CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

NO: **500-06-000517-108**

"Class Action"
SUPERIOR COURT

OPTION CONSOMMATEURS

Plaintiff

and

PIERRE GAUMOND

Designated Member

v.

SHOPPERS DRUG MART CORP. ET ALS.

Defendants

DEFENDANTS' RE-AMENDED PLEA

IN DEFENCE TO PLAINTIFF'S AMENDED MOTION TO INSTITUTE PROCEEDINGS, DEFENDANTS PLEAD AS FOLLOWS:

1. As for the allegations contained in paragraphs 1, 2 and 3 of the Amended Motion to Institute a Class Action ("Motion"), Defendants refer to the court record and deny all that is not in conformity therewith;

2. Subject to the terms and conditions contained in the various versions of the Pharmaprix Optimum Program, as amended prior to July 1, 2010, and not the Shoppers Optimum Program, which is not in issue in this case, Defendants admit the allegations contained in paragraphs 6, 8 and 9 of the Motion;

3. Defendants deny as drafted the allegations contained in paragraphs 4, 5 and 7 of the Motion in so far as it relates to all Defendants and specifying that the retail stores in Quebec are not owned by Pharmaprix;

4. Defendants deny the allegations contained in paragraph 10 of the Motion;

5. With regard to the allegations contained in paragraphs 11, 12, 13 and 14 of the Motion and the Pharmaprix Optimum Program in issue, Defendants refer to the terms and conditions of the various versions of the Pharmaprix Optimum Program, as amended prior to July 1, 2010, and deny all that is not in conformity therewith;

5.1. Defendants deny as drafted the allegations contained in paragraph 15 of the Motion;

5.2. With regard to the allegations contained in paragraphs 15.1, 15.2, 15.3, 15.4, 15.5 and 15.6 of the Motion, Defendants refer to Exhibit P-17 (also Exhibit D-1) and deny all that is not in conformity therewith;

5.3. With regard to the allegations contained in paragraph 15.7 of the Motion, Defendants refer to Exhibit P-18 and deny all that is not in conformity therewith;

5.4. With regard to the allegations contained in paragraphs 15.8 and 15.9 of the Motion, Defendants refer to Exhibit P-19 and deny all that is not in conformity therewith;

5.5. With regard to the allegations contained in paragraph 15.10 of the Motion, Defendants refer to Exhibit P-20 (also Exhibit D-2) and deny all that is not in conformity therewith;

5.6. With regard to the allegations contained in paragraph 15.11 of the Motion, Defendants refer to Exhibits P-21 (also Exhibit D-3), P-17, P-18, P-19 and P-20 (also Exhibit D-2) and deny all that is not in conformity therewith;

5.7. Defendants deny the allegations contained in paragraph 15.12 of the Motion;

5.8. With regard to the allegations contained in paragraphs 15.13 and 15.14 of the Motion, Defendants refer to Exhibit P-10 and deny all that is not in conformity therewith;

5.9. With regard to the allegations contained in paragraph 15.15 of the Motion, Defendants refer to Exhibit P-2 and deny all that is not in conformity therewith;

5.10. With regard to the allegations contained in paragraph 15.16 of the Motion, Defendants refer to Exhibit P-22 and deny all that is not in conformity therewith;

5.11. Defendants deny the allegations contained in paragraph 15.17 of the Motion, adding that the agreements with each of the members of the Pharmaprix optimum Program are of an indeterminate duration;

5.12. With regard to the allegations contained in paragraph 15.18 of the Motion, Defendants refer to Exhibit P-17 (also Exhibit D-1) and deny all that is not in conformity therewith;

5.13. With regard to the allegations contained in paragraph 15.19 of the Motion, Defendants refer to Exhibits P-18, P-19 and P-10 and deny all that is not in conformity therewith

5.14. With regard to the allegations contained in paragraph 15.20 of the Motion, Defendants refer to Exhibit P-22 and deny all that is not in conformity therewith;

6. Defendants deny as drafted the allegations contained in paragraphs (...) 16 and 20 of the Motion;

7. Defendants deny the allegations contained in paragraphs 17 and 18 of the Motion;

8. Defendants admit the allegations contained in paragraph 19 of the Motion;

9. Defendants deny as drafted the allegations contained in paragraphs 21 and 29 of the Motion (...);

10. Defendants admit the allegations contained in paragraphs 22, 23, 24, 25, 26, 27, 28 and 30 of the Motion;

11. Defendants deny the allegation contained in paragraph 31 of the Motion (...);

11.1. Defendants deny the allegations contained in paragraph 31.1 of the Motion insofar as the table referenced therein contains a final column calculated by the Plaintiff that does not appear in the terms and conditions of the Pharmaprix Optimum Program, and add that pursuant to section 34 of the terms and conditions of the Pharmaprix Optimum Program, the reward points have no monetary value;

11.2. Defendants deny the allegations contained in paragraph 31.2 of the Motion insofar as the table referenced therein contains a final column calculated by the Plaintiff that does not appear in the terms and conditions of the Pharmaprix Optimum Program, and add that pursuant to section 34 of the terms and conditions of the Pharmaprix Optimum Program, the reward points have no monetary value;

11.3. Defendants deny the allegations contained in paragraph 31.3 of the Motion;

11.4. Defendants deny as drafted the allegations contained in paragraph 31.4 of the Motion;

11.5. Defendants deny the allegations contained in paragraph 31.5 of the Motion insofar as the table referenced therein contains a final column calculated by the Plaintiff that does not appear in the terms and conditions of the Pharmaprix Optimum Program, and add that pursuant to section 34 of the terms and conditions of the Pharmaprix Optimum Program, the reward points have no monetary value;

12. Defendants deny as drafted the allegations contained in paragraph 32 of the Motion in so far as the table referenced in the Motion contains a final column calculated by the Plaintiff that does not appear in the terms and conditions of the Pharmaprix Optimum Program, <u>and reiterate that pursuant to section 34 of the terms and conditions of the Pharmaprix Optimum Program, the reward points have no monetary value</u>;

13. Defendants deny the allegations contained in paragraphs 33 and 34 of the Motion as the reward points have no cash value and are not exchangeable for cash (section 34) <u>(...)</u>;

14. As for the allegations contained in paragraphs 35, 36 and 37 of the Motion, Defendants refer to section 45 of the Pharmaprix Optimum Program and deny all that is not in conformity therewith<u>, adding that the requirements alleged by Plaintiff were not applicable</u>;

<u>14.1.</u> <u>Defendants deny as drafted the allegations contained in paragraph 37.1 of the Motion, adding that the members of the Pharmaprix Optimum Program were adequately notified of the upcoming modifications;</u>

15. Defendants admit the allegations contained in paragraph 38 of the Motion;

16. Defendants deny the allegations contained in paragraph 39 of the Motion;

17. As for the allegations contained in paragraph 40 of the Motion, Defendants refer to Exhibits P-11 to P-14 and deny all that is not in conformity therewith;

18. Defendants deny the allegations contained in paragraphs 41, 42, <u>42.1, 42.2, 42.3,</u> 43, 44 and 45 of the Motion<u>, adding that the obligations and requirements alleged by Plaintiff were not applicable</u>;

<u>18.1.</u> <u>Defendants admit the factual portion of the allegations contained in paragraph 42.4 of the Motion adding that section 44 of the terms and conditions of the Pharmaprix Optimum Program constitutes another example of how the Program is designed to allow Pharmaprix to make unilateral modifications to the Program from time to time;</u>

19. Defendants ignore the allegations contained in paragraphs 46, 47 and 48 of the Motion;

20. Defendants admit the allegations contained in paragraphs 49, 50 and 51 of the Motion;

21. Defendants deny the allegations contained in paragraph 52 of the Motion;

22. Defendants admit the allegations contained in paragraph 54 of the Motion, adding however, that 19,990 points were earned after June 30, 2010 under the Pharmaprix Optimum Program;

23. Defendants deny the allegations contained in paragraphs 53, 55, 56, 57 and 58 of the Motion.

AND FOR FURTHER PLEA, DEFENDANTS ADD THE FOLLOWING:

I. INTRODUCTION

24. Shoppers Drug Mart Corporation is a publicly traded company.

25. Pharmaprix Inc. ("Pharmaprix"), is a wholly-owned subsidiary of Shoppers Drug Mart Corporation.

26. Pharmaprix is the contracting party under the terms and conditions of the Pharmaprix Optimum Program, which Program is operated in the Province of Quebec.

27. Shoppers Drug Mart Inc. is a wholly-owned subsidiary of Shoppers Drug Mart Corporation and is the contracting party under the terms and conditions of the Shoppers Optimum Program in Canada with the exception of the Province of Quebec.

28. 911979 Alberta Ltd is the trade mark owner of various trade-marks including the "Pharmaprix Optimum" and "Shoppers Optimum" trade-marks.

II. LACK OF PRIVITY

29. As admitted by Plaintiff in its Motion, this class action is limited to Quebec residents and members prior to July 1, 2010 who seek the nullity of section 45 of the terms and conditions of the Pharmaprix Optimum Program and damages for alleged breach of contract.

30. Co-Defendants Shoppers Drug Mart Corporation, Shoppers Drug Mart Inc. and 911979 Alberta Ltd. are not parties to the Pharmaprix Optimum Program offered to Quebec members and have no contractual relationship with the class members.

31. As the class representative, Mr. Pierre Gaumond ("Gaumond"), and the members of the class have no contractual relationship with any of the Defendants other than Pharmaprix, and, in fact, do not allege to have any contractual relationship with same, it is respectfully submitted that the class action against the co-Defendants should be dismissed.

III. THE PHARMAPRIX OPTIMUM PROGRAM

32. The Pharmaprix Optimum Program was launched in January 2001.

33. The Pharmaprix Optimum Program allows members to join without any cost and with no initial purchase required to join, the whole as appears from the terms and conditions of the January 2001 Pharmaprix Optimum Program, a copy of which is communicated herewith as **Exhibit D-1**.

34. As appears from the terms and conditions of the January 2001 Pharmaprix Optimum Program (**Exhibit D-1**), Pharmaprix Optimum members accumulated ten points for every dollar spent at any participating store ("**Participating Store**") and could exchange their points for a rebate on the purchase price of certain products. The reward schedule consisted of a discount based on the following percentages:

Points required	% rebate
3 000	20% (up to $5)
6 000	35 % (up to $10)
13 000	55 % (up to $25)
20 000	70 % (up to $40)
26 000	85 % (up to $55)
34 000	100 % (up to $75)

35. On March 8, 2008, the terms and conditions of the Pharmaprix Optimum Program in Quebec were modified and the reward schedule was changed, the whole as appears from a copy of the March 8, 2008 terms and conditions of the Pharmaprix Optimum Program communicated herewith as **Exhibit D-2.**

36. The reward schedule in effect on March 8, 2008 is reproduced as follows:

Points required	100% Reward Value
3 500	$ 5
7 000	$ 10
15 000	$ 25
30 000	$ 55
40 000	$ 75
75 000	$ 150

37. On March 24, 2008, the terms and conditions of the Pharmaprix Optimum Program were modified (...) in accordance with the Program, in order to allow members to accumulate 10 points for every dollar spent rounded down to the closest dollar amount, the whole as more fully appears from a copy of a March 24, 2008 notice to members communicated herewith as **Exhibit D-3**.

38. On May 2, 2009, the terms and conditions of the Pharmaprix Optimum Program were again modified (...) in accordance with the Program, and the reward schedule was changed to eliminate the first tier of the 2008 reward schedule, the whole as appears from the copy of the May 2, 2009 notice of change to the Pharmaprix Optimum Program communicated herewith as **Exhibit D-4**.

39. The reward schedule in effect as of May 2, 2009 is reproduced in Exhibit P-10 to the Motion and was as follows:

Points required	100% Reward Value
7 000	$ 10
15 000	$ 25
30 000	$ 55
40 000	$ 75
75 000	$ 150

40. As admitted by Plaintiff, as early as **June 3, 2010**, Pharmaprix provided the members of the public, including the class members, with notification that the May 2, 2009 reward schedule would be modified effective July 1, 2010, in the following forms:

(a) Website notification of the notice of change to the Pharmaprix Optimum Program along with a link to the new terms and conditions that would come into effect July 1, 2010 were posted on the Pharmaprix website from June 3, 2010 to June 30, 2010. Copies of the website notices together with the new terms and conditions of the Pharmaprix Optimum Program are communicated herewith as **Exhibit D-5** *en liasse*;

(b) Emails containing notices of the change to the Pharmaprix Optimum Program were sent to all members of the Pharmaprix Optimum Program who provided their email address, including the Designated Member, on the following dates: June 3, 10, 18 and 24, 2010. Copies of the texts of these four (4) emails are communicated herewith as **Exhibit D-6** *en liasse*;

(c) All cash register receipts at Participating Stores in Quebec, from June 3, 2010 until June 30, 2010, contained a notice of the change of the terms and conditions of the Pharmaprix Optimum Program to come into effect on July 1, 2010 and a reference to the Pharmaprix website. Copies of the wording appearing on the cash receipts are communicated herewith as **Exhibit D-7** *en liasse*;

(d) All Participating Stores received instructions to display tent cards at the cash registers from June 3, 2010 to July 8, 2010. A sample copy of the tent card texts in English and French are communicated herewith as **Exhibit D-8**; and

(e) All Participating Stores, including the Murale corporate store, were instructed to place a sticker on the Pharmaprix Optimum (...) application forms distributed as of **June 3, 2010**, which indicated that the terms and conditions of the Pharmaprix Optimum Program would no longer be in effect as of July 1, 2010 and referring them to the new Pharmaprix Optimum Program terms and conditions provided in-store or available on the Pharmaprix website, the whole as is admitted by Plaintiff in paragraph 38 of the Motion.

41. During the 4 week prior notice period, Pharmaprix also advertised to its members the option to redeem points accumulated prior to July 1, 2010 at special events where Pharmaprix enhanced its reward schedule significantly, the whole as more fully appears from Exhibit D-6.

42. For example, Pharmaprix modified the reward schedule at two (2) redemption events that were held on June 5 and 6, 2010 and June 26 and 27, 2010, in order to allow members to redeem 75,000 points for a discount of $200 instead of $150 or 40,000 points for a discount of $100 rather than $75 under the May 2, 2009 reward schedule.

43. The reward schedule in effect as of July 1, 2010, modifies both the points required as well as the corresponding reward value, the whole as appears from **Exhibit D-5** as follows:

Points required	100% Reward Value
8 000	$ 10
22 000	$ 30
38 000	$ 60
50 000	$ 85
95 000	$ 170

IV. THE CLASS REPRESENTATIVE AND CLASS

44. Gaumond became a member of the Pharmaprix Optimum Program on May 9, 2009, the date of the first use of his Pharmaprix card (section 46). A copy of Gaumond's purchase history is communicated herewith as **Exhibit D-9**.

45. Gaumond therefore adhered to the terms and conditions of the May 2, 2009 Pharmaprix Optimum Program (Exhibit P-10).

46. In his answers to particulars dated November 8, 2012, Gaumond stated he became a Pharmaprix Optimum member in order to benefit from the promotions offered to members and to obtain a discount on the purchase of products, the whole as appears from answers to particulars dated November 8, 2012 and communicated herewith as **Exhibit D-10**.

47. Despite his claim that he personally did not read the amendment notices, Gaumond, in fact, received four (4) email notifications of the July 1, 2010 changes on June 3, 10, 18 and 24, 2010 (**Exhibit D-6**). In addition, he purchased products at a Murale corporate store on June 25, 2010, where the proposed July 1, 2010 changes to the reward schedule appeared on his receipt and a tent card was displayed at the cash register of that particular store.

48. In any event, as appears from a copy of Gaumond's Pharmaprix Optimum card, he and every member of the class, is deemed to have accepted the terms and conditions of the Pharmaprix Optimum Program, as amended from time to time, every time he/they use the card to accumulate points under the Program (see also section 46 of the Pharmaprix Optimum Program). A copy of Gaumond's member card is communicated herewith as **Exhibit D-11**.

49. In addition, once a member redeems his points under the Pharmaprix Optimum Program, he grants Pharmaprix a release of any and all liability and claims regarding the redemption and use of the reward (section 51).

50. Gaumond continued to use his Pharmaprix Optimum card after July 1, 2010, as appears from Exhibit D-9 and is deemed to have accepted the July 1, 2010 reward schedule.

51. Moreover, on December 5, 2010, all of Gaumond's points accumulated as at June 30, 2010, as well as points accumulated after July 1, 2010, were transferred to his spouse in order for them to redeem points and jointly benefit from a Super Redemption Bonus Event where a 50,000 point redemption provided a discounted value of $125 as opposed to $85 under the July 1, 2010 reward schedule, the whole as more fully appears from Exhibit D-9 as well as a redacted copy of his spouse's purchase history communicated herewith as **Exhibit D-12**.

52. As such, Gaumond and his spouse also granted Pharmaprix a release from any and all liability and claims regarding the redemption and use of the reward and Gaumond is not a member of the class and has no valid claim.

V. SECTION 45 OF THE (...) PROGRAM

53. The Pharmaprix Optimum Program, allows its members to benefit from significant promotions and discounts on the purchase of certain products in the Participating Stores, free of charge.

54. The Pharmaprix Optimum Program allows Pharmaprix to make unilateral modifications to all of the terms and conditions of the Program as well as to the existence and duration of the Program (sections 22a, b, 33, 44 and 45). It also allows Pharmaprix to revoke membership card at any time (section 4).

55. The unilateral modification of the terms and condition of the Pharmaprix Optimum Program and, in particular, the reward schedule also allows for such promotions as, among others:

    (a) the 20x events, which allows members to benefit from 20 times the number of points accumulated for every dollar spent;

    (b) redemption events, which allow for the redemption of points at a reward value that is significantly higher than that indicated in the reward schedule; and

    (c) member only promotions.

55.1. The members of the Pharmaprix Optimum Program benefit greatly from the flexibility that is built into the Program.

55.2. Moreover, the modifications to the reward schedule have in fact allowed Pharmaprix to enhance the promotions offered to the members and increase the frequency of special promotions events, during which the reward schedule is temporarily changed to the members' significant benefit.

56. Plaintiff seeks the nullity of section 45 of the Pharmaprix Optimum Program on the basis that it is abusive as it permits the unilateral modification of the Program by Pharmaprix.

57. However, Plaintiff takes no issue with other sections of the Pharmaprix Optimum Program which also allow Pharmaprix to unilaterally modify the terms and conditions of the Pharmaprix Optimum Program or even terminate the Pharmaprix Optimum Program.

58. Defendants' submit that section 45 is not abusive and is no different from any other section in the Pharmaprix Optimum Program that allows for unilateral modification.

59. Indeed, Plaintiff's case is ill-founded and is premised on the erroneous legal argument that a clause is abusive and null only where the unilateral amendment results in a change that is not perceived by Plaintiff as being to the consumers' benefit.

60. The Court must look objectively at the clause in the context of the Pharmaprix Optimum Program and industry standards and not subjectively.

61. Indeed, in comparison to other loyalty programs that exist in Quebec and in Canada, the Pharmaprix Optimum Program does not represent a significant departure from industry standards. Copies of the terms and conditions of some of the other loyalty programs are communicated herewith as **Exhibit D-12**.

61.1. In fact, the Pharmaprix Optimum Program is generally recognized as one of the best loyalty programs in Canada.

61.2. Various changes have been required in order to ensure the sustainability of the Pharmaprix Optimum Program.

61.3. In addition, the legal nature of the Pharmaprix Optimum Program and the context within which it operates and/or evolves cannot be ignored.

61.4. More particularly, the Pharmaprix Optimum Program is a unilateral contract of gratuitous title insofar as the members have no obligations towards Pharmaprix.

61.5. In joining and accessing the Program, the members:

(a) do not pay Pharmaprix;

(b) do not undertake to pay Pharmaprix at a later date;

(c) do not undertake to remain members for any period of time;

(d) do not undertake to shop at Pharmaprix;

(e) do not undertake to encourage friends or family to shop at Pharmaprix; and

(f) do not undertake to promote Pharmaprix in any way.

61.6. Moreover, and notwithstanding the reference to a termination date indicated in section 42 of the terms and conditions of the Shoppers Optimum Program, the agreements with each members are of an indeterminate duration, as a result, *inter alia*, of the fact that each of Pharmaprix and the member could terminate the agreement at any time.

61.7. Section 44 of the terms and conditions of the Pharmaprix Optimum Program allows Pharmaprix to extend the Program beyond the termination date or terminate the Program at any time prior to the termination date.

61.8. As admitted by Plaintiff, the duration of the Pharmaprix Optimum Program was extended on several occasions since the January 2001 launch of the Program.

61.9. Rather than modify the reward schedule in March 2008, Pharmaprix would have been entitled to, pursuant to section 44 of the terms and conditions of the

Program, terminate the Pharmaprix Optimum Program at that time or choose not to extend the Program beyond the December 31, 2011 termination date.

61.10. Instead, Pharmaprix chose to make changes to the reward schedule and, subsequently, extend the Program beyond the December 31, 2011 termination date.

62. When considered in light of all of these factors, it is not excessive or unreasonable, much less *shocking*, for Pharmaprix to retain the right to unilaterally modify the terms and conditions of the Pharmaprix Optimum Program, in this case, the reward schedule.

63. Finally, subsidiarily Plaintiff argues that if section 45 is not abusive, that the exercise of section 45 was abusive.

64. Good faith is presumed and there are no allegations of fact that would support a cause of action for the abusive exercise of contractual rights. To the contrary, as admitted by Plaintiff, a prior notice of almost four (4) weeks was given to members before the reward schedule was modified effective July 1, 2010, contradicting Plaintiff's vague assertions that there was an abusive exercise of a contractual right .

65. Therefore, Defendants submit that the Plaintiff's class action proceedings are ill-founded and should be dismissed.

VI. SUBSIDIARILY AND WITHOUT PREJUDICE TO THE FOREGOING, THE CLASS IS NOT ENTITLED TO AN INJUNCTION OR DAMAGES

A. Any claims arising from the 2008 and 2009 modifications are prescribed

66. Should the Court find that section 45 of the Pharmaprix Optimum Program is abusive, which is expressly denied, Defendants submit the following without admission or prejudice.

66.1. Any claims arising from the 2008 and 2009 modifications to the Pharmaprix Optimum reward schedule are prescribed.

66.2. A motion for authorization was filed on or around July 28, 2010, pursuant to which Plaintiff sought the authorization to institute a class action attacking the legality of section 45 of the Pharmaprix Optimum Program and the July 1, 2010 unilateral modification of the reward schedule.

66.3. On March 9, 2012, the Court authorized the class action.

66.4. On or around June 27, 2012, Plaintiff filed a motion to institute class action proceedings pursuant to which it sought the annulment of the July 1, 2010 unilateral modification of the reward schedule.

66.5. On or around October 19, 2015, Plaintiff amended its claim to seek the annulment of the previous modifications to the reward schedule which occurred in 2008 and 2009, in addition to the 2010 modification.

66.6. Defendants submit that section 45 of the Pharmaprix Optimum Program is legal, valid and enforceable, and that the broad wording of this provision is both required and justified in the context of this reward program.

66.7. However, should the Court find section 45 of the Pharmaprix Optimum Program to be illegal, or any of the modifications to be abusive, which is vigorously denied by the Defendants, each of the modifications must be considered as separate and autonomous faults.

66.8. To the extent that the 2008 and 2009 modifications of the reward schedule are to be considered illegal, which again is vigorously denied by the Defendants, the alleged faults committed in 2008 and 2009 must be considered as separate and autonomous from the alleged fault committed in 2010.

66.9. Consequently, any claims arising from the 2008 and 2009 modifications must be considered as claims arising from sources that are distinct from the source of any claim arising from the 2010 modification.

66.10. As such, the filing of the motion for authorization in July 2010 did not suspend prescription and the filing of the Motion to Institute Proceedings in June 2012 did not interrupt prescription as regards any claims arising from the 2008 and 2009 modifications of the Pharmaprix Optimum Program reward schedule.

67. (...) With this in mind, as the Plaintiff claims that the May 2, 2009 reward schedule is the essential element for Mr. Gaumond and all class members adhering to the Pharmaprix Optimum Program, the class action is necessarily limited to Quebec residents adhering to the Pharmaprix Optimum Program **between May 2, 2009 and June 3, 2010**, who did not use their Optimum card or redeem their points after July 1, 2010.

68. There is no evidence that such class members actually exist. Indeed, Gaumond himself is not a member of the class.

B. No right to an injunction

69. (...) Assuming that there is such a class of Pharmaprix members (i.e. Quebec residents adhering to the Pharmaprix Optimum Program between May 2, 2009 and June 3, 2010), an injunction to modify the reward schedule to the Pharmaprix Optimum Program for this limited subset of members alone is simply not possible.

70. In addition, the issuance of such an injunction would prejudice the rights of third parties and cannot be granted.

70.1. In any event, specific performance is not admitted in cases where the contract provides a party with a right of unilateral resiliation.

70.2. Section 44 of the terms and conditions of the Pharmaprix Optimum Program confers a right of unilateral resiliation to Pharmaprix.

70.3. Section 4 of the terms and conditions of the Pharmaprix Optimum Program also provides that the Pharmaprix Optimum card may be revoked at any time by Pharmaprix in its sole discretion.

C. No right to compensatory damages

71. (...) The nullity of section 45 of the Pharmaprix Optimum Program does not give rise to a claim for compensatory damages. The points accumulated, for class members prior to (...) the March 8, 2008, May 2, 2009 and July 1, 2010 modifications, if any, have no cash value and cannot be redeemed for cash (section 34).

72. (...) Class members who redeemed (...) points accumulated prior to March 8, 2008 after (...) the March 2008 modification have provided a release to Pharmaprix from any liability and have no claim for compensatory damages.

72.1. The same applies to class members who redeemed points accumulated between March 8, 2008 and May 1, 2009 after the May 2, 2009 modification and to class members who redeemed points accumulated between May 2, 2009 and June 30, 2010.

72.2. Subsidiarily, Defendants are not liable for any damages that the class members could have avoided.

72.3. More specifically, the class members were provided with a notice of change prior to the 2008, 2009 and 2010 modifications to the Pharmaprix Optimum Program reward schedule and provided with the opportunity to redeem points accumulated prior to the announced changes at special events where Pharmaprix enhanced its rewards significantly.

72.4. Furthermore, even if the Court were to conclude that the modifications to the reward schedule were done illegally, which Defendants explicitly deny, any damages arising from said modifications, should they exist, must be limited to the points accumulated prior to the effective date of each of the impugned modifications.

72.5. Also, since what is good for the goose is good for the gander, should the Court conclude that the 2008, 2009 and 2010 modifications to the Pharmaprix Optimum Program reward schedule were done illegally, which again is explicitly denied, then all modifications to the reward schedule, including those modifications which significantly benefited the members, must therefore also be considered as having been done illegally.

72.6. As such, if any damages were suffered by the members following the 2008, 2009 and 2010 modifications, said damages must be offset by the benefits derived by the members who earned or redeemed points in the context of promotional events during which the reward schedule was enhanced.

72.7. As a second alternative, any damages arising from said modifications, should they exist, must be limited to the date the Program was set to expire before any of the impugned modifications occurred, i.e. December 31, 2011.

D. No right to punitive damages

73. (...) There is no legal or factual basis for a claim in punitive damages.

73.1. Defendants believed and still believe to this day that section 45 of the terms and conditions of the Pharmaprix Optimum Program allowed for the 2008, 2009 and 2010 unilateral modifications to the reward schedule.

73.2. In addition, while section 45 of the terms and conditions do not require Pharmaprix to provide prior notice of any changes made to the Program, in good faith, Pharmaprix provided the members with a four (4) week prior notice period, thereby providing the members with a fair opportunity to redeem their points before the modifications.

73.3. During the four (4) week prior notice period, Pharmaprix also advertised to its members the option to redeem points accumulated prior to the effective date of the change at special events where Pharmaprix enhanced its reward schedule significantly.

VII. CONCLUSION

74. All of the defences raised by Pharmaprix apply to all Defendants without admission or prejudice to the lack of privity argument.

75. This Defence is well-founded in fact and in law.

WHEREFORE MAY IT PLEASE THIS COURT TO:

DISMISS Plaintiff's class action;

THE WHOLE with costs, including any expert costs.

MONTREAL, September 22, 2016

Osler Hoskin & Harcourt

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Attorneys for Defendants

500-06-000517-108

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CLASS ACTION
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OPTION CONSOMMATEURS

Plaintiff

and

PIERRE GAUMOND

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Defendants

RE-AMENDED PLEA

ORIGINAL

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