IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Krishnan v. Jamieson Laboratories Inc.,* 2021 BCSC 2127

Date: 20211101
Docket: S199401
Registry: Vancouver

Between:

Uttra Kumari Krishnan

Plaintiff

And

Jamieson Laboratories Inc., WN Pharmaceuticals Ltd., Natural Factors Nutritional Products Limited, Vita Health Products Inc., Sisu, Inc., Sobeys Capital Incorporated, Rexall/Pharma Plus Pharmacies Ltd., Rexall/Pharma Plus Pharmacies (BC) Ltd., Rexall Pharmacy Group Ltd., Medicine Shoppe Canada Inc., Loblaw Companies Limited, Loblaws Inc., T&T Supermarket Inc., Shoppers Drug Mart Corporation, Shoppers Drug Mart Inc., Georgia Main Food Group Ltd., London Drugs Limited, Buy-Low Foods Limited Partnership, Buy-Low Foods Ltd., Choices Market Ltd., Save-On-Foods Limited Partnership, Save-On-Foods Ltd., Quality Foods Ltd., Pure Integrative Pharmacy, Pharmasave Drugs Ltd., Pharmasave Drugs (National) Ltd., Pharmasave Drugs (Pacific) Ltd., Pharmachoice Canada Inc., Costco Wholesale Canada Ltd., and Wal-Mart Canada Corp.

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice Branch

Supplementary Reasons for Judgment on Certification

In Chambers

Counsel for the Plaintiff:	D. Jones M. Mounteer A. Sunter
Counsel for the Defendants, Jamieson Laboratories Inc.:	C. Hunter, QC A. Morrish, AS J. Roos
Counsel for the Defendants, WN Pharmaceuticals Ltd. and Natural Factors Nutritional Products Limited:	K. Ervin R. Graham
Counsel for the Defendants, Vita Health Products Inc. and Sisu Inc.:	M. Laity
Place and Date of Hearing:	Vancouver, B.C. September 24, 2021
Place and Date of Judgment:	Vancouver, B.C. November 1, 2021

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I. INTRODUCTION

[1] These reasons are supplementary to those certifying this class action claim against certain defendants but not others, indexed as *Krishnan v. Jamieson Laboratories Inc*., 2021 BCSC 1396 (the "Certification Reasons"). I will not repeat the facts set out therein, except as necessary to resolve the residual issues before me. I will also use the same defined terms.

[2] In the Certification Reasons, I declined to certify the claim against Jamieson Laboratories Inc., given the failure on the part of the plaintiff to file proper evidence supporting the proposed common issues as against this defendant. My core concern was the manner in which the alleged evidence of any problem with Jamieson's products was presented. The only evidence speaking specifically to the nature of Jamieson's products was found in a report from Dr. French, but this report was simply attached to the affidavit of another expert, Dr. Liu. I expressed my concern about this approach:

> [127] While I accept that the expert evidence at certification is scrutinized at a lower standard than it will be subject to at trial, there remains a standard that must be met. The court must still be satisfied that "the expert's evidence on the issue is sufficiently reliable that it provides some basis in fact for the existence of the common issue": *Bhangu* at para. 99.
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> …
>
> [129] While an expert may rely on second-hand evidence (hearsay) in coming to their own opinion, such hearsay evidence is only admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based: *R v. Lavallee*, [1990] 1 S.C.R. 852, at 893.
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> [130] In *West Moberly First Nations v. British Columbia*, 2018 BCSC 730 at paras. 180-185, the court commented on an expert's adoption of another expert's report:
>
> > [181] In my view, there is difficulty with admitting expert evidence that does nothing more than adopt the opinions expressed in another report, if that report is only admissible as hearsay evidence. Since the two opinions (the expert's and the opinion in the report) are identical, it would be practically impossible to use one opinion to evaluate the other.
> >
> > …
> >
> > [184] <u>In my opinion, the thrust of the case law supports the proposition that while an expert may rely on other experts' reports for</u>

> limited purposes (for example, to situate their own opinion within a body of specialized knowledge or to refer to commonly accepted treaties/practices), another expert's report cannot be tendered for the truth of its content. An expert's opinion must be the result of independent analysis. Another expert's opinion cannot simply be adopted. This practice does not allow the opposing party or the trier of fact to adequately assess the opinion.
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> [Emphasis added.]
>
> [131] I find that the requisite standard was not met here. Dr. French's work is not used to simply situate Dr. Liu's own opinion. Rather, Dr. French's analysis is the foundation upon which the plaintiff's case for certification against Jamieson rests. Absent that evidence, there would be no basis to suggest that there is any issue with Jamieson's GS Products. While experts such as Dr. Liu may rely on hearsay in order to formulate their own opinion, the plaintiff needs Dr. French's evidence to stand for the truth of its contents in order to support the existence of the common issues against Jamieson.
>
> [132] Had Dr. French performed his tests under Dr. Liu's supervision, that may have led to a different result. Experts are permitted to rely on tests carried out by others under their supervision and to delegate to technicians who do not testify: *R. v. J.-L.J.,* 2000 SCC 51 at para. 50; *Canadian Natural Resources Limited v. Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*, 2018 ABCA 305 at para. 23. In those circumstances, Dr. Liu, as a properly qualified expert, could directly attest to the tests' reliability. However, in this case, the two experts were operating out of separate institutions in separate countries and there is no suggestion that Dr. Liu supervised Dr. French's work.
>
> [133] Alternatively, had Dr. French provided his own affidavit, report, and curriculum vitae establishing his qualifications at issue, Jamieson's argument on this point would likely have been rejected.
>
> [134] Under s. 5(6) of the *CPA*, I have the ability to adjourn the matter to allow for the admission of further evidence. I find that this is an appropriate case to exercise this discretion given that the failing as it relates to Dr. French's report is quite technical. The necessary evidence appears to exist but it simply was not presented with the procedural and evidentiary requirements designed to ensure its reliability. The plaintiff shall have three weeks following the issuance of these reasons to file a proper affidavit from Dr. French himself. If the plaintiff fails to file the affidavit, the certification application as against Jamieson will be rejected, as absent this evidence there is no basis in fact for the common issues sought to be certified against Jamieson. If the affidavit is filed, Jamieson shall confirm, within 14 days, whether it accepts that certification should issue against it consistent with the balance of these reasons. Failing agreement, the parties may set a further one-hour hearing to address any necessary residual argument on this issue.
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> [Emphasis in original.]

[3] The plaintiff exercised their right to file further evidence. The plaintiff filed an affidavit from Dr. French himself which set out his qualifications, acknowledged his

various duties as an expert, and confirmed the evidence contained in his earlier report. In this first affidavit, Dr. French reviewed and explained the procedures followed and tests performed. He attached the results from the tests of a Jamieson product, and explained how those results supported his conclusion that none of the tested tablets actually contained individual crystals of glucosamine sulfate or glucosamine sulfate potassium chloride. In his second affidavit, Dr. French addressed a responsive affidavit from Jamieson's expert witness, Dr. Vukotic. Dr. French opined that Dr. Vukotic's criticism of his experimental methods was misleading or inconsequential.

[4] After reviewing the plaintiff's supplementary evidence, Jamieson confirmed that it maintained its objection to certification. Jamieson relies primarily on the following grounds:

1. The court does not have jurisdiction to allow the plaintiff to file supplementary material without holding a further hearing to consider whether such a right should be granted.

2. Dr. French is not a proper expert given that:

    i. his methodology has not achieved general acceptance; and

    ii. his opinion is biased.

[5] Jamieson also argues that certification should not be granted because there is still no evidence from a class member who has used their product.

[6] Finally, Jamieson argues that, at a minimum, certain common issues relating to reliance should not be certified against it for the reasons set out in para. 175 of the Certification Reasons.

[7] For the reasons expressed below, I find that:

1. the court has jurisdiction to allow further evidence without holding an additional hearing;

2. Dr. French's affidavits can be admitted as expert opinion;

3. these affidavits provide the necessary "some basis in fact" which is necessary to support certification;

4. it is not necessary that there be direct evidence from a class member who used their product in order to certify the claim against Jamieson; and

5. common Issues 10 and 11 should not be certified as against Jamieson, given that Jamieson does not appear to sell products where the term GS is used on the front of the bottle.

II. JURISDICTION TO ADJOURN CERTIFICATION MOTION TO ALLOW FURTHER EVIDENCE

[8] It was not necessary for the court to hold a separate hearing before exercising its discretion to adjourn the hearing to allow for the submission of further evidence.

[9] The issue that drove the exercise of my discretion was squarely before the court at the initial hearing. Jamieson specifically raised concerns about the plaintiffs' ability to rely on Dr. French's evidence in their argument: Certification Reasons at paras. 119-134; Jamieson's Certification Argument at paras. 15-18. While I agreed with Jamieson's concern, I concluded that their objection was sufficiently technical that the plaintiff should be allowed an opportunity to correct the inadequacies. Within the context of a potential class action, the court has some responsibility to ensure that absent proposed class members are treated fairly. This includes the power to ensure that the class is not unnecessarily prejudiced by a technical failing on the part of proposed class counsel.

[10] I find that the exercise of the court's discretion under s. 5(6) does not necessarily require an additional hearing, particularly when the specific issue driving said adjournment was considered within the context of the original hearing.

[11] In *Bodnar v. The Cash Store Inc*., 2007 BCCA 366, the Court of Appeal spoke of the breadth of the court's discretion:

> [2] The applicants claim, in essence, that the chambers judge applied an overbroad interpretation to the power given by s. 5(6) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50:
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> > The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence.
>
> …
>
> [16] As for a decision to adjourn a matter, Wood J.A. said in *Andersson v. Andersson* (8 May 1990), Vancouver CA012399, quoted in *British Columbia (Pharmacare Program) v. Shah*, [1992] B.C.J. No. 2208 at para. 21 (CA.)(QL):
>
> > Of all the interlocutory matters that come before this Court seeking leave to appeal, there is none more discretionary than that where one party seeks and is either granted or refused an adjournment of some proceeding at the trial level. Whether to grant or to refuse an adjournment of a trial is a question which the trial judge before whom the application originates is best suited to answer. To attempt to interfere with the exercise of a trial judge's discretion in such a matter is an exercise which is to be avoided at all costs unless there is evidence that the judge clearly misdirected himself in law or failed to act judicially in the exercise of his discretion….

[12] In *Jiang v. Peoples Trust Company*, 2018 BCSC 299, aff'd 2019 BCCA 149, the chambers judge made an order similar to the present case. The court allowed the plaintiffs to file further evidence in order to establish that the plaintiff was a British Columbia resident. There was no indication in the decision that a separate hearing occurred. The chambers judge stated:

> [40] In my view the affidavit evidence does not establish that the plaintiff is a resident of British Columbia. Her address is simply shown as care of a law firm. Nowhere in her affidavits does the plaintiff state that she resides in British Columbia. The plaintiff's attempt to introduce fresh evidence of her residency at the Court of Appeal was rejected and it is not apparent why she did not introduce additional evidence at the continuation of the certification hearing. Nevertheless, under s. 5(6) or s. 12 of the *CPA* it is open to the court to conditionally certify a proceeding, adjourn the proceedings, and allow the plaintiff to provide further evidence of her residency at the time this application was commenced. To refuse certification solely on the ground that the evidence at this stage was insufficient to establish the plaintiff's residency would be a severe result and detrimental to the interests of the absent class members. As has been said before, a class proceeding is flexible and

> dynamic and ss. 5(6) and 12 of the *CPA* provide the court with broad powers to help ensure that the objectives of the legislation are achieved.

[13] Indeed, Jamieson did not direct me to any case where the court held an additional hearing before exercising its discretion under s. 5(6). To the contrary, a sampling of cases that have discussed or exercised the court's discretion both in B.C. and in other jurisdictions support the view that such a secondary hearing is not mandatory: *Lakes v. MacDougall*, 2011 BCSC 1273 at para. 24 per Grauer J. as he then was, further proceedings 2012 BCSC 49; *Sharp v. Royal Mutual Funds Inc*., 2020 BCSC 331 at para. 12; *Chalmers v. AMO Canada Company*, 2009 BCSC 689 at para. 53, rev'd in part on other grounds 2010 BCCA 560; *Fairhurst v. Anglo American PLC*, 2014 BCSC 2270 at para. 86; *Finkel v. Coast Capital Savings Credit Union*, 2016 BCSC 561 at para. 43, aff'd 2017 BCCA 361; *MacKinnon v. Pfizer Canada Inc*., 2021 BCSC 1093 at para. 70; *Brown v. Canada (Attorney General),* 2013 ONCA 18 at para. 46; *Murphy v. Bdo Dunwoody LLP* (2006), 32 C.P.C. (6th) 358 at para. 33, 2006 CanLII 22809 (Ont. S.C.J.).

[14] I find that the procedure adopted by the Court was fair to Jamieson. Once the plaintiff purported to rectify the problem identified, Jamieson still retained its full right to maintain its objection to certification. Jamieson availed itself of this right, filing additional evidence and making full argument before the Court at a further hearing. I cannot find that they were prejudiced in any way by the procedure adopted.

[15] Finally, it is clear to me from the arguments advanced at this supplementary hearing that, even had a separate hearing been held, I would have still made the order.

III. THE ALLEGED BIAS

[16] Jamieson raises a concern about bias on the part of Dr. French.

[17] The governing authority on this issue is *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, in which Justice Cromwell held that expert

evidence will only be inadmissible for lack of independence or impartiality at the threshold stage:

> [49] … in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of the costs and benefits of receiving the evidence.
>
> [Emphasis added.]

[18] More broadly, Justice Cromwell explained the explained the applicable underlying principles as follows:

> [32] Underlying the various formulations of the duty are three related concepts: impartiality, independence and absence of bias. The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: P. Michell and R. Mandhane, "The Uncertain Duty of the Expert Witness" (2005), 42 *Alta. L. Rev.* 635, at pp. 638-39. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

[19] However, the requirement that an expert remain independent and refrain from acting as an advocate for either party does not mean that an expert cannot advocate for his or her conclusions, as Justice Nathan Smith explained in *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, 2007 BCSC 899:

> [15] These principles are often encapsulated with the statement that an expert should not be an advocate. However, that statement is sometimes misunderstood. There is a difference between an expert who advocates for a party and one who advocates for his or her opinion. By that I mean that an expert opinion should be confined to the expert's field of expertise and to the question within that field that is at issue. It should be the result of careful and objective consideration of all relevant facts and scientific principles and not based on extraneous considerations.
>
> [16] In short, the Court should be able to approach the opinion with some confidence that the expert would have rendered the same opinion if he or she had been consulted by the opposite party. However, once an expert has formed an opinion through that process, he or she may be firm, emphatic or

> even strident in the way he or she expresses the opinion or defends it against contrary opinions.
>
> [Emphasis in original.]

[20] Turning to the application of these principles to present case, Dr. French reviewed his awareness of his duty under Rule 11-2 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "Rules"), to assist the court and to not assume the role of advocate for any party, and certified that he had made his affidavits in conformity with that duty.

[21] Jamieson's concern about Dr. French's objectivity principally flows from events that took place in similar U.S. litigation. In *Hollins v. Walmart Inc*., No. 2:19-cv-05526-SVW (C.D. Cal. Aug. 17, 2021), a U.S. court excluded evidence provided by Dr. French's supervisor, Dr. Spingarn. Given that this decision is not generally available, I attach the relevant extract as Appendix A.

[22] I find that what took place in the U.S. litigation does not justify a finding of bias in this Canadian litigation.

[23] First, this court must assess the allegations of bias against Dr. French based on the record before it. The record before me in this matter is not the same as that which was before the court in *Hollins*, nor can I import the U.S. record into my decision. Further, this court does not have the same expert before it as in *Hollins*. Although Dr. Spingarn is Dr. French's supervisor, they are separate individuals. Dr. Spingarn's statements which contributed to his evidence's exclusion in *Hollis* were not made by Dr. French in the present case.

[24] I can draw little from a U.S. court's conclusion as to the admissibility of a different report from a different expert in a different case argued on a different record.

[25] Second, it is not clear to me that the U.S. court fully appreciated the point that Dr. Spingarn appears to have seeking to make in that case: that the reference standard for GS used by the European Directorate for the Quality of Medicines (the "EDQM") was not actually what it was said to be. The evidentiary basis for Dr.

Spingarn's responses would appear to flow from emails that are before this Court but which Jamieson suggests are themselves a basis for its bias claim.

[26] The emails are between Dr. French, Dr. Spingarn, and regulatory authorities and businesses in the U.S. and Europe. Dr. French and Dr. Spingarn were engaged in an effort to find a GS reference sample and ran into difficulties. From the record, it appears that the only available GS reference sample may not in fact be a pure chemical sample of GS. Dr. French and Dr. Spingarn were surprised by this and brought this to the attention of various businesses and regulatory authorities. They did take some gratification in having established this point (at least to their own satisfaction).

[27] The evidence appears to be somewhat clearer in this litigation. Dr. French has provided evidence that "[t]o the best of my knowledge, there is no commercially available reference sample of glucosamine sulfate potassium sulfate ($(C_6H_{14}NO_5)_2SO_4 \cdot 2KCl$)." Dr. French explains that the only commercially available reference sample of glucosamine sulfate potassium chloride is produced by the EDQM, and that the EDQM has now confirmed that this reference sample is a blend of glucosamine HCl and potassium sulfate, and not a co-crystal of glucosamine sulfate and two potassium chlorides. It would appear that Dr. Spingarn may not have provided as clear an explanation of their concern in the U.S. litigation, which may have caused confusion that raised concerns for the U.S. court.

[28] The first set of emails that Jamieson relies upon as evidence of bias is an exchange between Dr. Spingarn and the U.S. Pharmacopeia ("USP"). Dr. Spingarn notified the USP that his lab's testing indicated that the reference standard for "glucosamine sulfate potassium chloride" was, in fact, a blend. Dr. Spingarn asked USP to confirm that the reference standard is a blend and, if so, to explain why the USP standard has a misleading and chemically incorrect name. This correspondence concluded with USP stating "[s]orry, the current USP monograph is not capable of distinguishing between the complex and blends… I really appreciate

your time and support." I cannot find that Dr. Spingarn's efforts to clarify the nature of the USP monograph is indicative of bias on the part of Dr. French.

[29] The second set of emails outline Dr. French's efforts to obtain clarification on a similar point from Millipore Sigma, a company that purports to distribute a reference standard for "glucosamine sulfate potassium chloride". Dr. French sought to confirm why the sample he purchased actually contained a mixture of glucosamine HCl and potassium sulfate. Dr. French forwarded his test results to Millipore Sigma. In response, Millipore Sigma stated that the company did no quality testing on the sample and offered Dr. French a refund as "a one-time courtesy". Dr. French described Millipore Sigma's response to Dr. Spingarn as "lame." While perhaps intemperate, I cannot find that their internal discussion about the failure of a product supplier to validate the content of their own product is anything more than frustration, as opposed to evidence of bias.

[30] Dr. French followed up with Millipore Sigma, but Millipore Sigma reiterated that Millipore Sigma is just the distributor and that the proper place to direct the inquiry would be the European regulatory body.

[31] Dr. Spingarn then sent an inquiry stating "[a]s we have carefully demonstrated, this material is not a co-crystal and, in fact, contains no glucosamine sulfate whatsoever" and as such, in his view, the continued sale of the material as meeting the monograph requirements was fraudulent. There follows an internal exchange between Dr. Spingarn and Dr. French regarding the tone of Dr. Spingarn's inquiry, and the likelihood that Dr. Spingarn's reference to fraud will solicit a more substantive response from Millipore Sigma. Dr. French writes on April 27, 2020: "You wanted to have fun. This should provoke a more interesting response". On June 23, 2021. Dr. Spingarn writes, in reference the purported GS reference standards, that he "would really like to have some of the real material to distinguish from these fakes".

[32] Given that their laboratory was testing against a reference standard that appeared not to consist of the correct chemical formulation, one could reasonably

understand why a chemist such as Dr. Spingarn might feel compelled to deliver a strong response. I would characterize their work and reaction as a (perceived) vindication of the opinion Dr. Spingarn proffered in the U.S. litigation that any products sold were not GS simply because they may have been tested against a (in their view, flawed) reference sample.

[33] In terms of Dr. French's work specifically, it is not surprising that Dr. French might insist that a reference sample he purchased contain the chemical formulation of the material which the sample was designed to serve as a reference. The fact that he and Dr. Spingarn held to this position cannot be viewed as evidence of bias, but is more accurately a defence of their opinion.

[34] Millipore Sigma responded to the inquiries by forwarding material from EDQM to the effect that the monograph does not state any specification requiring that the material is a co-crystal of glucosamine sulfate with two potassium chlorides. Dr. French also received a response from EDQM to the effect that "[t]he monograph does not state any specification requirement that the material contains glucosamine sulfate and potassium chloride." Dr. Spingarn then wrote to Dr. French that "[t]he monograph specifically writes the structure out as glucosamine sulfate-2KCL. And if they want to change the name to 'glucosamine chloride potassium sulfate' then I'm cool with it." Again, these would seem to be a substantive response to a substantive issue, rather than an indication of bias.

[35] Jamieson characterizes these email exchanges as demonstrating that Dr. French is an advocate "against regulatorily-mandated testing specifications". However, I cannot find sufficient evidence in these emails that Dr. French has become an advocate for one party or the other.

[36] Further, the debate that Jamieson raises as an indication of bias is of far less moment in the present litigation than it was in the U.S. litigation, as:

1. Jamieson is not taking the position that regulatory-mandated testing pre-empts the plaintiff's ability to pursue a claim: Certification Reasons at paras. 142-146; and

2. Dr. French's initial report does not enter into the debate about the effect of regulation-mandated testing specifications. Rather, it simply purports to outline the results of specific and identified tests he performed.

[37] Jamieson filed an additional affidavit after the period mandated by the Rules that attached a transcript of evidence given by Dr. French on May 3, 2021, in *Amavizca v. Nutra Manufacturing, LLC*, No. 8:20-cv-01324 (C.D. Cal. May. 3, 2021). I grant leave for the admission of this late affidavit given the importance of ensuring that any expert before the Court is properly qualified and impartial. Further, there is little prejudice to the plaintiffs given that it is evidence Dr. French would clearly have been aware as it is what he said under oath previously.

[38] In the *Amavizca* litigation, Dr. French was not being advanced as an expert. Rather, he conducted testing that underpinned the expert opinion provided by Dr. Spingarn. It is clear to me that during his deposition, Dr. French was being careful (probably excessively so) to hold to the position that he was a mere testing technician rather than an expert. This position seems to have led him to take certain positions about his role that were somewhat awkward, but these are not sufficient to justify a finding that he is biased against Jamieson. The most troublesome exchange was the following:

> Q. Okay. You said that this method also would tell you about the composition of the product as a whole, correct?
>
> A. Correct
>
> Q. And so I'm asking you: What's the level of accuracy when you use this method of testing, four crystals from a product; what's it's level of accuracy to tell you about the composition of the product as a whole?
>
> A. You'll have to refer to Dr. Spingarn on that. The method is his.
>
> Q. Okay So you don't know the level of accuracy?
>
> A. I cannot speak to that.
>
> Q. Okay. You don't know the answer to the question. Is that correct?

A. Do not know the answer to that question.

[39] My sense is that the nature of this exchange was again driven by Dr. French's insistence in affirming his limited role in that litigation. In this case, Dr. French has fully acknowledged that he is the expert and that he stands behind the testing performed.

[40] Jamieson relies on the decision in *Turpin v. TD Asset Management Inc*., 2021 BCSC 1830, where an expert's evidence was excluded for bias because the expert demonstrated "an unshakeable bias against any 'big Canadian' bank": para. 15. The expert, who was seeking to offer evidence in support of a proceeding brought against a subsidiary of TD Bank for allegedly overcharging investors in specific mutual funds, had included in his report passages from his book "*Beat the Bank: The Canadian Guide to Simply Successful Investment*". In the book, he contended that "big Canadian banks" capitalized on investors' poor understanding, deep loyalty and misplaced trust: *Turpin* at para. 10. He had also tweeted to similar effect. Justice Funt concluded that the expert had come to court with a "philosophical hostility", that he viewed his testimony as part of a game, and that he was hence unable to be fair and objective: paras. 16 and 19-20.

[41] There is no indication of a similar lack of objectivity on the part of Dr. French. His evidence is neither conclusory nor inflammatory. He describes the substance of the testing performed, and explains how those results support the conclusions reached. There is no indication that Dr. French would not have reached the same conclusions about the results of his testing had he been retained by Jamieson.

IV. THE METHODOLOGICAL CHALLENGE

[42] Dr. Vukotic takes issue with Dr. French's analysis for, among other things, (i) not testing in accordance with the USP specifications, and (ii) not comparing his results to "a reference standard for Glucosamine Sulfate Potassium Chloride (which is readily commercially available)."

[43] Dr. French responded to these criticisms in his second affidavit. As noted above, Dr. French explained his opinion that the USP specifications cannot distinguish between a complex of glucosamine sulfate potassium chloride and a blend of glucosamine HCl and potassium sulfate.

[44] There is no doubt that Dr. French did not perform the same tests required by the USP, and he did not appear to use the same amount of sampling product as USP requires. But I find that it is much too early to decide whether Dr. French's tests were better or worse at identifying GS than those mandated by USP and supported by Dr. Vukovic. For example, any debate about the size of sample required to obtain an accurate result falls squarely within the scope of the "battle of the experts" that can and should be left to trial.

[45] I also find that this complaint largely parallels the concerns that Jamieson previously raised regarding Dr. Liu's report, which I have already found to be admissible: Certification Reasons at paras. 135-139.

[46] I find that, at this stage of the litigation, Dr. French's evidence and methodology is sufficient to establish "some basis in fact" for the certification requirements of s. 4(b)-(e) of the *CPA* in relation to Jamieson.

V. THE LACK OF AN AFFIDAVIT FROM A JAMIESON PURCHASER

[47] The Court held in the Certification Reasons that the plaintiff was a suitable representative plaintiff, even if she was not '"typical' of the class, nor the best possible representative: paras. 230-235. B.C. courts have not required that the representative plaintiff have a cause of action against each named defendant so long as there is evidence that the plaintiff will adequately represent the interests of all class members, and all the other certification requirements are met: *MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.,* 2004 BCCA 472 at paras. 33, 38, and 49-51.

[48] In relation to the need for there to be "some basis in fact" for the existence of a class, the Court already found in its Certification Reasons at para. 24, that "[s]ince

2004, Jamieson has sold well over a million units of NHPs purporting to contain GS." This is sufficient evidence that the requirements of s. 4(1)(b) of the *CPA* are met. As this Court stated in its Certification Reasons:

> [102] … The Defendant Manufacturers suggested that there is insufficient evidence of class members being dissatisfied with the GS Products. However, there is no requirement to show evidence of complaints or concerns before a class is certified… This is a case where it is clear from the record that a class exists — persons who have clearly purchased GS Products since 2004. That is sufficient forthis stage of the certification analysis.
>
> [Citations omitted.]

VI. THE COMMON ISSUES

[49] I agree with Jamieson that Issue 11 should not be certified against it. There is no evidence that any of the Jamieson products has the words “glucosamine sulphate” on the front of the bottle. This fact drives the need for some individual assessment of any reliance issues.

[50] Similarly, Issue 10 cannot be certified against Jamieson since it addresses products where GS is shown on the front of the bottle. There is no evidence that Jamieson sells such products.

[51] There is sufficient evidence to support the other common issues certified in the Certification Reasons. In particular, Dr. French’s opinion provides at least some evidence that Jamieson’s products listing GS as an ingredient may have been mislabeled.

VII. CONCLUSION

[52] The case will be certified against Jamieson consistent with the Certification Reasons and these supplementary reasons.

“Branch J.”

APPENDIX A—EXTRACT FROM *HOLLINS V. WALMART INC.*, 2021 WL 3748315, 2021 LEXIS 162030 (DIST. CT. C.D. CAL., AUGUST 17, 2021

I. The Court Concludes Spingarn Is Not Credible

At the outset, the Court concludes that Plaintiffs' expert Neil Spingarn is not credible because he made false—or, at the least, highly misleading—statements in his declarations.
First, in his declaration submitted to this Court, Spingarn stated that it is impossible to compare the FTIR spectra to a reference standard for glucosamine sulfate potassium chloride. See Spingarn Decl. ¶ 29. Later, at his deposition, Spingarn doubled down on this statement:

> Q: Are you saying it's impossible to buy a certified reference standard for glucosamine sulfate potassium chloride?
>
> A: That's correct.
>
> *See* Spingarn Depo. at 131:8-16.

This was untrue or, at the least, highly misleading. During the evidentiary hearing, Spingarn admitted that he purchased a certified reference standard of glucosamine sulfate potassium chloride from European Pharmacopeia (hereinafter “the EP standard”) and tested it. *See* Dkt. 136 at 5:16-24. On its face, this admission contradicts Spingarn's deposition testimony that it is impossible to buy a certified reference standard for glucosamine sulfate potassium chloride. *See* Spingarn Depo. at 131:8-16.

To the extent Plaintiffs argue that Spingarn's inconsistent testimony simply reflects his belief that the certified reference standard itself is mislabeled, the Court rejects that argument as too clever by half. If Spingarn intended to say the reference standard is mislabeled, then that is what he should have said: “the certified reference standard is mislabeled,” “the only reference standard you can purchase is incorrectly labeled as glucosamine sulfate potassium chloride,” or, most clearly, “it depends how you define glucosamine sulfate potassium chloride.” Instead, Spingarn misleadingly testified that it was “impossible” to buy a certified reference standard for glucosamine sulfate potassium chloride.

***2** The second false statement is contained in Spingarn's declaration in support of Plaintiffs' opposition to Defendants' ex parte application prior to the evidentiary hearing. *See* Dkt. 123 (Defendants' ex parte application); Dkt. 129-1 (Spingarn Decl. ISO Opp. to Ex Parte). In that declaration, Spingarn stated that any tests he had conducted on the EP standard were “not conducted in the scope of [his] engagement in this or related litigation.” *Id*. ¶ 4. He further stated that he “performed the testing on [his] own time [and] did not perform it related to any specific case.” *Id*. 5.

That testimony is contradicted by documents Plaintiffs produced regarding Spingarn's testing. The documents contain several test results. Some of those results list the "client" as "S&N Labs." *See* PLTFS-WLMRT000055–62. Those results are also labeled with the word "internal" rather than with a specific file number. *See id.*

However, on the results for testing conducted on the EP standard, the "client" is listed as Wolf Popper LLP—*i.e.*, Plaintiffs' counsel. *See* PLTFS-WLMRT000096–104. Moreover, the results for testing conducted on the EP standard are not labeled "internal." Instead, they have a specific file number assigned to them (24486). *Id*. That file number matches the file number on the test results submitted in support of Spingarn's original declaration (which also list the client as Wolf Popper LLP). *Compare* PLTFS-WLMRT000096–104 *with* Dkt. 113-5. This is strong circumstantial evidence that, contrary to his declaration, Spingarn's testing on the EP reference standard was, in fact, conducted in the scope of this litigation or, at the least, related glucosamine litigation.

Further confirming that conclusion is internal correspondence between Spingarn and his colleague, Chris French. French began corresponding with the European Directorate for the Quality of Medicines & Healthcare ("EDQM"), the publisher of the European Pharmacopeia. PLTFS-WLMRT000092. French forwarded his correspondence to Spingarn and suggested that it was "pointless to debate" with EDQM. Id. In response, Spingarn stated as follows: "Since it carries over the legal realm I think it is worth another round of clarification." *Id*.

In other words, Spingarn was actively considering the legal ramifications of his testing on the EP reference standard. Yet, in his declaration, he stated that his testing was "not conducted in the scope of [his] engagement in this or related litigation" and was not "related to any specific case." Dkt. 129-1 (Spingarn Decl. ISO pp. to Ex Parte) ¶¶ 4–5.

These statements substantially undermine Spingarn's testimony, and the Court concludes he is not credible.

II. Spingarn's Testing Method is Not Reliable and Appropriate.

The Court concludes that, regardless of his lack of credibility, Spingarn's testing methods are not reliable and appropriate. This is so for several reasons.
First, Spingarn's method is not validated. "Method validation is the process of demonstrating or confirming that a method is suitable for its intended purpose." Guidelines for the Validation of Chemical Methods in Food, Feed, Cosmetics, and Veterinary Products (Oct. 2019) at 4. "Validation includes demonstrating performance characteristics such as accuracy, precision, sensitivity, selectivity, limit of detection, limit of quantitation, linearity, range, and ruggedness, to ensure that results are meaningful." *Id*.

Spingarn admitted at the evidentiary hearing that none of his test methods are validated.

> Q: All right. You have not prepared a validation report for the use of EDX to distinguish between glucosamine sulfate potassium chloride and glucosamine hydrochloride with potassium sulfate; correct?
>
> ***3** A: Correct.
>
> Q: You haven't done that for your XRD testing either; correct?
>
> A: Correct.
>
> Q: And you haven't done it for your FTIR testing; correct?
>
> A: Correct.
>
> Dkt. 136 at 27:8-18.

Defendants argue that alternative methods need not be validated. This is incorrect. Regulatory guidance promulgated by the FDA expressly states that an alternative method "must be suitable to achieve the purpose for which it is used." 58 Fed. Reg. 2079-01, 1993 WL 1537, at *2110 (Jan. 6, 1993). That is the very definition of a "validated" method. See Guidelines for the Validation of Chemical Methods in Food, Feed, Cosmetics, and Veterinary Products (Oct. 2019) at 4. ("Method validation is the process of demonstrating or confirming that a method is suitable for its intended purpose.").

1 The Court previously noted that the regulation at issue here "expressly allows for someone ensuring compliance—here, Plaintiff[s]—to use an alternative method if no AOAC method is 'appropriate.' No language limits the use of alternative methods, or the determination of whether a method is 'appropriate.' to the FDA." Dkt. 79 at 6. While this remains true, that does not mean that FDA guidance is irrelevant. To the contrary, given the dearth of authority on this issue, the Court will rely on FDA guidance.

Moreover, even if Defendants were correct, that would not mean the lack of validation is irrelevant. To the contrary, it would still be relevant to the overall analysis of whether Spingarn's method is reliable and appropriate. Indeed, even Plaintiffs acknowledge that the FDA prefers validated methods. Dkt. 139 at 13 ("The FDA thus expresses a preference for validated methods over non-validated methods ....").

2 Plaintiffs' sentence continues: "but this is assuming that the validated methods are valid in the first instance to do what they are being asked to do. Here, the AOAC method may be a validated method for determining the amount of glucosamine—but it is not a valid test to determine whether the substancecontains glucosamine sulfate specifically." Dkt. 139 at 13. The AOAC method is irrelevant to the instant issue. Specifically, the instant inquiry is not whether the AOAC method is valid but, rather, whether Spingarn's method is reliable and appropriate.

Second, Spingarn's method is not peer reviewed, published, or documented in a standard operating procedure. Regulatory guidance promulgated by the FDA states as follows: “Alternative methodology is recommended only in the absence of AOAC Official Methods. If alternative methods are developed and/or used, they should be accompanied by documentation that describes in detail the analytical procedures and performance characteristics of the method.” Guidance For Industry FDA Nutrition Labeling Manual -- A Guide For Developing and Using Data Bases, 1998 WL 34327548, at *15.

Here, Spingarn has not subjected his methodology to peer review. *See* Dkt. 136 at 22:7-9. He has not published his methodology. *See id*. His method is not a compendial method. *See id*. at 19-21. Spingarn has not even documented his methodology in a standard operating procedure. *See id*. at 22:10-12. Not only does this raise serious Daubert concerns, but it also further persuades this Court that Spingarn's method is not reliable and appropriate.

***4** Finally, Spingarn admits that when he tested Spring Valley Glucosamine Sulfate against the certified EP reference standard, the results showed that the Spring Valley products matched the reference standard. Spingarn argued that this was because both the Spring Valley products *and* the EP reference standard are mislabeled. *See* Dkt. 136 at 23:18-24:20. Spingarn essentially argues that this Court should reject a vcertified reference standard that says a substance containing a blend of glucosamine hydrochloride and potassium sulfate is sufficient to be labeled glucosamine sulfate potassium chloride.

The Court declines to do so. Regulatory guidance promulgated by the FDA consistently emphasizes that the accuracy of a particular testing method depends, at least in part, on whether that method incorporates certified reference standards. See, e.g., Guidelines for the Validation of Chemical Methods in Food, Feed, Cosmetics, and Veterinary Products (Oct. 2019) at 6 (“The use of known reference materials (when available and applicable) should be incorporated to assess the accuracy or bias of the method, as well as for obtaining information on interferences.”); Guidance For Industry FDA Nutrition Labeling Manual -- A Guide For Developing and Using Data Bases, 1998 WL 34327548, at *16 (“When new methods are under development or when older methods are modified, the precision and accuracy of the new applications should be established. While precision can usually be demonstrated with replicate assays, *determination of accuracy requires a material or a standard with a certified concentration of the analyte being measured*.”) (emphasis added).

The implication of the FDA's emphasis on certified reference standards is clear: those standards are valuable because they are authoritative and trustworthy. Here, substances containing a blend of glucosamine hydrochloride and potassium sulfate satisfy the certified EP standard for glucosamine sulfate potassium chloride. *See* Dkt. 136 at 29:10-20.

Spingarn disagrees with the EP's definition of glucosamine sulfate potassium chloride. Indeed, this entire dispute appears to be definitional: whether "glucosamine sulfate potassium chloride" is properly defined as including both the blend and the single crystal forms. Spingarn's colleague French admitted as much in internal correspondence with Spingarn: "[p]robably pointless to debate [with EP] as it appears to be a regulatory definition and not a chemical definition." PLTFSWLMRT000091.

For now, regulatory agencies have decided that the blended form is accurately labeled "glucosamine sulfate potassium chloride." *See* 21 C.F.R. § 101.36(b)(3)(i) (explaining that ingredients such as glucosamine sulfate potassium chloride should be declared by their "common or usual name"); 60 Fed. Reg. 67194-01, 1995 WL 760960, at *67201 (Dec. 28, 1995) (explaining that the "common or usual name" should be drawn from "an official compendium" like EP or United States Pharmacopeia ("USP")); *see also* Dkt. 136 at 45:11-15 (Spingarn admitting that both the single crystal form and blended form satisfy the EP and USP monographs for glucosamine sulfate potassium chloride).

Spingarn's retort that the EP and USP monographs do not distinguish between the blended form and the single crystal form is, essentially, a criticism of the official compendiums that the FDA relies on. But that criticism is better addressed by the EP, USP, or FDA. Once the FDA chooses to rely on official compendiums, Plaintiffs cannot disregard those compendiums, and it is not this Court's role to second guess the scientific and technical judgment of the FDA. *See Charles D. Bonanno Linen Serv., Inc. v. N.L.R.B.*, 454 U.S. 404, 418 (1982) ("[T]he dissenting Justices would have us substitute our judgment for those of the [agency] with respect to the issues that Congress intended the [agency] should resolve. This we are unwilling to do."); *see also Durnford v. MusclePharm Corp.*, 907 F.3d 595, 602 (9th Cir. 2018) (challenges to labels complying with federal regulations are preempted); *Gubala v. Allmax Nutrition, Inc.*, 2015 WL 6460086, at *3 (N.D. Ill. Oct. 26, 2015) (claim preempted where it was "really an attack on the manner in which the FDA permits protein content to be calculated").

4 This is particularly true where the Court would be substituting the judgment of the regulating agency based on the testimony of an expert whose methodology is not validated, peer reviewed, or published.

*5 For the foregoing reasons, the Court concludes that Spingarn's method is not reliable and appropriate.

III. Conclusion.

This case cannot proceed on the basis of a testing method that has not been validated, subjected to peer review, published, or documented in a standard operating procedure. Moreover, this is not the proper forum to resolve Spingarn's definitional dispute with the FDA and the scientific community, particularly where Spingarn lacks credibility and where authoritative scientific bodies (*e.g.*, the EP and

USP) currently allow the blended form to be labeled “glucosamine sulfate potassium chloride.”

For the foregoing reasons, Defendants have met their burden of establishing that all of Plaintiffs' claims are preempted. Accordingly, summary judgment is hereby GRANTED in favor of Defendants.

[Footnotes omitted throughout.]