs 58 ~~59~~ to 59 ~~60~~ above, the imposition of the sale of the lunch menu resulting in unreasonably low margins constitutes a breach of the license agreements between the Defendants and the Plaintiffs and Class B Members and constitutes a separate actionable wrong based on a breach of the duty of fair dealing and good faith owed at common law and in statute.
64. Accordingly, the Plaintiffs and Class B Members are entitled to compensation and restitution for unjust enrichment.
65. The Plaintiffs and Class B Members are entitled to an order requiring the Defendants to disclose, account for and pay to the Plaintiffs and Class B Members all additional profits realized as a result of the sale of the lunch menu items, on which the margins were unreasonably low due to the high cost of goods.

66. The Plaintiffs plead and rely upon the *Class Proceedings Act, 1992*, S.O. 1992 c. 6, the *Negligence Act*, R.S.O. 1990, c. N.1, the *Arthur Wishart Act, 2002* and the *Franchises Act (Alberta)*.

67. The Plaintiffs propose that this action be tried in Toronto.

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