Federal Court  Cour fédérale

Date: 20250711

Docket: T-545-24

Citation: 2025 FC 1239

Ottawa, Ontario, July 11, 2025

PRESENT: THE CHIEF JUSTICE

PROPOSED CLASS PROCEEDING

BETWEEN:

DIANA SUN

Plaintiff/Responding Party

and

BLOOMEX, INC.

Defendant/Moving Party

ORDER AND REASONS

I. Overview

[1] These reasons concern a motion brought by the Defendant Bloomex Inc. (**"Bloomex"**) to strike certain claims made in the underlying proposed class action proceeding.

[2] In that underlying proceeding, Diana Sun, the representative Plaintiff, claims damages pursuant to section 36 of the *Competition Act*, RSC 1985, c C-34 (the **"Act"**) for three distinct contraventions of section 52 of the Act and one contravention of section 54 of that legislation.

Ms. Sun also seeks a declaration that Bloomex has been unjustly enriched by the receipt of some or all of the price that she and other members of the proposed class directly or indirectly paid to Bloomex for floral services. In addition, Ms. Sun seeks an order requiring Bloomex to account for and make restitution to her and the other members of the proposed class, equal to the amount by which Bloomex is found to have been unjustly enriched.

[3] In the present motion, Bloomex seeks to strike the claims made with respect to two of the alleged contraventions of section 52. Those claims are defined below as the Strikethrough Pricing Claims and the Star Ratings Claims. Bloomex also requests the Court to strike certain passages from the Further Amended Statement of Claim filed by Ms. Sun (the **"FASC"**), on the ground that they contain impermissible evidence.

[4] For the reasons that follow, Bloomex's request to strike the Strikethrough Pricing Claims and the Star Ratings Claims will be dismissed. However, its request to strike certain passages from the FASC on the ground that they contain impermissible evidence will be largely granted.

II. The Parties

[5] Ms. Sun is a resident of British Columbia who claims to have purchased flowers through the Bloomex's website www.bloomex.ca (the **"Website"**).

[6] Bloomex is a corporation incorporated pursuant to the laws of Canada. It carries on business in the distribution of floral products and services.

III. Overview of the Principal Claims

[7] Ms. Sun brought the underlying action on behalf of all individuals and legal persons in Canada who purchased a floral product through the Website from the date Bloomex began offering such products and related floral services in Canada until the action is certified as a class proceeding (the **"Class Members"**). Ms. Sun was later granted leave to carve out Quebec residents from the proposed class, given that she is pursuing a separate proceeding in that jurisdiction. This is reflected in the FASC.

[8] Among other things, Ms. Sun alleges that Bloomex contravened section 52 of the Act in the following three distinct ways:

1. engaging in "drip pricing," as contemplated by subsection 52(1.3) of the Act, by failing to include a $1.99 "surcharge" in its initial representation of the prices for its floral products, at the outset of the purchasing process;

2. representing that floral products and/or floral services are being offered at a discount when Bloomex knew or was recklessly blind to the fact that such products and services were rarely, if ever, offered at the higher (struck-through) prices represented on the Website (the **"Regular Prices"**); and

3. including inaccurate **"Star Ratings"** next to each of the floral products sold on the Website, thereby giving the impression that such products and/or services have greater value than is actually the case.

[9] In the reasons below, the foregoing claims will be referred to as (1) the **"Surcharge Claims**,**"** (2) the **"Strikethrough Pricing Claims**,**"** and (3) the **"Star Ratings Claims**,**"** respectively.

[10] Ms. Sun also alleges that Bloomex contravened section 54 of the Act by supplying floral products at a price that exceeds the lowest of two or more prices that are clearly expressed on a point of purchase display, namely the Website. That higher price is alleged to be the sum of (i)

the initial price displayed on the Website during the purchasing process (the **"First Price"** or the **"Discount Price"**), and (ii) the aforementioned $1.99 "surcharge" (the **"Surcharge"**), which appears at the end of the purchasing process, plus applicable taxes and an uncontentious delivery charge. The First Price plus these additional charges are termed the **"Second Price,"** which is the higher price at which the products in question are allegedly actually sold.

[11] In addition to the foregoing, Ms. Sun alleges that Bloomex has been unjustly enriched by the amounts received from her and the other Class Members, through the sale of floral products and/or services on the Website.

IV. The Relief Sought on this Motion

[12] In its Notice of Motion, Bloomex sought an Order striking out the entire FASC pursuant to Rules 221(1)(a), (c) and (f) of the *Federal Courts Rules*, SOR/98-106 (the **"Rules"**), with leave to amend. In the alternative, Bloomex requested an Order striking out the paragraphs in the FASC pertaining to the second and third alleged violations of section 52, discussed above, namely, the Strikethrough Pricing Claims and the Star Ratings Claims, without leave to amend.

[13] However, in its Reply submissions, Bloomex abandoned its request for an Order striking out the entire FASC, and stated that its Motion "focuses solely on the Plaintiff's Claims related to Strikethrough Pricing and Stars Rating." Bloomex confirmed this position during the hearing of this Motion. For each of those two claims, Bloomex seeks to strike out the passages in the FASC pertaining to the claims, pursuant to Rules 221(1)(a), (c) and (f).

[14] Bloomex also seeks to strike all of what it submits is evidence contained within the FASC, pursuant to Rule 174. In particular, Bloomex requests the Court to strike the screenshots

of the various steps in the purchasing process on the Website, as well as certain other details pertaining to that purchasing process, as set forth in paragraphs 9 and 18–29 of the FASC.

V. Issues

[15] The principal issues on this Motion are as follows:

1. Does the FASC contain impermissible evidence?
2. Should the Strikethrough Pricing Claims be struck pursuant to Rules 221(1)(a), (c) or (f)?
3. Should the Star Ratings Claims be struck pursuant to Rules 221(1)(a), (c) or (f)?
4. If any claims are struck, should Ms. Sun be given leave to amend the FASC?

[16] During the hearing of this Motion, Ms. Sun specifically requested a ruling on whether it is plain and obvious that her claims of unjust enrichment disclose a reasonable cause of action. However, Bloomex maintained that it was not taking issue with those claims for the purposes of this Motion. Consequently, it is unnecessary to address that issue here. Given Bloomex's position on this issue, those claims will not be struck from the FASC.

VI. Analysis

A. *Does the FASC contain impermissible evidence?*

[17] Pursuant to Rule 174, pleadings "shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved."

[18] Bloomex maintains that the FASC includes details and screenshots of the Website that are impermissible pursuant to Rule 174. In this regard, Bloomex refers to paragraphs 9 and 18–29 of the FASC.

[19] With the exception of some details included in paragraph 9 of the FASC, as well as the full contents of paragraphs 18, 28 and 29, I agree with Bloomex on this point.

[20] In the first sentence of paragraph 9, Ms. Sun claims that when she purchased certain flowers on the Website on May 13, 2023, she was charged a $1.99 surcharge that was not disclosed until the end of the purchasing process. I consider these details to be helpful material facts that provide a basis for Ms. Sun's claims, help to frame those claims, and assist the Court to understand them. They are also essential to informing Bloomex of the case it has to meet: *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [***Mancuso***] at paras 16–20, leave to appeal to SCC refused, 36889 (23 June 2016); *Mercantile Office Systems Private Limited v Worldwide Warranty Life*, 2021 BCCA 362 [***Mercantile***] at paras 45–50.

[21] The same is true with respect to the details and the screenshots that are included in paragraphs 18 and 28 of the FASC. In brief, the details in paragraph 18 help to explain the defined terms "First Price," "Discount Price," and "Regular Price," as well as the term "Star Rating," by reference to the screenshot that follows them. In the example provided, Ms. Sun describes the terms First Price and the Discount Price as the price at which the floral products in question are being offered, namely, $69.99. She defines the "Regular Price" as the price that is struck through in the screenshot, namely, $119.99. These are particulars that assist to "flesh out the 'material facts', but are not so detailed as to amount to 'evidence'": *Curtis v Canada (Employment, Workforce Development and Disability Inclusion)*, 2022 FC 826 at para 26, aff'd

2024 FCA 206, citing *Copland v Commodore Business Machines Ltd*, 1985 CanLII 2190 (ON SC).

[22] The details and the screenshot in paragraph 28 perform a similar function. They assist the Court to understand the claim that the Surcharge is not disclosed until the end of the purchasing process. They also implicitly help the Court to understand that the Surcharge is not for delivery, but rather is simply a "fee" imposed "to offset rising costs of product, handling and delivery," despite the fact that there is a separate "Delivery Fee" of $14.99.

[23] Turning to paragraph 29, the details are helpful particulars because they help the Court to understand the concept of the "Second Price," as it is used in the FASC.

[24] However, the screenshots and details provided at paragraphs 19–27 are neither essential elements to Ms. Sun's claim nor helpful particulars. Moreover, they are not necessary to enable Bloomex to formulate its defence. The same is true with respect to the second sentence in paragraph 9, which simply alleges that the Plaintiff and Class Members experienced a purchasing process that was substantially similar to that described in paragraphs 18–29. Consequently, these passages all constitute impermissible evidence.

[25] Ms. Sun notes that "there are times where the distinction between what constitutes a material fact and what constitutes evidence may be blurred and difficult to apply": *Mercantile* at para 49. She adds that there are also situations in which it may be appropriate for the Court to refuse to strike out "statements that are merely surplus, provided no prejudice flows from them": *Apotex Inc v Glaxo Group Ltd*, 2001 FCT 1351 at para 10; *Sivak v Canada*, 2012 FC 272 [***Sivak***] at para 27. Ms. Sun proceeds from there to assert that the challenged details and screenshots are

material particulars that illustrate her allegations and provide clarity to the benefit of the parties and the Court.

[26] I disagree.

[27] It is important to maintain the distinction between what constitutes a material fact and what constitutes evidence that is impermissible in a pleading: *AstraZeneca Canada Inc v Novopharm Limited*, 2010 FCA 112 [***AstraZeneca***] at para 5; *Mercantile* at para 49. In my view, the details and screenshots provided in paragraphs 19–27, and that demonstrate the intermediate steps of the purchasing process, are not material particulars and do not provide clarity to the benefit of the parties and the Court. They are evidence that ought not to remain in the pleadings: *Sivak* at para 29.

[28] Given the foregoing, I will order paragraphs 19–27, as well as the second sentence in paragraph 9, to be struck from the FASC.

B. *Should the Strikethrough Pricing Claims be struck pursuant to Rule 221?*

(1) Rule 221(1)(a)

(a) *General principles*

[29] The general principles applicable in determining whether pleadings should be struck for failure to disclose a reasonable cause of action were summarized in *Sunderland v Toronto Regional Real Estate Board*, 2023 FC 1293 at paras 46–51. In brief:

i. The basic test is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiff's pleaded claims disclose no reasonable cause of action.

ii. If a claim has no reasonable prospect of success, it should not be allowed to proceed to trial.

iii. A claim will fail to disclose a reasonable cause of action if it contains a "radical defect," is "doomed to fail" or is "so clearly improper as to be bereft of any possibility of success."

iv. In applying this test, the Court's task is not to resolve conflicting facts and evidence and assess the strength of the case. Rather, the Court's focus is on the pleadings, not on the evidence. Those pleadings must be read generously, holistically, and practically, with a view to erring on the side of permitting a novel but arguable claim to proceed.

v. Nevertheless, the Court has an important screening role to play. That role includes assessing whether the pleadings (i) are sufficient to put the defendant on notice of the essence of the plaintiff's claim, (ii) have adequately addressed the constituent elements of each cause of action, and (iii) provide enough facts or particulars to ensure that the trial proceedings will be both manageable and fair.

vi. Moreover, the presumption of truth that applies to pleaded facts

> ". . . does not extend to matters which are manifestly incapable of being proven, to matters inconsistent with common sense, vague generalization[s], conjecture[s], bare allegations, bald conclusory statements or speculation that is unsupported by material facts."
>
> *Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89 at para 15 [***Jensen FCA***] at para 52(b), endorsing *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 [***Jensen FC***] at paras 81–82.

See also *L'Oratoire Saint-Joseph du Mont-Royal v JJ*, 2019 SCC 35 at paras 59–60.

vii. Where a cause of action advanced is under section 36 of the Act, the Court will also focus upon the sufficiency of the pleadings with respect to (i) the alleged "loss or damage suffered," and (ii) whether that loss or damage was as a result of "conduct contrary to part VI of the Act" (which establishes various criminal offences): see also *Jensen FCA* at para 19; *Jensen FC* at paras 93 and 123.

[30] I will return further below to the issue of the sufficiency of the pleadings with respect to the alleged "loss or damage suffered."

[31] In the present proceeding, the alleged contraventions of part VI of the Act concern sections 52 and 54 of the Act. Given that the present Motion is focused on two of the three claims made under section 52, it is unnecessary to discuss section 54 below, except to the extent required to address certain arguments advanced by Bloomex in its Reply submissions and at the hearing of this Motion.

[32] Subsection 52(1) of the Act establishes an offence for making false or misleading representations. That offence is a hybrid offence that can be prosecuted either by way of indictment or by way of summary conviction.

[33] Subsection 52(1) states as follows:

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly	**52 (1)** Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment

make a representation to the public that is false or misleading in a material respect.	ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

[34] The principal elements of subsection 52(1) are as follows:

1) knowingly or recklessly;
2) making a representation to the public;
3) that is false or misleading;
4) in a material respect;
5) for the purpose of promoting, directly or indirectly, by any means whatsoever:
    a. the supply or use of a product; or
    b. any business interest.

[35] The foregoing elements were recently discussed in *Pass Herald Ltd v Google LLC*, 2024 FC 1623 at paras 257–268. It is unnecessary to repeat that discussion here.

[36] Pursuant to subsection 52(1.3), certain types of representations, known as "drip pricing," are deemed to constitute false or misleading advertising for the purposes of subsection 52(1): see generally *Canada (Commissioner of Competition) v Cineplex Inc*, 2024 Comp Trib 5 [***Cineplex***] at paras 331–333, which concerned an identically worded provision in subsection 74.01(1.1) of the Act.

[37] Subsection 52(1.3) states as follows:

(1.3) For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent	**(1.3)** Il est entendu que l'indication d'un prix qui n'est pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue une indication fausse ou trompeuse, sauf si les frais obligatoires ne représentent que le

only an amount imposed by or under an Act of Parliament or the legislature of a province.	montant imposé sous le régime d'une loi fédérale ou provinciale à l'acquéreur du produit visé au paragraphe (1).

[38] Given that subsection 52(1.3) is only relevant to the Surcharge Claims, it is unnecessary to address the principal elements of that provision for the purposes of this Motion. Put differently, it is not necessary to discuss those elements because they are not relevant to the assessment of whether the Strikethrough Pricing Claims or the Star Ratings Claims should be struck under Rule 221.

(b) *Assessment*

(i) The sufficiency of the pleadings with respect to subsection 52(1)

[39] Bloomex submits that the FASC does not contain any particulars of evidence or material facts to support a claim for relief under subsection 52(1) in relation to the Strikethrough Pricing Claims.

[40] I disagree.

[41] As noted at paragraph 34 above, subsection 51(1) has five principal elements.

[42] The first element requires that the representation in question be made "knowingly or recklessly." Given the challenges associated with proving subjective intent, knowledge or

recklessness may be inferred based on common sense and a consideration of objective factors: *R v Stucky*, 2009 ONCA 151 at para 128.

[43] At paragraph 36 of the FASC, Ms. Sun claims that, "[a]t all material times, Bloomex controlled how the prices and Star Ratings of the Floral Products and/or the Floral Services were represented on its website." At paragraphs 49 and 50, the FASC adds:

> 49. At all material times, the benefit in the form and quantity of the Discount Value did not exist or was substantially less than the Discount Value. At all material times Bloomex knew or ought reasonably to have known this to be the case.
>
> 50. At all material times, Bloomex knew or ought reasonably to have known that they rarely, if ever, offered to sell the Floral Products and/or the Floral Services at a price equal to the Regular Price.

[44] Ms. Sun then explains at paragraph 57 that, "[t]hrough its representations of the Discount Price, the Regular Price, the Discount Value and/or the Star Ratings of the Floral Products and/or Floral Services, Bloomex knowingly or recklessly misled the Plaintiff and Class Members as to the value that they would obtain by purchasing these products."

[45] Furthermore, at paragraph 72, under the heading "False Discounts," the FASC states:

> 72. Bloomex's representations as to the Discount Price, the Regular Price, and/or the Discount Value of the Floral Products and/or the Floral Services when Bloomex knew or was reckless or willfully blind to the fact that these products were rarely, if ever, offered at a price equaling the Regular Price is in breach of section 52(1) of the Competition Act.

[46] It is not plain and obvious that the above-quoted passages of the FASC fail to provide sufficient material facts regarding the "knowingly or recklessly" element of subsection 52(1). Considering that this element may be established on the basis of common sense inferences, the claims reproduced in the three immediately preceding paragraphs above are not doomed to fail.

[47] The second element of subsection 52(1) requires a demonstration that the defendant made a "representation to the public." The material facts with respect to this element are provided throughout the FASC, including at paragraphs 10, 12–16, 18, 28, 45, 48 and 72. In brief, those paragraphs describe how Bloomex offers and sells floral products on the Website, and explain the representations made with respect to the Regular Price the Discount Price. This description is assisted by way of a helpful example discussed at paragraphs 18 and 28. The FASC also explains that the access to and use of the Website to purchase floral products constitutes the "Floral Services" referred to throughout the FASC. In addition, it explains that the "Discount Value" is the amount by which the Regular Price exceeds the Discount Price. It further explains that the Discount Value "is the amount that Bloomex represents customers will save by purchasing one of the Floral Products and/or the Floral Services at the Discount Price compared to purchasing one of the Floral Products and/or the Floral Services at the Regular Price."

[48] Taken together, these material facts are sufficient for the purposes of this Motion. It is not plain and obvious that Ms. Sun's case with respect to the element of "making a representation to the public" is doomed to fail.

[49] The third element in subsection 52(1) requires a demonstration that the representation in question is "false or misleading." Pursuant to subsection 52(1.1), it is not necessary to prove that any person was actually deceived or misled. Moreover, subsection 52(4) provides that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect."

[50] At paragraph 30 of the FASC, Ms. Sun claims that the Regular Price (which was struck through on the Website and which is depicted in the screenshot included at paragraph 18 of the FASC) is falsely and misleadingly represented as the price at which Bloomex's floral products and/or floral services are regularly offered for sale. In support of this claim, she alleges in the following paragraph that Bloomex's floral products and/or services are infrequently offered for sale at the Regular Price, and that the significant majority of sales volume is at the Discount Price. Consequently, Ms. Sun states that "the Regular Price does not accurately reflect the price that Bloomex ordinarily charges for the Floral Products and/or the Floral Services." Ms. Sun makes similar allegations at paragraphs 46–47, 72 and 74 of the FASC. Indeed, in two of those paragraphs, she claims that Bloomex "rarely, if ever," offered its products at the Regular Price.

[51] This was implicitly acknowledged by Bloomex during the hearing, when it stated that it *never* charged the "higher price" referred to in what is now the FASC.

[52] In my view, it is not plain and obvious that the claims made with respect to the "false or misleading" nature of the strikethrough representations made on the Website are doomed to fail.

[53] The same is true with respect to the fourth element in subsection 52(1), which requires that the impugned representations be false or misleading "in a material respect." In assessing this element, the Court's focus is upon whether the representation was "so pertinent, germane or essential" that it could affect the decision to purchase: *Apotex Inc v Hoffman La-Roche Limited*, 2000 CanLII 16984 (ON CA) [***Apotex***] at para 16; *Energizer Brands, LLC v Gillette Company*, 2023 FC 804 at para 176(4); *Maritime Travel Inc v Go Travel Direct Inc*, 2008 NSSC 163 at para 76, aff'd 2009 NSCA 42 at paras 27–29.

[54] At paragraph 49 of the FASC, Ms. Sun claims that "[a]t all material times, the benefit in the form and quantity of the Discount Value did not exist or was substantially less than the Discount Value" [emphasis added]. A similar claim is made at paragraph 72, where she states that the products sold on the Website "were worth an amount much lower than the Regular Price" [emphasis added]. Likewise, at paragraph 74, the FASC refers to "the magnitude of the exaggerated savings suggested by the representations." The screenshot at paragraph 18 of the FASC depicting the difference between the Discount Price that is offered and the struck-through price provides additional particulars to support the "material" nature of this difference.

[55] Considering all of the foregoing, it is not plain and obvious that the claims made with respect to the "materiality" element of subsection 52(1) are doomed to fail.

[56] The fifth and final element of subsection 52(1) requires a demonstration that the impugned representations were made for the purpose of promoting, directly or indirectly, by any means whatsoever, (a) the supply or use of a product, or (b) any business interest.

[57] The word “promote” contemplates “to move forward or advance,” or to “enhanc[e] or increase[e] the volume of business for the company”: *Apotex* at para 11. The words “promote, directly or indirectly, any business interest” have “a very wide meaning and can include any business interest” of the person or persons making the representation: *Apotex* at paras 13–14.

[58] Ms. Sun specifically pleads this element of subsection 52(1) at paragraph 73 of the FASC.

[59] Reading the FASC holistically, I consider that it is not plain and obvious that the claims made with respect to this element are doomed to fail. It is implicit throughout the FASC that the manner in which Bloomex offers and sells its floral products and related services on the Website is claimed to be for the purpose described immediately above.

[60] In summary, for the reasons set forth above, I conclude that it is not plain and obvious that the claims made with respect to any of the five principal elements of subsection 52(1) are insufficient, and that therefore the Strikethrough Pricing Claims are doomed to fail. In brief, the material facts and particulars provided in the FASC sufficiently address each of the constituent elements of subsection 52(1) and provide Bloomex with sufficient notice of the case it has to meet.

[61] I pause to observe that, in its Reply submissions and during the hearing of this Motion, Bloomex briefly addressed Ms. Sun’s claims in relation to section 54 of the Act, which deals

with “double ticketing.” It did so despite confirming that this Motion solely relates to the Strikethrough Pricing Claims and the Star Ratings Claims.

[62] In this regard, Bloomex maintained that Ms. Sun failed to demonstrate how the alleged Surcharge of $1.99 falls within the purview of section 54. However, paragraph 29 of the FASC clearly defines the “Second Price” as the sum of (i) the First Price (namely, the First Price/Discounted Price at which the floral products are offered, i.e., $69.99 in the example given); and (ii) the Surcharge, taxes and the delivery fee. At paragraph 38, the FASC adds that the First Price and the Second Price were clearly expressed on the Website, which constitutes a point-of-purchase display.

[63] Bloomex also maintained that it did not contravene section 54 because it never charged anyone the struck-through price, namely, the alleged “Regular Price.” However, in making this submission, Bloomex appears to have misunderstood the basis of Ms. Sun’s claims in relation to section 54 and confused the “First Price” and the “Regular Price.” In discussing the section 54 claim, paragraph 81 of the FASC makes it clear that the two relevant prices are the First Price (the price initially offered on the Website) and the Second Price (the price actually charged, after the imposition of the Surcharge, taxes and the delivery fee). This position is also reflected in paragraph 83, which states that the “Plaintiff and Class Members were entitled to pay Bloomex only the First Price, plus the delivery fee and taxes on the item price and the delivery fee, for the Floral Products or alternatively the Floral Services.” The Court assumes that the second reference to the delivery fee in this quoted passage was modified by the word “taxes.”

[64] Bloomex further alleged that the Second Price is defined differently throughout the FASC. However, Bloomex failed to explain this allegation, with which I disagree.

[65] Given that the claims with respect to section 54 are based on the Surcharge Claims, which were explicitly not challenged on this Motion, I will not further address the section 54 claims in these reasons.

(ii) The claimed damages and the causal link to the impugned conduct

[66] As noted at paragraph 2 above, Ms. Sun's claim for damages is brought under section 36 of the Act. Pursuant to paragraph 36(1)(a), any person who has suffered loss or damage as a result of conduct that is contrary to any provision of Part VI of that legislation may sue for and recover from the person who engaged in the conduct an amount equal to the loss or damage proved to have been suffered by him, as well as certain costs of investigation and of proceedings under section 36. Consequently, it is necessary for Ms. Sun to properly plead that she suffered loss or damage as a result of the alleged breaches of the Act: see paragraph 29(vii) above. Among other things, this requires that Ms. Sun appropriately plead "a causal link" between the loss or damage suffered and the impugned conduct contrary to part VI of the Act, namely, the alleged contraventions of sections 52 and 54 of the Act: *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 76; *Jensen FC* at para 94.

[67] Bloomex asserts that the FASC fails to disclose a reasonable cause of action because it contains no allegations of specific damage suffered by Ms. Sun in relation to the Strikethrough Pricing Claims, and does not explain how she may have incurred any such damages. Bloomex

adds that it is difficult to envision how any evidence could exist to support any claims of damages related to the Strikethrough Pricing Claims.

[68] In support of its position that there is no explanation of how Ms. Sun may have suffered damages from the Strikethrough Pricing Claims, Bloomex maintained during the hearing of this Motion that there is no suggestion in the FASC that Ms. Sun ever paid anything more than the Discount Price. As noted above, Bloomex added that it never charged the higher price, i.e., the Regular Price that was struck through on the Website.

[69] This misses the point. Insofar as the Strikethrough Pricing Claims are concerned, the damages Ms. Sun claims to have suffered are based on the value she expected to obtain from the products/services she purchased, after viewing them alongside the strikethrough pricing representations. This is first explained at paragraph 61 of the FASC, which states as follows:

> 61. Due to Bloomex's representations as to the Regular Price, Discount Price and/or Discount Value of the Floral Products and/or the Floral Services, the Plaintiff and Class Members obtained less value than they expected to obtain when purchasing these products because the value of the Floral Products and/or the Floral Services was less than the Regular Price that Bloomex represented these products to be worth. The Plaintiff and Class Members therefore suffered loss and/or damage in an amount equal to the difference between the Regular Price and the Discount Price (i.e. the Discount Value), plus taxes paid on that difference.

[70] Essentially the same claim is reiterated at paragraph 75 of the FASC.

[71] In brief, Ms. Sun alleges that she and the Class Members suffered damages equivalent to the difference between the Regular Price and the Discount Price, plus taxes paid on that

difference (which is defined as the Discount Value: see paragraph 47 above). This claim is repeated again at paragraph 87. In setting the stage for this claim, at paragraph 30 of the FASC, Ms. Sun added:

> 30. The Regular Price is a false and misleading representation of the price at which the Floral Products and/or the Floral Services are regularly offered for sale. As a result, the Discount Value customers ostensibly receive when purchasing the Floral Products and/or the Floral Services at the Discount Price is illusory.

[72] I recognize that, strictly construed, the damages claimed in relation to the Strikethrough Pricing Claims overlap with the damages claimed in relation to the Surcharge Claims (which are not at issue on this Motion). That is to say, to the extent that Ms. Sun claims the entire difference between the Regular Price and the Discount Price, in connection with the Strikethrough Pricing Claims, this claim covers the Surcharge (plus applicable taxes) that represents the damages claimed in relation to the Surcharge Claims (and indeed the claims made pursuant to section 54).

[73] Nonetheless, it is readily apparent that there is a unique component to the damages claimed in relation to the Strikethrough Pricing Claims. That unique component is the difference between the Regular Price and the sum of the Discount price and the Surcharge (plus taxes on the Surcharge and a delivery fee that is not in dispute).

[74] Given the foregoing, I reject Bloomex's assertions that the FASC contains no allegations of specific damage suffered by Ms. Sun in relation to the Strikethrough Pricing Claims.

[75] Turning to the causal link between the Strikethrough Pricing Claims and the damages Ms. Sun claims to have suffered, this was addressed in several passages of the FASC. To begin,

at paragraph 59 of the FASC, Ms. Sun explained, in a generic way, that she and the Class Members suffered loss and/or damage "[a]s a result of Bloomex's" [emphasis added] various breaches of the Act. Ms. Sun proceeded to further particularize those claims at paragraphs 60–62 of the FASC, in relation to the Surcharge Claims, the Strikethrough Pricing Claims and the Star Ratings Claims, respectively. For the present purposes, the relevant passage is the following:

> 61. Due to Bloomex's representations as to the Regular Price, Discount Price and/or Discount Value of the Floral Products and/or the Floral Services, the Plaintiff and Class Members obtained less value than they expected to obtain when purchasing these products because the value of the Floral Products and/or the Floral Services was less than the Regular Price that Bloomex represented these products to be worth. …

[76] This causal link is repeated in slightly different terms at paragraph 75 of the FASC, which states as follows:

> 75. As a result of Bloomex's breaches of section 52 of the *Competition Act*, the Plaintiff and Class Members suffered loss and/or damage. In particular, the Plaintiff and Class Members obtained less value than they had expected to obtain when they purchased the Floral Products and/or the Floral Services because the value of these products was less than the Regular Price, and/or the Plaintiff and Class Members did not obtain value equal to the Discount Value by purchasing the Floral Products and/or the Floral Services at the Discount Price.

[77] Paragraph 87 of the FASC then reiterates this causal link again.

[78] The FASC further claims, at paragraph 56, that "[t]he Plaintiff and Class Members reasonably relied on the Discount Price, the Regular Price and/or the Discount Value of the Floral Products and/or Floral Services in deciding to purchase these products" [emphasis added].

[79] I pause to note that, during the hearing, Mr. Turner represented on behalf of Ms. Sun that she has retained an economist who will demonstrate later in the certification motion that (i) there is a methodology to establish damage based on loss of expected value, and (ii) there is some basis in fact that such damage can be established on a class-wide basis.

[80] Having regard to all of the foregoing, it is not plain and obvious that Ms. Sun's claim for damages with respect to the Strikethrough Pricing Claims is doomed to fail or is so clearly improper as to be bereft of any possibility of success. For greater certainty, and solely for the purposes of this Motion, I consider that the FASC adequately address the causal link between the conduct contemplated by the Strikethrough Pricing Claims and the damages alleged to have been suffered by Ms. Sun.

(2) Rule 221(1)(c)

(a) *General principles*

[81] Pursuant to Rule 221(1)(c), a pleading may be entirely or partially struck, with or without leave to amend, on the ground that it is scandalous, frivolous or vexatious.

[82] A claim may be struck under this Rule either where (i) the claimant can present no rational argument, based upon evidence or law, in support of the claim, or (ii) the pleadings are so deficient in factual material that the defendant cannot know how to answer them: *kisikawpimootewin v Canada*, 2004 FC 1426 at para 8; *Zbarsky v Canada*, 2022 FC 195 at para 40.

(b) *Assessment*

[83] Bloomex maintains that the FASC is scandalous, frivolous or vexatious in relation to the Strikethrough Pricing Claims on the grounds that (i) it contains no possibility of producing an evidentiary foundation, (ii) is entirely deficient in factual material, and therefore, (iii) those claims are impossible to answer.

[84] I disagree.

[85] As discussed in the immediately preceding section above, it is not plain and obvious that the FASC is deficient in providing material facts and particulars with respect to each constituent element in subsection 52(1) of the Act.

[86] Regarding the possibility of producing an evidentiary foundation and Bloomex's ability to answer the FASC, Ms. Sun produced an affidavit affirmed by the founder of Bloomex, Mr. Dmitri Lokhonia (the **"Lokhonia Affidavit"**). That affidavit was sworn in connection with a proceeding in Australia that led to the reported decision *Australian Competition and Consumer Commission v Bloomex Pty Ltd*, [2024] FCA 243 (Federal Court of Australia) [***Bloomex Australia***]. In his affidavit, Mr. Lokhonia made various admissions in relation to what Ms. Sun characterizes as "substantially similar legal allegations based on substantially similar facts." Ms. Sun argues that this evidence is admissible because Rule 221(2) only bars evidence with respect to a motion to strike grounded in Rule 221(1)(a), and therefore evidence is permitted with respect to motions to strike grounded in Rules 221(1)(c) and (f).

[87] Bloomex maintained in its Reply submissions that the Lokhonia Affidavit is inadmissible evidence. In support of this submission, Bloomex advanced three arguments. First, it asserted that the affidavit related to a penal matter in a different jurisdiction. Second, it stated that there are "absolutely zero material facts before this Court to establish that the Australian action is the

same as those before the Court in these proceedings." Third, Bloomex maintained that the filing of the Lokhonia Affidavit is "in wanton disregard for the Rules and in a flagrant violation of Rule 221(2)."

[88] I disagree with Bloomex's position that the Lokhonia Affidavit is inadmissible in the present proceeding.

[89] Ms. Sun does not rely on the statements in the Lokhonia Affidavit for the truth of their contents. Instead, she relies on those statements as evidence that Bloomex was able to understand and answer "substantially similar legal allegations based on substantially similar facts" in a proceeding that involved a "very similar legal context." Given that Ms. Sun relies on that affidavit for the purposes of Rule 221(1)(c), not Rule 221(1)(a), there is no violation of Rule 221(2): *Zhao-Jie v TD Waterhouse Canada Inc*, 2024 FC 261 at para 20; *Specialized Desanders Inc v Enercorp Sand Solutions Inc*, 2018 FC 689 at para 38.

[90] I recognize that this Court has observed that "the defendant's motion to strike, as required by Rule 221(2) must be judged solely on the basis of the allegations of the statement of claim and particulars … without considering any evidence:" *Underwriters Laboratories Inc v San Francisco Gifts Ltd*, 2009 FC 909 [***Underwriters***] at para 9. However, that case is distinguishable because it is readily apparent that this quoted statement was made with respect to a motion brought under Rule 221(1)(a). The Court rejected the Defendant's attempt to argue that its motion was also being brought under another provision in Rule 221.

[91] Turning to the differences between *Bloomex Australia* and the present proceeding, I fail to see how they provide a basis upon which to conclude that the Lokhonia Affidavit is inadmissible in the current motion.

[92] Insofar as the *nature* of the two proceedings is concerned, contrary to Bloomex's assertion, *Bloomex Australia* was not a true penal proceeding. It concerned proposed orders for *civil* penalties and costs. Following various admissions made by Bloomex, the only dispute was with respect to the quantum of those penalties and costs to be imposed on Bloomex: *Bloomex Australia* at paras 2–3. The court there made a point of distinguishing the "civil penalties" that it imposed from "criminal" sanctions. In this regard, the court observed: "In contrast to criminal sentences, civil penalties are not concerned with retribution and rehabilitation but are 'primarily if not wholly protective in promoting the public interest in compliance'": *Bloomex Australia* at para 101, quoting *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at paras 55 and 59. Bloomex has not provided any authority to support the view that an affidavit filed in such a proceeding is inadmissible in a proposed civil class proceeding for damages under sections 36 and 52 of the Act.

[93] Turning to the *conduct* at issue in *Bloomex Australia*, it appears to have been very similar to that which is the subject of the present proceeding. As in the present proceeding, Bloomex offered its floral products for sale on its Website by displaying a picture of those products, followed by two prices: a struck-through price and a much lower price at which the products were actually offered for sale. Bloomex's representations included discount representations, star ratings claims and representations regarding the total price of its products that did not include surcharges which were only disclosed later in the online purchasing process.

[94] Also, as in the present context, the focus of the proceeding was on the interplay between the above-described conduct and statutory provisions prohibiting misleading or deceptive conduct: *Bloomex Australia* at paras 1, 78, 98, 148–150 and 171.

[95] As I have noted, the dispute in *Bloomex Australia* was confined to the quantum of the penalties and to costs, because Bloomex made various admissions: *Bloomex Australia* at paras 2–3. Among other things, those admissions included that the discount representations implicit in the impugned struck-through prices, as well as the representations with respect to star ratings and total prices, were false, misleading or deceptive: *Bloomex Australia* at paras 25, 36 and 46. I recognize that the representations made on Bloomex's Australian website included certain representations that are not at issue in the present proceeding, including the words "50% off," "Half Price" and "You Save," followed by an amount that was the difference (or the approximate difference) between the struck-through price and the offered price: *Bloomex Australia* at paras 21–22. However, the fact that those additional representations were made does not negate the substantial similarities between, on the one hand, the facts, the allegations and the statutory provisions in *Bloomex Australia,* and, on the other hand, those in the present proceeding.

[96] Considering all of the foregoing, I find that the Lokhonia Affidavit is admissible for the purpose of assisting to establish that it is not plain and obvious that the Strikethrough Pricing Claims are "scandalous, frivolous or vexatious," as contemplated by Rule 221(1)(c).

[97] My finding in this regard is reinforced by the fact that the Lokhonia Affidavit explicitly describes important similarities between Bloomex's business model in Australia and Canada, as well as market conditions in the two countries: Lokhonia Affidavit at paras 11, 16 and 127. It also describes how the star ratings depicted on Bloomex's Website were based on a product survey that was conducted in Australia, Canada and the U.S., "between about 2013 and January 2015": Lokhonia Affidavit at paras 58–59.

[98] Beyond the Lokhonia Affidavit, and as noted at paragraph 79 above, Ms. Sun has retained an economist for the purpose of demonstrating in the certification motion that (i) there is a methodology to establish damage based on loss of expected value, and (ii) there is some basis in fact that such damage can be established on a class-wide basis.

[99] Considering all of the foregoing, I reject Bloomex's assertions that (i) there is no possibility of producing an evidentiary foundation for the Strikethrough Pricing Claims, including the damages claimed in relation thereto; (ii) the FASC is entirely deficient in factual material; and (iii) the Strikethrough Pricing Claims are impossible to answer. I find that it is not plain and obvious that the Strikethrough Pricing Claims are "scandalous, frivolous or vexatious," as set forth in Rule 221(1)(c).

(3) Rule 221(1)(f)

(a) *General principles*

[100] A claim may be struck under Rule 221(1)(f) on the ground that it "is otherwise an abuse of the process of the Court." In this context, the word "otherwise" indicates that the abuse of process must be something beyond one or more of the grounds for striking set forth in Rules 221(1)(a)–(e): *Underwriters* at para 9; *Bay Limited Partnership v Zellers Inc*, 2023 CanLII 45170 (FC) [***Zellers***] at para 14; *Burke v Canada (Corrections)*, 2023 FC 1350 (CanLII) at para 7.

[101] What constitutes an abuse of process will often depend on the particular circumstances of the matter. However, for the present purposes, it will suffice to state that bald and speculative allegations made without any evidentiary foundation will generally constitute an abuse of

process: *Astrazeneca* at para 5; *Apotex Inc v Allergan, Inc*, 2011 FCA 134 at para 4; *Zellers* at para 14.

(b) *Assessment*

[102] Bloomex submits that the Strikethrough Pricing Claims amount to an abuse of process because they fail to disclose a reasonable cause of action and are "otherwise deficient pursuant to Rule 221(1)(c)."

[103] This submission is based on an interpretation of Rule 221(1)(f) that would deprive it of any independent meaning. In essence, Bloomex's argument is that the Strikethrough Pricing Claims constitute an abuse of process because they fall within the purview of Rules 221(1)(a) and (c).

[104] In the absence of any other argument as to why the Strikethrough Pricing Claims might constitute an abuse of process, Bloomex has not demonstrated that those claims should be struck on that basis.

(4) Conclusion – Strikethrough Pricing Claims

[105] For the reasons set forth in parts VI.B.(1)–(3) above, I conclude that Bloomex has not demonstrated that the Strikethrough Pricing Claims should be struck pursuant to Rules 221(1)(a), (c) or (f), respectively.

C. *Should the Star Ratings Claims be struck pursuant to Rule 221?*

(1) Rule 221(1)(a)

(a) *General principles*

[106] The general principles applicable in assessing a motion under Rule 221(1)(a) are discussed in Part VI.B.(1) of these reasons above. It is unnecessary to repeat them here.

(b) *Assessment*

[107] Bloomex makes the same submissions with respect to the Star Ratings Claims that it made in relation to the Strikethrough Pricing Claims. To reiterate for convenience, Bloomex maintains that the FASC (i) does not contain any factual foundation or particulars of evidence to support a claim for relief in relation to the Star Ratings Claims, (ii) makes no allegations of specific damages suffered by Ms. Sun, and (iii) fails to explain how such damages may have been incurred by her. Bloomex adds that, given the way in which Ms. Sun has framed her claim for damages in relation to the Star Ratings Claims, it is difficult to envision how any evidence could exist to support that claim.

[108] I disagree.

[109] As with the claims made in relation to the Strikethrough Pricing Claims, the FASC contains sufficient material facts and particulars with respect to the Star Ratings Claims and each of the five constituent elements of subsection 52(1) of the Act.

[110] The first of those elements requires that the representation in question be made "knowingly or recklessly." For the reasons discussed at paragraphs 42–44 and 46 above, I reject Bloomex's argument that the FASC does not contain sufficient particulars to support a claim for relief in relation to this element of subsection 52(1). It is not plain and obvious that the Star

Ratings Claims are doomed to fail insofar as the "knowledge or recklessness" element of subsection 52(1) is concerned. I will simply add in passing that additional particulars with respect to this element and the Star Ratings Claims are provided at paragraphs 76–77 of the FASC.

[111] The second element of that provision requires a demonstration that the defendant made a "representation to the public." The material facts and particulars with respect to this element are provided at paragraphs 4, 17, 18, 32–34, 36 and 51–52 of the FASC. In brief, those paragraphs describe how Bloomex represents Star Ratings next to its floral products and services on its Website. Given the claims made in those paragraphs, it is not plain and obvious that Star Ratings Claims are doomed to fail in relation to this element of subsection 52(1).

[112] The third element of subsection 52(1) requires a demonstration that the representation in question is "false or misleading": see paragraph 49 above. At paragraph 4 of the FASC, Ms. Sun claims the following:

> 4. … These star ratings purport to indicate the degree of satisfaction that consumers obtained from purchasing these services. However, these star ratings are not based on up-to-date customer reviews of exclusively individuals who purchased products from Bloomex's Canadian website and are accordingly not an accurate representation of the value of Bloomex's floral services.

[113] At paragraphs 32–34 of the FASC, Ms. Sun elaborates as follows:

> 32. The Star Ratings are a false and misleading representation of customer satisfaction with the Floral Products and/or the Floral Services.
>
> 33. At material times, Bloomex represented, expressly or by implication, that the Star Ratings accurately represented customer satisfaction with the Floral Products and/or the Floral Services. However, the Star Ratings remained static from a date unknown to

> the Plaintiff but known to Bloomex and included ratings from customers who purchased products on Bloomex's non-Canadian websites. As a result, the Star Ratings are not based on up-to-date reviews of customers and accordingly are not an accurate indication of customer satisfaction with the Floral Products and/or the Floral Services. Bloomex ceased representing the Star Ratings in early 2024.
>
> 34. The effect of the Star Ratings on the Platform was to give the impression that the Floral Products and/or the Floral Services had greater value than was actually the case.

[114] Similar claims are made at paragraphs 51–54 of the FASC.

[115] At paragraph 55, the FASC adds:

> 55. At material times, the value of the Floral Products and/or the Floral Services, or some of them, was lower than the value implied by the Star Ratings. At all material times Bloomex knew or ought reasonably to have known this to be the case.

[116] Given the material facts and particulars provided in the passages quoted above from paragraphs 4, 32–34 and 55 of the FASC, it is not plain and obvious that the Star Ratings Claims are doomed to fail in relation to the "false or misleading" element of subsection 52(1) of the Act.

[117] The fourth element of that provision requires that the impugned representations be false or misleading "in a material respect": see paragraph 53 above.

[118] Insofar as this element is concerned, the essence of Ms. Sun's claim is stated at paragraph 62 of the FASC, which states as follows:

> 62. Due to Bloomex's representations as to the Star Rating of the Floral Products and/or the Floral Services, the Plaintiff and Class Members obtained less value than they expected to obtain when purchasing these products because customer satisfaction with the Floral Products and/or the Floral Services was less than what was represented by the Star Rating. The Plaintiff and Class Members therefore suffered loss and/or damage in an amount equal to the difference between the price paid (i.e. the Discount Price) and the

> actual value of the FLoral *[sic]* Products and/or the Floral Services unaccompanied by the Star Ratings.

[119] The foregoing claims are essentially repeated at paragraph 79 of the FASC. Given those claims, it is not plain and obvious that the Star Ratings Claims are doomed to fail in relation to the "in a material respect" element of subsection 52(1) of the Act.

[120] The fifth, and final, element of subsection 52(1) requires a demonstration that the impugned representations were made for the purpose of promoting, directly or indirectly, by any means whatsoever, (a) the supply or use of a product, or (b) any business interest: see paragraphs 56–57 above.

[121] This element is addressed at paragraph 77 of the FASC, which states as follows:

> 77. This conduct was done for the purpose of promoting, directly or indirectly, the supply or use of the Floral Products and/or the Floral Services, and/or for the purpose of promoting, directly or indirectly, Bloomex's business interests in attracting customers to purchase the Floral Products and/or the Floral Services from them.

[122] It is clear from the context that the "conduct" in question is the representations with respect to the Star Ratings of Bloomex's floral products and/or services. To the extent that a common sense inference can be made that the Star Ratings Claims were made for the purpose stated in paragraph 77 of the FASC, I consider that it is not plain and obvious that those claims are doomed to fail in relation to the fifth element of subsection 52(1).

[123] In summary, for the reasons set forth above, I conclude that the FASC contains sufficient material facts and particulars with respect to the Star Ratings Claims, including for each of the five constituent elements of subsection 52(1) of the Act. In brief, it is not plain and obvious that the Star Ratings Claims are doomed to fail with respect to those elements. The material facts and

particulars of the claims made in relation to those elements are sufficient for the purposes of the present Motion.

[124] I will now turn to Bloomex's arguments that the FASC makes no allegations of specific damages suffered by Ms. Sun, and fails to explain how she may have incurred such damages.

[125] At paragraph 59 of the FASC, Ms. Sun specifically claims that she and the Class Members "suffered loss and/or damage" "[a]s a result of Bloomex's breach or breaches of the Competition Act."

[126] At paragraph 62 of the FASC, reproduced at paragraph 118 above, Ms. Sun then explained the nature of the damages she and the Class Members allegedly suffered as a result of the Star Ratings Claims. Those damages consisted in having "obtained less value than they expected to obtain when purchasing these products because customer satisfaction with the Floral Products and/or the Floral Services was less than what was represented by the Star Rating." Ms. Sun claims this damage to be "an amount equal to the difference between the price paid (i.e. the Discount Price) and the actual value of the FLoral [*sic*] Products and/or the Floral Services unaccompanied by the Star Ratings."

[127] The FASC reiterates essentially the same claim at paragraph 79, which states as follows:

> 79. As a result of Bloomex's breaches of section 52 of the Competition Act, the Plaintiff and Class Members suffered loss and/or damage. In particular, the Plaintiff and Class Members obtained less value than they had expected to obtain when they purchased the Floral Products and/or the Floral Services because the value of these products was less than the value that Bloomex represented the Floral Products and/or the Floral Services had when viewed alongside the Star Ratings.

[128] Those particulars, together with the claims made with respect to how the Star Ratings were represented on the Website and Ms. Sun's purchase of flowers on the Website on May 13, 2023, explain how she may have incurred the damages that she claims to have suffered. Those particulars are sufficient for the purposes of the present Motion. For greater certainty, they provide Bloomex with enough material facts and particulars to know the case it has to meet with respect to those matters. It is not plain and obvious that they are doomed to fail.

[129] Turning to the causal link between the Star Ratings Claims and the damages Ms. Sun claims to have suffered, this was initially addressed, in a generic way, at paragraph 59 of the FASC, where Ms. Sun explained that she and the Class Members suffered loss and/or damage "[a]s a result of Bloomex's" [emphasis added] various breaches of the Act. The FASC then proceeds to elaborate on this, at paragraphs 60–62. For the present purposes, the relevant passage is paragraph 62, which is reproduced at paragraph 118 above. Specifically, at the outset of that paragraph, Ms. Sun claims that she suffered damages "due to" the star ratings representations.

[130] This causal link is repeated at paragraph 79 of the FASC, which is reproduced at paragraph 127 above. The link is further repeated at paragraph 88 of the FASC. These paragraphs specifically plead that Ms. Sun and the Class Members suffered loss and/or damage "as a result of" the star ratings representations.

[131] What remains to be considered is whether those pleadings are sufficient for a cause of action based on subsection 36(1) and an alleged breach of section 52 of the Act. Whereas the FASC specifically claims, at paragraph 56, that Ms. Sun and the Class members "reasonably relied" on the strikethrough pricing representations, no similar claim regarding detrimental reliance is made in the FASC with respect to the star ratings representations.

[132] This Court's jurisprudence appears to require plaintiffs to explicitly plead and ultimately establish that they relied on the alleged false or misleading representation to their detriment: *Murphy v Compagnie Amway Canada*, 2015 FC 958 at paras 82–83; *Living Sky Water Solutions Corp v ICF Pty Ltd*, 2018 FC 876 at paras 32–34; and *Lin v Airbnb, Inc*, 2019 FC 1563 at para 71.

[133] However, there is subsequent jurisprudence from other courts stating that detrimental reliance is not required to be pleaded in all situations. I recognize that the circumstances in which this position has been taken have sometimes involved claims made by plaintiffs who did not directly purchase products from the defendant(s): *Valeant Canada LP/Valeant Canada SEC v British Columbia*, 2022 BCCA 366 at paras 225–232; *Live Nation Entertainment v Gomel*, 2023 BCCA 274 at paras 119–126, leave to appeal to SCC refused, 40930 (4 April 2024). Nevertheless, there have also been at least two Ontario cases where the court held that a plaintiff who directly purchased from the defendant(s) did not need to specifically plead detrimental reliance: *Rebuck v Ford Motor Company*, 2018 ONSC 7405 [***Rebuck***] at paras 32–35; *Drynan v Bausch Health Companies Inc*, 2021 ONSC 7423 [***Drynan***] at paras 178–184. Despite the fact that some subsequent decisions have specifically declined to follow that jurisprudence (see e.g., *Hoy v Expedia Group Inc*, 2022 ONSC 6650 at para 116; *Lewis v Uber Canada Inc et al*, 2023 ONSC 6190 [***Lewis***] at para 74), it is fair to say that the law on this issue remains somewhat unsettled. In what appears to be the most recent case on point, Justice Akbarali reviewed much of the relevant jurisprudence and accepted that he had characterized the test too strongly in *Lewis*. He concluded that, for claims under section 52 of the Act, "a causal connection is required, which will often be reliance, but not always": *Mackinnon v Volkswagen Group Canada Inc, et al*, 2024 ONSC 4988 at paras 182–192.

[134] Given the foregoing, I consider that it is not plain and obvious that the Star Ratings Claims are bound to fail because they do not specifically include a claim that Ms. Sun and the Class Members relied on those representations to their detriment.

[135] I pause to observe that the claimed loss in expected value is similar to that which was claimed in *Rebuck* and *Drynan*, where detrimental reliance was not required to be specifically pleaded: see *Rebuck* at paras 32–35; *Drynan* at paras 178–184. Such novel claims should not be struck at this stage of the proceedings: *Mohr v National Hockey League*, 2022 FCA 145 at para 48.

[136] Given the foregoing, and solely for the purposes of the present Motion, I consider that Ms. Sun adequately pleaded that the damages claimed in relation to the Star Pricing Claims were suffered *as a result of* those claims, as contemplated by subsection 36(1) of the Act: see paragraph 66 above.

[137] Consequently, Bloomex's request that the Star Ratings Claims be struck pursuant to Rule 221(1)(a) will be dismissed.

(2) Rule 221(1)(c)

[138] The general principles applicable in assessing a motion under Rule 221(1)(c) are discussed in Part VI.B.(2) of these reasons above. It is unnecessary to repeat them here.

[139] Bloomex makes the same arguments regarding this Rule as it made in connection with the Strikethrough Pricing Claims. For the reasons set forth at paragraphs 83–98 above, I reject those arguments. I find that it is not plain and obvious that the Star Ratings Claims are "scandalous, frivolous or vexatious," as set forth in Rule 221(1)(c).

(3) Rule 221(1)(f)

[140] The general principles applicable in assessing a motion under Rule 221(1)(f) are discussed in Part VI.B.(3) of these reasons above. It is unnecessary to repeat them here.

[141] Once again, Bloomex makes the same arguments regarding this Rule as it made in connection with the Strikethrough Pricing Claims. For the reasons set forth at paragraphs 102–104 above, I reject those arguments.

(4) Conclusion – The Star Ratings Claims

[142] For the reasons set forth above, Bloomex's request that the Star Ratings Claims be struck pursuant to Rules 221(1)(a), (c) and (f) will be dismissed.

D. *Should Ms. Sun be granted leave to amend?*

[143] Given that Bloomex has not demonstrated that either the Strikethrough Pricing Claims or the Star Ratings Claims should be struck pursuant to Rules 221(1)(a), (c) or (f), it is unnecessary to grant Ms. Sun's request for leave to amend the FASC.

VII. Conclusion

[144] For the reasons provided in Part VI.A. of these reasons, Bloomex's request to strike paragraphs 9 and 18–29 of the FASC on the ground that they consist entirely of impermissible evidence will be granted in part. Specifically, the second sentence in paragraph 9 and the entirety of paragraphs 19–27 will be struck on this ground. However, the first sentence in paragraph 9 as well as the full contents of paragraphs 18, 28 and 29 will not be struck, as they provide details

that assist to provide a basis for Ms. Sun's claims, help to frame those claims and assist the Court to understand them.

[145] For the reasons set forth in parts VI.B of these reasons, Bloomex has not demonstrated that the Strikethrough Pricing Claims should be struck pursuant to Rules 221(1)(a), (c) or (f). Consequently, Bloomex's Motion with respect to the Strikethrough Pricing Claims is rejected.

[146] For the reasons provided in part VI.C of these reasons, Bloomex has also not established that the Star Ratings Claims should be struck pursuant to Rule 221(1)(a), (c) or (f). Accordingly, Bloomex's requests to strike those claims under those Rules will be dismissed.

[147] In the Order below, I will also vary a provision that was included in the Order issued by Associate Judge Ring on September 17, 2024, granting Bloomex's request for this Motion to be heard prior to Ms. Sun's motion to certify the underlying action as a class proceeding. The Order also established a timeline for the completion of the various steps to be taken prior to the hearing of this Motion, and set a date for that hearing.

[148] That Order was issued following a case management conference that I co-presided with Associate Judge Ring on September 13, 2024, to discuss Bloomex's above-mentioned request. Before granting that request, Associate Judge Ring discussed the interests of judicial economy, including in the scenario in which the Court did not grant the present motion to strike. In considering that scenario, we determined that it would be appropriate for the ruling on this Motion to be determinative of the first element of the certification test set forth in Rule 334.16(1), namely whether the pleadings disclose a reasonable cause of action.

[149] The parties ultimately agreed to include a provision to this effect in the Order granting Bloomex's request for this Motion to be heard prior to Ms. Sun's certification motion. Consequently, such a provision was included in Associate Judge Ring's Order dated September 17, 2024.

[150] However, given that Bloomex abandoned its request for an Order striking the entire FASC, I consider it appropriate to vary the above-mentioned provision in Associate Judge Ring's Order. Specifically, for the purposes of the first element of the test in Rule 334.16(1), my ruling on this Motion will only apply to (i) the Strikethrough Pricing Claims and the Star Ratings Claims, in respect of which Bloomex was not successful on this Motion under Rule 221(1), as well as to (ii) the Surcharge Claims, which Bloomex conceded during the hearing are sufficient to pass the "plain and obvious" test. Considering that the Defendant did not seek to strike the claims with respect to unjust enrichment, it would not be fair or appropriate for my ruling on this Motion to apply to those claims, insofar as Rule 334.16(1)(a) is concerned.

VIII. Costs

[151] The Court has broad discretion over the amount and allocation of costs: Rule 400(1); *Eli Lilly and Company v Teva Canada Limited*, 2011 FCA 220 at para 55; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 at paras 47 and 49. However, that discretion must be exercised in accordance with established principles pertaining to costs, unless the circumstances justify a different approach: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 [***Okanagan Indian Band***] at para 22; *Nova Chemicals Corporation v Dow Chemical Company*, 2017 FCA 25 at para 19.

[152] The principal factors the Court may consider in its determination of a cost award are set forth in a non-exhaustive list in Rule 400(3).

[153] The general rule is that the successful party is entitled to have its costs, even if it was not successful in respect of each and every argument it pursued: *Okanagan Indian Band* at paras 20–21; *Raydan Manufacturing Ltd v Emmanuel Simard & Fils (1983) Inc*, 2006 FCA 293 at paras 2–5. However, the Court may depart from this approach in cases of truly "divided success" or "mixed results": *Eurocopter v Bell Helicopter Textron Canada Limitée*, 2012 FC 842 at paras 23 and 56, aff'd 2013 FCA 220 at paras 10 and 15; *Sanofi-Aventis Canada Inc v Novopharm Limited*, 2009 FC 1139 at paras 8–9; *Apotex Inc v Sanofi-Aventis*, 2012 FC 318 at para 11; *Bristol-myers Squibb Canada Co v Teva Canada Limited*, 2016 FC 991 at paras 9–14.

[154] In my view, the outcome in the present Motion is one of only somewhat "mixed results." In brief, Bloomex largely prevailed with respect to its request to strike from the FASC the passages it maintained constitute impermissible evidence. However, Ms. Sun succeeded in resisting Bloomex's request to strike the Strikethrough Pricing Claims and the Star Ratings Claims.

[155] Given that Ms. Sun largely succeeded on this Motion, I consider it appropriate to award costs to her in a lump sum amount of $5,000.

ORDER in T-545-24

THIS COURT ORDERS that:

1. The second sentence of paragraph 9 of the Further Amended Statement of Claim (the **"FASC"**), together with the entire contents of paragraphs 19–27, are struck from the FASC.
2. Bloomex's request to strike the first sentence of paragraph 9, as well as paragraphs 18, 28 and 29, is dismissed.
3. Bloomex's request to strike the Strikethrough Pricing Claims and the Star Ratings Claims from the FASC is dismissed.
4. Ms. Sun is awarded lump sum costs in the amount of $5,000.
5. Paragraph 7 of this Court's Order in this proceeding, dated September 17, 2024, is varied as follows:

> 7. The ruling on the Defendant's Motion to Strike will be determinative of the first element of the certification test, namely whether the pleadings disclose a reasonable cause of action under Rule 334.16(1)(a) of the Rules, solely insofar as the Strikethrough Pricing Claims, the Star Ratings Claims and the Surcharge Claims are concerned.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-545-24
STYLE OF CAUSE:	DIANA SUN v BLOOMEX, INC.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 17, 2025
ORDER AND REASONS:	CRAMPTON CJ.
DATED:	JULY 11, 2025

APPEARANCES:

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