

CITATION: *Kohl & Frisch Limited v. Wal-Mart Canada Corp., et al.*, 2026 ONSC 3869
COURT FILE NO.: CV-21-00659216-0000
DATE: 20260708

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KOHL & FRISCH LIMITED

Plaintiff

– and –

WAL-MART CANADA CORP., WAL-
MART PHARMACY (B.C.) LIMITED,
WAL-MART PHARMACY (NS)
LIMITED, WAL-MART PHARMACY
(SASK.) LIMITED, and WAL-MART
PHARMACY LIMITED

Defendants

)
)
) *Peter F.C. Howard, Aaron Kreaden, Hesam*
) *Wafaei and Shannon Jickling, for the Plaintiff*
)

)
)
) *Andrew Bernstein, Andrew Gray, Emily*
) *Sherkey, Adrienne Oake and Allyson Reid*
) *Taylor, for the Defendants*
)

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) **HEARD:** November 10, November 12, 13,
) 17–21, 24–27, January 13, 2026

REASONS FOR JUDGMENT

CALLAGHAN J.

[1] This proceeding arises out of the termination of a long-term business relationship. By all accounts, the relationship was successful for decades but came to an end in 2021. The plaintiff supplied pharmaceutical and other products to the defendants.

[2] In the main action, the plaintiff claims that the defendants did not abide by the terms of their agreement. The plaintiff asserts that the defendants repudiated the arrangement before the agreement expired. The plaintiff asserts that it earned extensions to the term of the agreement through to 2023. The plaintiff seeks expectation damages for what it believes to be the extended term of the agreement and reliance damages for its early termination. The defendants dispute the plaintiff's interpretation of the agreement and its claim for damages. Among other arguments, the defendants rely on the minimum performance doctrine in responding to the damage claim.

[3] In their counterclaim, the defendants assert that, while the agreement was winding down, the plaintiff failed to meet its contractual obligations to supply product to the defendants. The defendants claim to have sustained significant damages because of this alleged contractual failure. The defendants also claim damages for certain funds wrongfully retained by the plaintiff.

[4] As will be apparent from the decision, I have found amounts owing in both the main action and the counterclaim. Because of the nature of the damage evidence, it is not possible to calculate the ultimate balance owing. The parties will need to consider my findings and agree on the amounts or reattend to resolve the calculations.

Overview

[5] Kohl & Frisch Limited (“K&F”) is a family-owned company with roots dating back to 1916. It began as a wholesaler of tobacco and candy. Over time, the business evolved. It is now a distributor of pharmaceutical products, both prescription (“Rx”) and over the counter (“OTC”) products. It also supplies other products to pharmacies, described as non-OTC. The current CEO is Ron Frisch.

[6] Wal-Mart Canada Corp. is one of the world’s largest retailers. It is the parent company of the other corporate defendants. As the parties did, I will refer to the defendants collectively as “Walmart”. Walmart operates stores that include pharmacies.

[7] This proceeding included several Quebec entities that were independent operators of pharmacies located within Walmart stores in that province. Those entities are no longer part of the action as Walmart agrees to address all liability that might arise because of this decision, including in respect of the Quebec entities.

[8] K&F was the long-time supplier of Rx, OTC, and other products to Walmart. The relationship dates back over 30 years. During the relevant period, K&F was Walmart’s near exclusive national distributor for Rx and OTC products. The Rx products included both generic and non-generic drugs (i.e. branded) products. Walmart has hundreds of stores across Canada. This required K&F to maintain warehouse and distribution capacity across Canada.

[9] This proceeding involves the parties’ last agreement, which commenced January 1, 2013, with an initial term that expired on June 13, 2018 (the “Agreement”). Their prior agreement was entered into in 2007 (the “2007 Agreement”). There was a separate agreement in respect of the Quebec entities, but the parties agree that I need not address that agreement.

[10] In the main action, the case turns on the interpretation of provisions of the Agreement that address the possible extension of the “Term” of the Agreement. The Agreement defines the “Initial Term” as ending March 31, 2018, and then defines the phrase “Term” as including the “Initial Term, together with any extension”. As will be explained, the Agreement provides that extensions may be earned by K&F. Much of the main action addresses the contractual mechanism as to how those extensions are earned and how the Agreement operates during the extension periods.

[11] Under the Agreement, K&F’s compensation for distributing Rx and OTC products to Walmart was based on the following fee structures:

- (a) For branded Rx products, Walmart paid K&F the acquisition cost of the product plus a gross fee, less a prompt payment discount. The Rx gross fee varied by province and was between 6-10% of the acquisition cost.

(b) For generic Rx products, Walmart paid K&F its acquisition cost and K&F's compensation was the distribution fee it received from the manufacturer. If there was no such distribution fee, the applicable service fee for generic Rx products would apply as set out in Appendix A of the Agreement.

(c) For OTC products, Walmart paid K&F the acquisition cost of the product plus a gross fee of 5% of the acquisition cost, less a rebate of 2.26% and a prompt payment discount.

[12] Under the Agreement, Walmart had four days from the date of receipt of K&F's invoice to make payment and thereby receive the prompt payment discount. Walmart always paid within four days to take advantage of the prompt payment discount. The prompt payment discount was 2%.

[13] When the discounts and rebates were factored into the payments, the blended fee paid to K&F was 1.3% of sales under the Agreement, a reduction from the 2007 Agreement where the blended fee was 1.69%. The ultimate rate paid on OTC products was even less. It was 0.59% under the Agreement, which, according to K&F, was below its distribution cost.

[14] It is agreed that during the tenure of the Agreement, provincial governments across Canada were reducing the amount that they would pay for generic drugs. This was known as generic deflation. In other words, a generic drug that once commanded a price of \$100 might subsequently command a price of \$50.

[15] This had an impact on both Walmart and K&F. In the case of K&F, because it derived its revenue from commissions paid by the generic manufacturer which were a percentage of the sale price, a drop in the sale price resulted in a decline in revenue. If the manufacturer paid 5%, K&F would receive a commission of \$5 on a sale price of \$100. If the sale price dropped to \$50, the commission would drop to \$2.50. The difficulty for K&F was that its distribution costs were largely fixed. This meant that the Agreement was less profitable as generic deflation became more prevalent.

[16] Generic deflation started to appear during the 2007 Agreement. The 2007 Agreement contemplated generic deflation and provided that the parties might renegotiate to account for the deflation. However, no renegotiation took place under the 2007 Agreement. The person responsible for the K&F relationship at Walmart, Mr. Muir, testified that he was not prepared to renegotiate because both sides were impacted by generic deflation. As such, the parties were not only aware of generic deflation when it came time to negotiate the Agreement but addressing the impact of generic deflation played a prominent role in the Agreement.

[17] The parties addressed the impact of generic deflation on K&F through provisions in the Agreement. The Agreement provided where generic deflation resulted in a negative financial impact ("NFI"), subject to certain conditions, there would be financial relief in the form of extending the Term of the Agreement and a financial contribution from Walmart to K&F after a certain threshold. These provisions are central to K&F's claim.

[18] As a starting point, NFI was required before any relief was granted. The Agreement provided certain means by which the impact of NFI could be mitigated. The parties agree that NFI was present from the commencement of the Agreement to March 31, 2021. The parties also agree on the dollar value of NFI during the period up to March 31, 2021.

[19] Walmart submitted that K&F failed to prove generic deflation continued past March 31, 2021. I reject this argument. I accept the evidence from Mr. Frisch that there was generic deflation

throughout the period at issue in this case (i.e. to the end of 2023). NFI is calculated with reference to the price of a generic drug in 2013 when the Agreement started. As such, unless the price of a drug increased (of which there was no evidence), there was always going to be NFI and that amount would only grow as provincial governments ratcheted down the price they would pay for generic drugs. As discussed in more detail, I accept the expert evidence that the amount of NFI for calculating damages may be extrapolated using the historical data and an inflationary adjustment.

[20] If the NFI exceeded \$600,000 in any calendar year the Term of the Agreement was to be extended by six months. In exchange, K&F absorbed the first \$600,000 of NFI. Walmart was required to compensate K&F for any NFI above \$600,000 in a calendar year. For example, in 2014, K&F experienced NFI of \$1,801,000. As a result, the Agreement was extended beyond its Initial Term which ended December 31, 2018, to June 30, 2019, being 6 months. Walmart was to compensate K&F for the remaining \$1,201,000 through a retroactive fee adjustment. As it happened, rather than having a fee adjustment, Walmart habitually remitted the amount to K&F. This was agreeable to K&F. In short, in 2014, the NFI resulted in the Term of the Agreement being extended for six months and K&F receiving compensation of \$1,201,000.

[21] The central issue in the main action is the interpretation and operation of the applicable sections in the Agreement that dealt with the compensation for NFI. K&F asserts that it continued to accrue NFI compensation, including extensions, after the Initial Term, ultimately extending the Agreement to December 31, 2023. K&F not only seeks the excess NFI payments but damages, by way of lost profits, for the extension periods which were denied which it asserts run from March 31, 2021, to December 31, 2023.

[22] Walmart states that K&F had no entitlement to earn NFI compensation, including additional extensions, after June 30, 2018, when the Initial Term ended. Because it rejected the notion that NFI was compensable during extensions, Walmart's view was that the Agreement came to an end on March 31, 2021, when the last extension earned during the Initial Term of the Agreement expired. It provided no compensation to K&F for the continued generic deflation after June 30, 2018.

[23] The Agreement contained provisions to address the mitigation of NFI. Those provisions were not used during the period to March 31, 2021. Nonetheless, if NFI compensation was owed, Walmart argues in calculating any damages owing that it had the right to mitigate the impact of NFI and relies on the minimum performance doctrine to reduce K&F's claim for expectation damages.

[24] Through the currency of the Agreement, the parties and their counsel exchanged communication as to their respective views on the interpretation of the Agreement, including when the Agreement terminated. Eventually, Walmart advised K&F that it was going to search for a new distributor. K&F was permitted to put its name forward for consideration. At a meeting in mid-August 2020, Mr. Frisch was advised that K&F was not selected. Walmart intended to hire McKesson Canada ("McKesson") as its new distributor starting April 1, 2021.

[25] At that meeting, however, Ms. Kiroff of Walmart offered K&F a new short-term contract as Walmart's primary distributor to March 2022 and to explore if K&F would agree to be Walmart's "secondary distributor" thereafter. In essence, she advised Mr. Frisch it could accept a year's extension with a possible secondary distributor status thereafter or Walmart would terminate as of March 31, 2021, in accordance with its interpretation of the Agreement.

[26] Mr. Frisch was disappointed and wrote the new Walmart CEO seeking some intervention. Letters were exchanged in September. In the end, there was no assistance forthcoming from the CEO.

[27] In a follow up email on October 16, 2020, Ms. Kiroff again proposed a one-year extension and that this “new contract” would follow the existing Agreement, but there would be no “language which may serve to extend the contract beyond March 31, 2022”. Mr. Frisch responded to Ms. Kiroff on the same day to say he had consulted with yet another lawyer. He advised that K&F remained of the view that the Agreement would continue to the end of 2023 due to the existing and anticipated NFI extensions. Mr. Frisch advised that unless a solution was reached by mid-November, K&F intended to accept Walmart’s repudiation, continue servicing Walmart until March 31, 2021, and then sue for damages. A draft statement of claim was included.

[28] On December 18, 2020, Ms. Kiroff wrote confirming there would be no new Agreement and that the Agreement would terminate March 31, 2021. On December 24, 2020, Mr. Frisch responded to Ms. Kiroff. He asserted that Walmart “will be in breach and is in anticipatory breach now” of the Agreement. K&F agreed to continue to perform through March 31, 2021, both as a matter of mitigation and to ensure a smooth transition but advised that K&F would seek damages for the failure to pay NFI compensation during the period from July 1, 2018 to March 31, 2021 and damages for the loss of further extensions earned from March 31, 2021 to December 31, 2023. The email also contained what he described as “rules of the road”, being Mr. Frisch’s attempt to provide a blueprint for the transition of Walmart’s business to McKesson.

[29] The Agreement expressly addressed that the parties were to collaborate on commercially reasonable business terms to minimize the cost of any transition, including the inventory held by K&F for Walmart. Part of the concern raised by Mr. Frisch was managing K&F inventory levels during this period, which was an express consideration raised in the Agreement.

[30] Walmart responded in January and accepted some but not all of Mr. Frisch’s rules of the road. In the interim, Walmart had executed an agreement with McKesson which included transition provisions. There then followed attempts by counsel to agree on transition terms. This failed. There were some low level discussions, but little happened in terms of settling transition terms until March when Ms. Kiroff and Mr. Frisch began to communicate again. There were some terms agreed upon, such as a prepayment of orders, but not to the extent one would expect given the Agreement expressly required the parties to collaborate. The Agreement provided a transition period of 15 business days after the termination in which K&F was to supply product and Walmart was required to purchase product. This would require the supply and purchase of product to April 21, 2021. In the end, the parties simply agreed to end the relationship on March 31, 2021 and this lawsuit ensued.

[31] In this action, K&F seeks both expectation and reliance damages. As expectation damages, it claims the lost profit that it would have earned through to December 31, 2023 both through the sale of product and other ancillary revenue streams. In its lost profit calculation, it seeks to be compensated for certain products that had been classified as OTC products but which it now seeks to classify as non-OTC products which would result in a significant lift in the distribution fee and resulting damages. It also seeks NFI payments withheld by Walmart and which were earned during past and expected extensions. As reliance damages, K&F claims the cost incurred in shutting down that portion of its operations which serviced Walmart, including warehousing and severance costs.

[32] Walmart disagrees both with K&F's entitlement to and calculation of its damages. In calculating damages, Walmart asserts that K&F's calculation fails to account for the doctrine of minimum performance which was reviewed by the Supreme Court in *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303.

[33] I have accepted that NFI compensation extends beyond the Initial Term. As such, K&F is entitled to NFI compensation beyond March 31, 2018. This includes extensions. This results in K&F being entitled to lost profits. I also accept Walmart's argument on minimum performance that Walmart could have performed the Agreement by mitigating the NFI by paying out the full sum owing and not extending the Agreement. However, this opportunity for mitigation only applies for the contractual performance after March 31, 2021, and does not apply to the extensions earned up to that date. Damages are thus limited to the period ending December 31, 2022. K&F is entitled to its lost profits on sales it would have made to December 31, 2022. I reject K&F's claim for the higher distribution fees relating to OTC products, which it claims should be classified as non-OTC. It is entitled to some but not all the lost profit on the ancillary revenue streams.

[34] I have accepted that K&F is entitled to reliance damages for its severance costs but that it has failed to establish an entitlement to the remainder of its reliance damage claim. K&F also seeks a modification to the pre-judgment interest rate which I reject.

[35] In its counterclaim, Walmart alleges that K&F failed to meet its contractual obligation to use "best efforts" to supply the required OTC products as the Agreement wound down, particularly during the period of February and March 2021. During that timeframe, K&F is alleged to have cancelled or failed to fulfill orders for fear of not being paid by Walmart, or alternatively for fear of being stuck with excess product upon termination. In either event, Walmart says this resulted in empty shelves and lost sales. It seeks compensation from K&F. K&F disagrees with Walmart and asserts that Walmart, in any event, sustained no loss.

[36] While K&F failed to supply OTC product at the rate stipulated in the Agreement, the transition provisions of the Agreement meant that K&F was entitled to take steps to reduce its inventory to limit the cost of the transition which, in turn, meant toward the end of the Agreement less products were available for shipping. Moreover, Walmart has failed to establish that the short supply of OTC product by K&F resulted in less sales and lost profit. Accordingly, I reject this claim.

[37] Walmart also seeks monies withheld by K&F. After Walmart refused to pay NFI compensation at the end of the Initial Term, K&F stopped approving quarterly OTC rebates as a form of set-off. Walmart is entitled to those rebates.

[38] In addition, in response to the "rules of the road" email, Walmart eventually agreed to prepay \$9 million to be used against future accounts. K&F agreed to return any unused funds. Walmart is entitled to the return of the unused portion.

[39] I was given many permutations as to how K&F's damages might be calculated. However, I was not given damage calculations for all scenarios. As such, I am providing my decision on each of the issues raised. There is, however, not a calculation for each issue where damages are awarded. Instead, the parties will have to calculate damages based on this decision and if there is a disagreement, they may reattend to have me resolve any dispute.

K&F's Claim

The first issue to determine is whether NFI compensation extends beyond the Initial Term and, if so, whether Walmart breached the Agreement by terminating the relationship on March 31, 2021. This is largely a matter of contractual interpretation. If there was such a breach, the issue of damages must then be considered.

Principles of Contractual Interpretation

[40] This case is one of contractual interpretation. The principles of contractual interpretation are well known and have been summarized in many cases. One such case is *Ontario First Nations (2008) limited Partnership v. Ontario Lottery and Gaming Corporation*, 2021 ONCA 592, at para. 46, in which the Court of Appeal set out the principles as follows:

1. Courts should take “a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine ‘the intent of the parties and the scope of their understanding’”: *Sattva*, at para. 47 (citations omitted).
2. Courts must “read the contract as a whole, giving the words used their ordinary grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”: *Sattva*, at para. 47; *Corner Brook*, at para. 20.
3. The surrounding circumstances should be considered in contractual interpretation. “[A]scertaining contractual intention can be difficult when looking at words on their own, because words do not have an immutable or absolute meaning”: *Sattva*, at para. 47. The meaning of words in a contract often derives from contextual factors, such as the purpose of the agreement and the nature of the relationship it creates: *Sattva*, at para. 48. A contract is not made in a vacuum and must be placed in its proper setting. Interpreting a commercial contract requires knowledge of the commercial purpose of the contract, based on “the genesis of the transaction, the background, the context, the market in which the parties are operating”: *Sattva*, at para. 47, citing *Reardon Smith Line Ltd. v. Hansen-Tangen*; *Hansen-Tangen v. Sanko Steamship Co.*, [1976] 3 All E.R. 570 (U.K.H.L.), at p. 574, per Lord Wilberforce.
4. The nature of the evidence that may be considered as part of the surrounding circumstances will vary from case to case, but should include only “objective evidence of the background facts at the time of the execution of the contract”, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting”. That determination is inherently fact specific: *Sattva*, at paras. 55, 58 (citation omitted); *Corner Brook*, at para. 20.
5. The surrounding circumstances should never be allowed to overwhelm the words of the agreement. The surrounding circumstances are considered in order “to deepen a decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract”. Courts cannot use the surrounding circumstances to deviate from the text of the contract to the point that the court “effectively creates a new agreement”: *Sattva*, at para. 57; *Corner Brook*, at para. 20.

[41] As outlined in the principles above, the surrounding circumstances, also known as the factual matrix, provide assistance in understanding the commercial purpose of the contract. This can aid in the interpretation of the Agreement. However, individualized background facts known by only one party may not be used to advance commercially reasonable arguments: *SS&C Technologies Canada Corp. v. The Bank of New York Mellon Corporation*, 2024 ONCA 675, 174 O.R. (3d) 410, at para. 42-44, leave to appeal granted [2025] S.C.C.A. No. 41543. Instead, the court must assess the meaning of the contract based on the shared objective understanding of both parties.

[42] What constitutes surrounding circumstances has already been an issue of debate in this litigation. I have already ruled on the admissibility of some evidence, addressing whether certain evidence constituted surrounding circumstances. Without repeating those reasons, I disallowed the admissibility an email because it expressed Walmart’s solicitor’s subjective view of a clause in the Agreement.

[43] As discussed in *James Bay Resources Limited v. Mak Mera Nigeria Limited*, 2025 ONCA 448 the surrounding circumstances to an agreement could include prior agreements and past business dealings between the parties: at para. 45. Accordingly, the 2007 Agreement and the past dealings of the parties may also be considered as part of the surrounding circumstances to the execution of the Agreement.

[44] For example, the 2007 Agreement acknowledged the prospect of government action reducing the consumer purchase price of generic Rx and that generic deflation would “materially and negatively impact upon the financial intent of the parties underlying this Agreement”. Even though generic deflation was acknowledged in the 2007 Agreement, that agreement did not provide a compensation mechanism for the impact of generic deflation to either party. Further, attempts by K&F to address the adverse impact of generic deflation during the currency of the 2007 Agreements were rebuffed by Walmart. This is part of the surrounding circumstances that inform the provisions in the Agreement that provides compensation to K&F for NFI.

[45] The issue of whether post-agreement conduct may be used as an interpretive aid was raised by Walmart. The law allows subsequent conduct to be considered, but only where ambiguity remains after applying the contractual interpretation principles set out above.

[46] Chief Justice Strathy reviewed the risks of relying on subsequent conduct in *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512. His Honour began by stating that subsequent conduct must be distinguished from the factual matrix: at para. 41. The factual matrix addresses the circumstances at the time of contracting whereas post-agreement conduct does not. While post-agreement conduct may be helpful in some circumstances, it is ripe for abuse because parties can tailor their conduct to support their interpretation. Accordingly, the Chief Justice stated that “[e]vidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix”: at para. 46. His Honour further noted that post-agreement conduct may itself be ambiguous which would not assist in the interpretation of a contract: at para. 44.

[47] The parties did not seek a ruling on the admissibility of subsequent conduct in advance of my interpretation of the Agreement. Instead, they accepted that the evidence of post-contractual conduct may be addressed at the conclusion of the trial after I had considered whether the Agreement was ambiguous. If it was ambiguous, I could go on to consider the proffered evidence

and, if the Agreement was not ambiguous, I need not do so. In my view, this was a reasonable approach to the management of both this issue and the trial.

[48] While each party has set forth their respective interpretations of the Agreement, this does not mean that the Agreement is ambiguous. As Justice Karakatsanis observed in *Sabeau v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 S.C.R. 121, at para. 42: “The mere articulation of a differing interpretation does not always establish the reasonableness of that interpretation and does not necessarily create ambiguity.” Indeed, as pointed out by K&F, neither party has pled that the provisions of the Agreement are ambiguous. As this is a matter of contractual interpretation, in my view, a plea of ambiguity is not a prerequisite for this court to consider post-agreement conduct, if the court otherwise finds the provisions of the Agreement to be ambiguous. While ambiguity need not be pleaded, each party’s position in this case as to the meaning of the Agreement was well staked out in advance, so no party has been taken by surprise. Before considering any subsequent conduct, it is necessary for me to go through the interpretive exercise to assess whether there is any ambiguity. As discussed below, I do not find the Agreement ambiguous and, as such, I need not consider the post-contractual conduct of either party.

NFI, Term and the Agreement

[49] The crux of K&F’s claim lies in the interpretation of the NFI provisions and how those provisions interact.

[50] As already mentioned, the Agreement was for an Initial Term of five years. Section 4.1 provides:

This Agreement shall have a term commencing on January 1, 2013 and continuing until June 30, 2018 (the "Initial Term"). The Initial Term will be automatically extended (a) for one additional period of three (3) years unless either party gives the other written notice of its intention to terminate this Agreement at least three hundred and sixty-five (365) days prior to June 30, 2018 or (b) further to Section 6.4(b) and 15.3 (the Initial Term, together with any extension, the "Term").

[51] Section 4.1 clearly distinguishes between the “Initial Term” (January 1, 2013 to June 30, 2018) and extensions. Where extensions apply, the Initial Term and the extension are collectively defined as the “Term”.

[52] Section 4.1 refers to two types of extensions. The first is an automatic renewal for three years unless a party provides written notice that it does not wish to renew. There is no dispute that Walmart gave that notice, so that extension does not apply. However, an extension may also arise under sections 6.4 and 15 which are the relevant NFI sections of the Agreement.

[53] Section 15 details the conditions for NFI. That section reads:

15. LEGISLATION AND MANUFACTURER'S POLICIES

15.1 In the event that provincial legislation and/or accompanying regulations applicable to the Products are amended following the date of this Agreement in a manner which significantly and negatively impacts the financial return or cost to each party of continuing

to consummate the transactions contemplated hereby, whether directly or as a result of changes to cash discount or distribution fee policies (including inventory management agreements and fee for distribution agreements) related to K&F's suppliers of Products which K&F sells to Walmart, to the extent such changes are the direct and corresponding result of such an amendment, both parties agree to use commercially reasonable efforts to reach agreement on an amendment to this Agreement which, to the extent reasonably possible, mitigates such negative impact.

15.2 Both parties agree to use reasonable commercial efforts to negotiate with K&F's suppliers of Products which K&F sells to Walmart so that any proposed changes to such suppliers' cash discount or distribution fee policies (including inventory management agreements and fee for distribution agreements) do not occur or do not negatively impact K&F's compensation under this Agreement

15.3 It is understood and agreed that the service fees specified in Appendix A and/or the Term of the Agreement are subject to revision from time to time in the event of a change in Provincial legislation as noted in 15.1 having a net negative financial impact on the profitability of K&F providing services pursuant to this Agreement (whether directly or as a result of changes to K&F's supplier's cash discount or distribution fee policies (including inventory management agreements and fee for distribution agreements) to the extent such changes are the direct and corresponding result of such a change in Provincial legislation), in each case in accordance with the terms of Section 6.4(b) and Section 6.4(c). Prior to any revision to the service fees and/or the Term of the Agreement, both parties agree to assess other appropriate measures to mitigate the negative financial impacts on each party, including but not limited to altering delivery frequency and/or increasing OTC unit of measure beyond the scope noted in Appendix D. Walmart agrees to be actively involved in supporting K&F's recovery efforts. Both parties agree to work in good faith to resolve the negative financial impact promptly, using commercially reasonable efforts.

[54] As reflected in s. 15.1 and as set out in the agreed statement of facts, the parties were aware that the provinces were actively taking steps that might negatively impact the cost of generic drugs. In turn, this would impact both parties. While generic deflation was acknowledged in the 2007 Agreement, there was no compensation mechanism in that agreement, and no accommodation was made to amend the 2007 Agreement to address the adverse impacts of NFI.

[55] Section 15.1 acknowledges that generic deflation may “significantly and negatively” impact “each party” In sections 15.1-15.3, the parties agreed to consider possible amendments, negotiations with supplier’s or other appropriate measures to offset any NFI. K&F made several proposed amendments to the Agreement and other changes to address NFI. The range of options to offset NFI included an increase in the Rx fee, service adjustments, packaging changes and other amendments that would impact the price or delivery of products covered by the Agreement. K&F’s proposals would result in an anticipated offset of almost \$2.5 million. None were acceptable to Walmart and Walmart made no suggested amendments to address NFI.

[56] Section 6.4, particularly ss. (b) addresses NFI compensation. The section provides:

6.4 The service fees as set out in Appendix A are subject to the following adjustments:

(b) In the event of a negative financial impact to K&F as set out in Section 15.3, and after applying credits further to Section 6.4(c):

- i. if the net negative financial impact is less than or equal to \$600,000 in any calendar year commencing January 1, 2013 or less than or equal to \$300,000 for the six (6) month period from January 1 to June 30, 2018, for each \$300,000 of such net negative financial impact, the Term of this Agreement shall be extended by three (3) months;
- ii. if the net negative financial impact is greater than \$600,000 in any calendar year commencing January 1, 2013 or \$300,000 for the six (6) month period from January 1 to June 30, 2018,
 - A. the OTC Net Fee set out in Appendix A will be automatically adjusted retroactively to the extent necessary to reduce the net negative financial impact for such period to \$600,000 (if in respect of a calendar year) or \$300,000 (if in respect of the six (6) month period from January 1 to June 30, 2018), as applicable, and
 - B. the balance of such net negative financial impact for such period shall be addressed in accordance with Section 6.4(b)i above, without duplication.
 - C. To the extent that the parties agree to or Walmart or any other party otherwise effects changes that result in lower costs or other recoveries to K&F beyond those contemplated in this Agreement or otherwise mitigate the financial impact to K&F of Walmart not meeting the targets set out in Appendices B and D as noted above and Section 15.3, K&F will credit back to Walmart any such savings realized up to the full extent of any adjustments made pursuant to subsections (a) and (b).

[57] Section 6.4(b) is where much of the debate occurs in this case. Section 15.1 acknowledged that generic deflation impacted each party. Section 6.4(b) addresses that impact. It begins by referencing s. 15.3 which reflects that there may be credits accrued from the mitigation efforts undertaken by the parties as set out in s. 15. It also refers to credits that may apply because of s. 6.4 (c). Once those amounts are considered, the section addresses how that NFI shall be addressed.

[58] For each twelve-month period where NFI was greater than \$600,000, s.6.4(c) (ii) applied and provided compensation for amounts over \$600,000 and an extension of three months in exchange for K&F absorbing the first \$600,000. The Agreement refers to the NFI above \$600,000 being addressed as an adjustment but as already noted, in practice the parties accepted and agreed that Walmart would simply remit this amount to K&F. I already set out the example of how this operated in practice in 2014.

[59] Section 6.4 allocates the risk of NFI between the parties. It provides that K&F, not Walmart, would absorb the first \$600,000 of NFI in any calendar year. This presumably was a benefit to Walmart in the year when the amount was absorbed. In return, K&F received an

extension of the Agreement. It also received financial compensation for the amount of NFI above \$600,000.

[60] NFI exceeded \$600,000 in each year. However, as noted, because Walmart disputed K&F's entitlement to NFI compensation after the Initial Term, it did not provide any NFI compensation after June 30, 2018. As such, it did not make payments to K&F for NFI amounts in excess of \$600,000 per year or acknowledge earned extensions for K&F after June 30, 2018. In response, K&F withheld OTC rebates which is part of Walmart's counterclaim.

[61] Section 6.4(b) refers to a 3-month extension for NFI equal to or less than \$300,000 for the six (6) month period from January 1 to June 30, 2018. This provision was necessary as the Initial Term ended halfway through the calendar year on June 30, 2018. This was because the parties did not want the Agreement to expire at year end, as it would be far too difficult to transition to a new supplier at year end with staff holidays and the holiday demands of Walmart's customers. I will return to this stub period as it factors into Walmart's argument.

[62] By the end of the Initial Term, it is agreed that K&F was entitled to extensions out to March 31, 2021. As such, the Agreement continued, and K&F continued to service Walmart after the Initial Term.

[63] During the extension periods, Walmart claims that K&F continued to have all the service responsibilities as the Initial Term, but its compensation no longer included NFI compensation, either by way of further extensions or NFI payments. In other words, Walmart contends that K&F took the entire risk of generic deflation for the period of the extensions.

[64] Walmart's argument hinges on the reference to the stub period. Walmart isolates the phrase "for the six month period from January 1 to June 30, 2018" in 6.4 (b) (i) and 6.4 (b) (ii) and claims that this reflects an end date for NFI compensation. This argument misconstrues the reason why the Agreement references the stub period. The stub period was required because of when the Initial Term ended. As noted, a mid-year end was deliberately chosen as being least disruptive to the parties' business operations. Having chosen a mid-year ending, the NFI compensation was adjusted to reflect an entitlement to a partial year compensation for that specific period. At the time of contracting, the scope of generic deflation could not be anticipated and the possibility that it would occur only in the stub period had to be addressed which accounts for that language in the Agreement.

[65] The stub period is not intended to change the compensation structure during the extensions. Both ss. 6.4 and 15 reference the "Term of this [or the] Agreement" being extended. The definition of "Term" expressly includes "the Initial Term, together with extensions." As already discussed, extensions include those earned through NFI compensation. Nowhere does the Agreement state that K&F's compensation during the extension periods shall differ prior to and after the Initial Term.

[66] In support of its argument, Walmart argues that the NFI extensions and payments were lucrative to K&F. Walmart argues that Walmart also suffered from generic deflation, and that it makes commercial sense that the parties would only provide K&F NFI compensation for a limited time. This argument is not persuasive.

[67] That argument ignores the factual matrix giving rise to the provision. NFI was a concern to K&F during the 2007 Agreement. While that Agreement provided for a possible amendment,

Walmart refused to do so. It makes perfect sense that with that background, K&F would insist on some mechanism in the Agreement to compensate it for the adverse impact of generic deflation. Relying on Walmart to amend the compensation structure to account for NFI was not a strategy that worked in respect of the 2007 Agreement. It was submitted and I accept that it would make no sense that K&F would not protect itself from generic deflation throughout the entire Term of the Agreement, including extensions.

[68] Walmart states that it too was impacted by NFI. It was noted by K&F that the Agreement already contained a significant financial benefit to Walmart in that the effective service fees K&F paid Walmart were ratcheted down in the Agreement from the 2007 Agreement. Whether that was part of Walmart's calculus in agreeing to the NFI compensation for K&F is unclear. But the Agreement does not expressly provide a benefit to Walmart for the adverse impact of NFI, other than K&F's responsibility to absorb \$600,000 of NFI in any calendar year.

[69] Moreover, the cost of servicing Walmart was no less during the extensions. Walmart's interpretation would require K&F to continue to fulfil its obligations while absorbing the entire impact of generic deflation, clearly a fundamental change to the compensation structure. Walmart's argument fundamentally changes the risk allocation relating to NFI, without any express or even implied change to the Agreement. In my view, if such a fundamental shift were intended by the parties, the Agreement would have clearly stated so. This is particularly so given that the Agreement was a contract between sophisticated parties with sophisticated counsel who could easily express in words such a fundamental change in the risk.

[70] As to Walmart's argument that the extensions were lucrative to K&F and thus would not have been agreed upon by Walmart beyond the Initial Term, Mr. Muir who negotiated the Agreement for Walmart was aware from the outset that the extensions were worth more than the \$600,000 per year absorbed by K&F. He was aware that the extensions were important to K&F. He also knew that Walmart was impacted by NFI. He was aware of the past history that K&F sought relief from NFI under the 2007 Agreement, but Walmart would agree to none. Yet, the Agreement does not expressly or impliedly change the compensation for services provided by K&F after the Initial Period, including NFI compensation. In my view, this reflects the importance of NFI compensation, including extensions, to K&F which was a fact known to Walmart at the time of contracting and is reflected in the plain wording of the Agreement. In hindsight, it may be that providing K&F extensions was a bad bargain for Walmart but that makes the terms of the Agreement no less enforceable in the circumstances.

[71] In summary, the interpretation proposed by Walmart strays from the plain meaning of the words used in the Agreement to define the obligations and benefits of the parties. Walmart's interpretation ignores the surrounding circumstances giving rise to the Agreement and ignores the commercial reality. On the plain reading of the sections and having regard to both the surrounding circumstances and commercial reality, I am satisfied that NFI provisions continued to apply after the Initial Term.

Subsequent Conduct

[72] Walmart does not lead with the argument that the provisions are ambiguous. Rather, it argued based on what it described in its pleading as the "plain language" of the Agreement which I have now rejected. In doing so, I have examined the Agreement using the ordinary interpretative aids as directed by the Court of Appeal in *Shewchuk v. Blackmont Capital Inc.* Nonetheless,

Walmart argues that I should have regard to post-contractual conduct as an aid to interpretation. Walmart does not identify what it believes to be ambiguous in those sections. As already discussed, absent any ambiguity, subsequent conduct is not relevant to the contractual interpretative exercise: *Greenspan v. Van Clieaf*, 2023 ONCA 681, 487 D.L.R. (4th) 291, at para. 51.

[73] In my analysis, I did not find the Agreement ambiguous as to whether the NFI provisions apply during the period of earned extensions; NFI applies throughout the Term including any extensions. Moreover, in my view, the sections are not reasonably susceptible to another meaning when it comes to assessing whether NFI compensation applies throughout the Term of the Agreement. Accordingly, I need not consider the subsequent conduct evidence offered by Walmart.

Wrongful Termination

[74] As discussed, in August 2020, Walmart informed K&F that it would be transferring the distribution business to McKesson as of April 1, 2021. Prior to August, the parties including their counsel debated when the Agreement ended. Walmart asserted it ended March 31, 2021 as it rejected that NFI compensation would extend the Agreement past the Initial Term. In contrast, K&F maintained that the Agreement continued through December 2023 on the understanding that the NFI continued. Even though Walmart advised it was shifting to McKesson, it offered to extend K&F's distributorship arrangement through 2022 and possibly further as a secondary distributor. While Walmart stated that the Agreement terminated on March 31, 2021, it offered to enter a new agreement for this extension. On December 18, 2020, Walmart confirmed that offer was no longer on the table. On December 24, Mr. Frisch wrote Walmart again asserting that Walmart was repudiating the Agreement by ending the relationship on March 31, 2021 but advised Walmart that K&F would perform the Agreement through March 31, 2021, and would sue for damages.

[75] As I have found that the earned NFI extensions extended the Term beyond March 31, 2021, I accept that Walmart wrongfully terminated the Agreement on March 31, 2021.

[76] There was discussion about whether there was an anticipatory breach by Walmart which had to be acted upon earlier by K&F.

[77] In an anticipatory breach, one party expresses an intention not to abide by the agreement any further. In that case, the innocent party has an election; it may accept the breach and sue immediately, or it may continue to press for performance. As expressed by the Court of Appeal in *Ali v. O-Two Medical Technologies Inc.*, 2013 ONCA 733, 118 O.R. (3d) 321, at para. 24:

Once the counterparty shows its intention not to be bound by the contract, the innocent party has a choice. The innocent party may accept the breach and elect to sue immediately for damages -- in which case, the innocent party must "clearly and unequivocally" accept the repudiation to terminate the contract: *Brown*, at para. 45. Alternatively, the innocent party may choose to treat the contract as subsisting, "continue to press for performance and bring the action only when the promised performance fails to materialize"; by choosing this option, however, the innocent party is also bound to accept performance if the repudiating party decides to carry out its obligations: S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 621.

More recently, Gillese J.A. made the same point in *Fram Elgin Mills 90 Inc. v Romandale Farms Limited*, 2021 ONCA 201, 32 R.P.R. (6th) 1, at para. 259:

An anticipatory breach does not, in itself, terminate the contract. Once the offending party shows its intention not to be bound by the contract, the innocent party has a choice. The innocent party may accept the breach and elect to sue immediately for damages, in which case the innocent party must “clearly and unequivocally” accept the repudiation to terminate the contract. Alternatively, the innocent party may choose to treat the contract as subsisting, continue to press for performance, and bring the action only when the promised performance fails to materialize. However, by choosing the latter option, the innocent party is bound to accept performance if the repudiating party decides to carry out its obligations: *Ali*, at para. 24.

[78] In August, Walmart was not bringing the Agreement to an end immediately. Instead, Walmart expected K&F to perform until March 31, 2021, and, given the offer of an extension, perhaps longer. This offer was outstanding until December. This was not a situation where K&F was put to its election to immediately terminate the Agreement. Instead, Walmart was insisting K&F continue to perform until March 31, 2021. In respect of the response by K&F on December 24, 2020, while it accepted that Walmart would not perform the Agreement after March 31, 2021, K&F agreed to perform as a form of mitigation. The lawsuit was not issued until after the actual breach.

[79] In my view, this was not a true anticipatory breach. Each party accepted that they would perform to March 31, 2021 with the attended contractual responsibilities. This is not a situation where the innocent party brought the Agreement to an end by suing “immediately for damages.” Instead, this is a situation where Walmart wrongfully terminated the Agreement on March 31, 2021.

K&F’s Damage Claim

[80] As mentioned, K&F seeks both expectation and reliance damages. In respect of expectation damages, K&F claims:

- (a) NFI payments, including the amount exceeding the first \$600,000 of NFI absorbed by K&F from March 31, 2018 to the end of the Agreement;
- (b) The lost contribution margin of the sales during the extension periods from March 31, 2021 to the end of the Agreement;
- (c) Certain other lost benefits during the period March 31, 2021 to end of the Agreement;
- (d) An increase in the prejudgment interest rate.

[81] In respect of reliance losses, K&F seeks compensation for:

- a) Severance cost for employees;
- b) Redundant warehouse space;
- c) Vendor Settlement Payments and Transportation Costs.

Legal Principles

[82] K&F seeks both expectation and reliance damages. The difference between expectation and reliance damage was discussed by Justice Laskin in *PreMD Inc. v. Ogilvy Renault LLP*, 2013

ONCA 412, 112 C.P.R. (4th) 159. Expectation damages are the customary assessment principle when addressing a breach of contract. Expectation damages seek to restore the bargain and put the innocent party in the same position as if the breach had not occurred. In assessing expectation damages the court seeks to compensate the innocent party for what it ought to have received had the contract been fully performed, subject to a duty to mitigate any avoidable losses.

[83] Reliance damages are often awarded where it is not possible to award expectation damages. In that case, the innocent party is awarded damages to restore it to the position it would have been in had it not entered the contract at all. As Laskin, J.A. described it, “[t]hus, reliance damages amount to wasted expenditures – expenses that the injured party incurred in reliance on the contract but would not have incurred had it known that the contract would be breached”, at para. 66. The damages must compensate for losses that would not have occurred but for the contract and would not have been wasted but for the breach: at para. 67.

[84] While expectation damages may be sufficient in most cases to compensate the innocent party, a party may be entitled to both reliance and expectation damages, provided there is no double recovery. That is what occurred in *Ticketnet Corp. v. Air Canada* (1997), 154 D.L.R. (4th) 271 (Ont. C.A), leave to appeal ref’d [1998] S.C.C.A. No. 4. In *Ticketnet*, Laskin J.A. awarded both expectation and reliance damages, while ensuring that there was no double recovery; at paras. 167-171; see also *FPS Food Process Solutions Corporation v. XTL Inc.*, 2025 BCCA 305, at paras. 47-62.

[85] The general rule is that contract damages are assessed as of the date of the breach: *Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Limited*, 2010 ONCA 45, at paras. 14-15. That presumption is not easily displaced but can be where fairness dictates: *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, 410 D.L.R. (4th) 509, at paras. 49-50. As indicated, the date of breach was March 31, 2021, when the Agreement was wrongfully terminated.

[86] The principles of remoteness and foreseeability apply when assessing damages for a contractual breach. In *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, [2008] 3 S.C.R. 79, at para. 63, the Supreme Court of Canada stated:

The defining explanation of the contractual breach principles of reasonable foreseeability and remoteness is found in *Hadley v. Baxendale* (1854), 9 where the court said:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. [p. 151]

A court must therefore ask itself “what was in the reasonable contemplation of the parties at the time of contract formation.” (*Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, 2006 SCC 30, at para. 54).

[87] When considering the damages that arise from a contractual breach, the Supreme Court describes the fundamental question as: [W]hat did the contract promise?: *Fidler*, at para. 44 . Answering this question will draw out what type of damages fairly, reasonably and naturally flow from the breach of the contract. These are the damages that may be said to arise in the “usual course of things” because of the breach: *YG Limited Partnership and YSL Residences Inc. (Re)*, 2025 ONCA 591, at para. 77. In addition to damages naturally arising from a breach of the contract, there may also “be actual knowledge of the contracting parties about special circumstances outside the ordinary course of things to widen the losses for which they are liable”: *Remington Development Corporation v Canadian Pacific Railway Company*, 2025 ABCA 244, at para. 86; *YG Limited Partnership and YSL Residences Inc.*, at para. 77. In other words, where there is actual knowledge of a loss that may not naturally arise from a breach of a contract, that loss may be recoverable. However, the court must be satisfied that not only was the potential of the special loss made known, but the contracting party impliedly undertook to bear the risk of that loss: *Remington Development*, at para. 87.

[88] In addressing remoteness, the court is “dealing with the ‘type’ of loss that is recoverable, not with the measure or quantification of the loss”: *YG Limited Partnership*, at para. 77. As such, damage that may appear to be considerable is not, by that measure alone, remote.

[89] There was an argument as to when the duty to mitigate arises in this case.

[90] Mitigation reflects an obligation on the innocent party to take steps to avoid losses that can reasonably be avoided: *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324 (S.C.C), p. 330-331. As the UK Supreme Court noted in *Bunge SA v. Nidera BV*, [2015] U.K.S.C. 43, the obligation to mitigate is not so much a duty but an expectation that an innocent party will act reasonably and, in doing so, take steps in its own interests to avoid accumulating losses. In doing so, the causation between the breach and damages is broken: at para. 81.

[91] The concept of repudiation which required the innocent party to elect to accept the anticipated breach by the opposite party also derived from the law’s abhorrence for economic waste: *Bunge SA v. Nidera BV*. In such circumstances, the duty to mitigate would arise at the time of acceptance of the repudiation by the innocent party. That duty does not arise if the innocent party does not accept the repudiation and continues to perform. Associate Chief Justice Morden in *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401, at p. 415, stated the general principle that where the repudiation is not accepted, “there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises”: quoting, *McGregor on Damages* 13th ed. (1972).

[92] In this case, the parties accepted that each would perform until March 31, 2021. The contract did not come to an end earlier than March 31, 2021, neither in August nor December 2020. It was not until the breach occurred on March 31, 2021 that the duty to mitigate arose. As discussed, there is always room for the court to choose a different date to impose the duty to mitigate. Given the circumstances, I do not see why the general principle should be deviated from in this case.

[93] If the above analysis is not correct, I would reject Walmart’s argument that K&F ought to have taken steps to mitigate as of August 2020 or earlier. From a practical perspective, even as of mid-December, Walmart sought to extend the relationship to March 31, 2022. If that came to pass, any mitigation efforts would have been for nought as K&F would need to retool and rehire staff to

provide the requested distribution services. That offer was only revoked in December. It would make little sense that K&F would be required to dismantle its operations before the prospect of any further agreement was resolved, which was not until December, 2020.

[94] Finally, while the plaintiff has the obligation to act reasonably to avoid losses, the onus to establish the plaintiff acted unreasonably in mitigating falls to the defendant whose actions created the need to mitigate: *Red Deer College*, at pp. 330-31. This entails establishing, on a balance of probabilities: (1) that opportunities to mitigate the loss were available to the plaintiff; and (2) that the plaintiff unreasonably failed to pursue these opportunities: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, at para. 73.

Minimum Performance and Termination

[95] Walmart relies on the minimum performance doctrine. It asserts that it always had the ability to compensate K&F with the entirety of the NFI compensation by way of a cash payment. In doing so, it asserts that K&F would not be granted any extensions, and the Agreement would end March 31, 2021 which would significantly reduce the damages owing. I accept that Walmart may rely on the doctrine in respect of its performance options after the date of breach on March 31, 2021 but cannot use the doctrine to deny K&F extensions it earned up to that date. As a result, and for the reasons that follow, the Agreement would terminate on December 31, 2022.

[96] When a contract has alternate modes of contractual performance, damages are to be assessed using the mode least profitable to the plaintiff and least burdensome to the defendant. As discussed in *Hamilton v. Open Window Bakery Ltd.*, at para. 20, the doctrine of minimum performance reflects that the non-breaching party is entitled to be restored to the position it would have been in had the contract been performed and, in many contracts, there are several modes of performance. In *Open Window*, the analysis was quite straightforward as the contract had a termination clause that was relied upon. The Court denied the plaintiff's claim to a continuing contract and calculated damages on the basis that the defendant could have performed the contract by providing notice of termination thereby limiting the damages.

[97] The minimum performance doctrine does not involve an analysis of what a party might hypothetically do, as is the case with the "but for" damage analysis involving a tort: *Open Window*, paras. 14-17; *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427 at paras. 11, 48, 49. The focus is on what the contract sets out as acceptable performance, not how a party would in fact act. The court assumes that as a rational economic actor, the breaching party will act in its best interest. In doing so, it is presumed to perform its contractual obligations in a manner that is least burdensome to it. As Justice Arbour put it: "The assessment of damages required only a determination of the minimum performance the plaintiff was entitled to under the contract, i.e., the performance which was least burdensome for the defendant": *Open Window*, at para. 20.

[98] In *SS&C* the Court of Appeal rejected the argument that the breaching party would have invoked a termination clause prior to it having repudiated the contract. The Court held that the minimum performance doctrine reflects performance options after repudiation. It stated that to expand the doctrine to apply prior to repudiation would give rise to "absurd and perverse results": at para. 136. One such result was that it would allow a breaching party to take the benefits of a contract for many years while escaping a corresponding liability by invoking the doctrine to limit its past exposure: paras. 141-143. *SS&C* sets an important limit on the doctrine. The doctrine

applies to limit damages on future performance and is not intended to limit earned entitlements for the innocent party based on performance that occurred prior to the breach.

[99] As a preliminary issue K&F states that Walmart may not rely on the minimum performance doctrine as it was not expressly pleaded in its statement of defence. The pleadings are intended to set out the facts to be adduced in support of a party's position at trial. In respect of a defence, a party is to plead affirmative defences: rule 25.07 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules"). I do not view the minimum performance doctrine as an affirmative defence. It does not defeat the claim. Rather, it is a legal principle that limits the damages but does not extinguish the claim or deny the entitlement to damages: *Atos IT Solutions v Sapient Canada Inc.*, 2018 ONCA 374, 140 O.R. (3d) 321, at para. 31.

[100] Moreover, in this case, K&F did not plead for the damages claimed. Instead, it made a general plea "for all expectation losses arising from... the breaches of Walmart...". The statement of claim goes on to state that K&F would provide particulars of its damages prior to trial. The rules provide that damages shall be "specified" and where special damages are unknown, a party need only plead what is known but notice of the particulars of any damages shall be sent forthwith to the opposite party once they are known: rule 25.06(9). I was directed to no such particulars. Accordingly, there was no plea as to the precise nature of K&F's damages.

[101] In the absence of any plea as to specific damages, even assuming one was required to plead the minimum performance doctrine, I fail to see how Walmart could make a plea as to the minimum level of performance it could have undertaken to limit a damage claim that has not been particularized.

[102] Even where a party fails to plead a defence, the court can relieve against that error where it is just to do so, which may occur where there is no prejudice to the opposite party: see *Midland Resources Holding Ltd. V. Shtaif*, 2017 ONCA 320, 135 O.R. (3d) 481, at paras. 109-11 discussed below. There are cases where parties are taken by surprise and are prejudiced because the matter is raised very late in the day: *Watt v. TD Insurance and TD Meloche Monnex*, 2022 ONSC 1514, at para. 35. That is not this case. In this case, it was no surprise to K&F that Walmart was contesting damages and relying on the minimum performance doctrine to do so. If a plea was required, in the circumstances, I see no prejudice to K&F.

[103] Accordingly, I reject this preliminary argument.

[104] Walmart argues that the Agreement allowed it to take steps to mitigate the impact of NFI section "up to the **full extent** of any adjustments made pursuant to subsections [6.4] (a) and (b). Walmart relies on s. 6.4(c). For ease of reference, I reproduce that section again which provides:

To the extent that the parties agree to or Walmart or any other party otherwise effects changes that result in lower costs or other recoveries to K&F beyond those contemplated in this Agreement or otherwise mitigate the financial impact to K&F of Walmart not meeting the targets set out in Appendices [sic] B and D as noted above and Section 15.3, K&F will credit back to Walmart any such savings realized up to the full extent of any adjustments made pursuant to subsections (a) and (b).

[105] Walmart focuses on the portion of the subsection that allows it to “otherwise mitigate the financial impact to K&F”. It states that the wording is non-restrictive and that it could mitigate by providing the full compensation of the NFI to K&F, including the first \$600,000 per annum. In doing so, K&F would have received full credit for the NFI negating the entitlement to an extension.

[106] Mitigating the impact of NFI is also discussed elsewhere in the Agreement. The reference to “beyond those contemplated in the Agreement” refers to the provisions in s. 15 which refers to the parties agreeing to “use commercially reasonable efforts to reach agreement on an amendment to this Agreement which, to the extent reasonably possible, mitigates such negative impact.” As discussed, K&F made offers that would have mitigated the impact of NFI by more than \$2 million, but all those offers were rejected by Walmart.

[107] However, the phrase “otherwise mitigate” in s. 6.4 (c) is not limited or circumscribed. It is mitigation that may extend beyond the consensual mitigation in s. 15. The mitigation does not require K&F’s agreement. The mitigation is not limited to benefits received from K&F suppliers as is s. 15 and the mitigation does not have to result in lower costs. Mitigation under s. 6.4(c) must result in “savings” up to the full amount of the adjustments in ss. (a) and (b) which are the provisions providing the NFI adjustments, including the extension. In addition, s. 6.4 (b) provides that NFI compensation is calculated “after applying the credits” from 6.4(c). As such, NFI compensation is not calculated until all credits are applied, including any arising from any mitigation by Walmart. There is no restriction on what constitutes mitigation, but the Agreement clearly provides that any such mitigation should be credited before assessing the NFI compensation. There is no reason why such mitigation would not include Walmart compensating K&F for the entirety of the NFI, including the \$600,000.

[108] Accordingly, in my view, s. 6.4 (c) of the Agreement provides Walmart with the ability to mitigate by paying the entirety of the NFI to K&F. This would result in no extensions being granted as no NFI would be incurred by K&F.

[109] While I accept that Walmart could have performed the Agreement by paying K&F the entirety of the NFI, it did not do so after the Initial Period expired through to March 31, 2021. K&F performed as required during this period. Walmart not only failed to mitigate any NFI, but it also wrongfully denied NFI compensation to K&F during this period.

[110] As noted in SS&C, “part of the search for a commercially reasonable damages award is the avoidance of absurd results”, at para. 141. As Justice Hourigan opined, it would be an absurd result to “permit a party who has breached a contract for many years by wrongfully obtaining the benefits of the contract to escape liability on the basis that it would have terminated the agreement had it been caught earlier”, at para. 141. The damage assessment is to be “based on what happened and not in an alternative reality”, at para. 140. As His Honour noted, the minimum performance doctrine was intended to avoid a claimant receiving a windfall and, instead, enforce the bargain struck by the parties: at para. 142.

[111] This is not a situation where K&F seeks a windfall. Rather, it seeks to receive what it earned. It performed in accordance with the Agreement and had the legitimate expectation that it had earned the extensions by absorbing the initial \$600,000 of NFI for the period up to March 31, 2021. In contrast, Walmart breached the terms of the Agreement for years by not paying any NFI compensation. As K&F asserts, Walmart cannot now unwind the rights accrued by K&F under the

Agreement. Doing so would be contrary to the minimum performance principle which is intended to hold parties to their bargain.

[112] As such, I do not accept that the minimum performance doctrine applies to deny K&F the extensions earned as of March 31, 2021.

[113] For the same reasons, I come to the opposite conclusion in respect to the period after March 31, 2021. While K&F is entitled to be compensated for all losses during the extension period, Walmart is entitled to have that amount calculated based on the minimum performance doctrine. As there has been no performance by K&F during this period it has no reasonable expectation that it would earn extensions as opposed to receiving compensation for the entirety of the NFI incurred during the extensions after March 31, 2021. In other words, during the earned extensions after March 31, 2021, the minimum performance would be for Walmart to pay out all the NFI compensation, including the \$600,000.

[114] This then requires an assessment as to the extensions earned by K&F through to March 31, 2021. The parties agree that as of December 2020, K&F had earned extensions that would extend the Term to June 30, 2022. There then remains the period from December 31, 2020 to March 31, 2021 and what extensions were earned in that period. Mr. Frisch and Ms. Fligel confirmed, and I accept that by March 2021, NFI exceeded a million dollars. As Walmart was refusing to pay NFI, this amount was absorbed by K&F. In my view, as K&F had absorbed over \$600,000 of NFI by March 31, 2021, it had earned an additional six month extension.

[115] Walmart argued that because K&F only performed the Agreement for three months, it should only be entitled to a three month extension. Walmart again refers to the stub period from January to June 30, 2018 in s. 6.4 of the Agreement which refers to a three months extension if NFI is greater than \$300,000 in that period. In my view, as already stated, the reference to the stub period is for that specific time (i.e. January to June 2018) which reflected the specific concern about the Initial Term ending halfway through that year. In contrast, the Agreement clearly provides K&F with a six month extension when NFI reaches \$600,000 “in any given calendar year”. In my view, the plain language reflected the contractual intention that K&F was to receive a six month extension after absorbing \$600,000 in any calendar year, which it did in the first three months of 2021. As such, K&F is entitled to a further extension that would take the Term of the Agreement to December 31, 2022, being six months after June 30, 2022.

[116] Having determined that the Term ended on December 31, 2022, the next step is to address the experts and their calculation of the expectation and reliance claims.

The Experts

[117] The parties each retained a business valuator. Both experts were highly qualified and provided helpful evidence.

[118] K&F retained Mr. Williams and Walmart retained Mr. Rosen. Mr. Williams provided an opinion on K&F's damages. However, Mr. Rosen was retained only to critique Mr. Williams' opinion, rather than provide an independent opinion on K&F's damage.

[119] The distinction between the two opinions is of some significance. Mr. Williams' opinion was not a limited review but rather was an unqualified opinion on the damages suffered by K&F. In contrast, Mr. Rosen followed the standard for Limited Critiques as set out in standard 420 of the Canadian Institute of Chartered Business Valuators (CICBV) Practice Standards. As he

explained, he did not undertake an independent assessment of K&F's damages but limited himself to critiquing Mr. Williams' opinion. In other words, he proffered no opinion on K&F's damage claim, but limited his opinion to undermining Mr. Williams' opinion, although there were significant areas where he agreed with Mr. Williams' opinion.

[120] Each expert clearly delineated the areas of difference between them, which often turned on the anticipated findings of the court rather than a dispute on methodology. Both demonstrated that they appreciated their role as experts and their duty to provide objective opinions to assist the court.

[121] Mr. Williams' report was divided into three sections: the first section addressed expectation damages; the second section addressed reliance damages; the third section addressed pre-judgment interest. Mr Williams was careful to ensure his opinion did not double count damages.

Calculating the Loss

[122] K&F is entitled to be placed in the same position as it would have been had the Agreement been performed by Walmart. Broadly speaking, this includes the payment of the NFI payments withheld for the period from March 31, 2018, to March 31, 2021. K&F is also entitled to NFI compensation earned from April 1, 2021 to December 31, 2022. As I have indicated, this compensation does not include further extensions beyond December 31, 2022 as the minimum performance doctrine provides that Walmart could simply pay K&F the entire amount of NFI, including the \$600,000, during the earned extensions after March 31, 2021.

[123] K&F is also entitled to that amount of profit it would have earned on products it distributed to Walmart had it serviced Walmart during the extensions earned, being the period April 1, 2021 to December 31, 2022. Both experts agreed that this lost profit is equal to the lost contribution margin on the revenue K&F would have earned had it continued to service Walmart during the extension. There is also a loss of various other services that K&F says were impacted by the termination.

[124] To calculate the remaining NFI payments and lost contribution margin requires a calculation of K&F's lost sales to Walmart from April 1, 2021 to December 31, 2022. Walmart, however, did not produce its actual sales data for this period. It is not clear why those sales figures were not produced. That data would have been of assistance in establishing or at least informing the court of what K&F's sales would likely have been in that period.

[125] K&F asks that I rely on the maxim *omnia praesumuntur contra spoliatores*, "everything is presumed against the wrongdoer", to overcome the lack of production. K&F submits that the maxim has the effect of reversing the onus so that Walmart (the purported wrongdoer) would need to disprove the damages as presented by K&F.

[126] The Court of Appeal has cautioned that such a result ought not to apply against every wrongdoer in a contract case: *Ticketnet Corp.*, at paras. 84-85. In *Ticketnet*, the court found it was sufficient to have Ticketnet prove its loss by relying on projections, discounted to reflect contingencies. In my view, a similar result is appropriate in this case.

[127] As it happens, Mr. Williams used projections to approximate what the sales would have been had the Term been extended. In doing so, Mr. Williams took the historical sales data and estimated what K&F's sales to Walmart would have been over the damage period. There was no issue taken by Mr. Rosen with Mr. Williams' use of the historical data which sets the baseline for

calculating these projected sales. Rather, the issue of disagreement was calculating the growth of future revenue.

[128] Because Mr. Williams was using historic data, he considered two growth scenarios. The first scenario applied an inflationary increase (Scenario 1) to the sales for branded Rx and OTC products. The inflationary data used was the applicable data for inflation related to branded Rx and OTC products with a blended rate for other services. Due to the deflationary trend for generic Rx, he calculated no increase for those sales. Mr. Rosen took no issue with Scenario 1.

[129] From an economic perspective, by only applying an inflationary increase, the calculation yields no real growth. This is inconsistent with the evidence before me that sales and revenue growth was the norm for Walmart. During the currency of the Agreement prior to March 31, 2021, Walmart expected and did increase its sales on a year over year basis. Some of this was due to obtaining a larger share of the market and some was due to the market category growing. With Covid, an aging population and new products such as GPL-1 drugs, it was projected that sales in this market, over this period, would increase.

[130] Because the calculation in Scenario 1 undervalues any real sales growth, Mr. Williams provided a second scenario for the court's consideration (Scenario 2). In Scenario 2, he made an adjustment for branded Rx and OTC sales, increasing the sales by the greater of 5% or the actual rate of inflation in each category. In the case of generic Rx, he used 5% less the rate of prescribed medicine (branded) inflation Canada. These calculations are intended to reflect growth from both inflation and increased sales.

[131] Mr. Rosen took issue with Scenario 2, principally because the 5% number was not grounded in any analysis of historical data. He felt there was no concrete evidence for the 5% increase. While Mr. Rosen preferred Scenario 1, he proffered a third scenario. He examined the historical data and calculated the average historic growth rate in sales for both Walmart and its associated pharmacies from 2018-2020 (Scenario 3). The rates of growth varied from -2.33% growth to +4.12%. He calculated an average growth rate of 2.49% for Walmart sales across Canada excluding Quebec and 1.68% for Quebec. I note that had Mr. Rosen taken the median of the historic numbers, rather than the average, those percentage would have increased.

[132] In response to the criticism of Mr. Rosen, Mr. Williams conducted sensitivity analyses to test his 5% inflation number. He took the midpoint from his two Scenarios and compared them with the outcome of Scenario 3. The lost contribution margin in Scenario 3 was the midpoint between Scenarios 1 and 2. He then looked at the increase in growth rates identified by the Patented Medicine Prices Review Board ("PMPRB") for 2021 and 2022. Using this data, he calculated a growth rate of 6.6%, being the average of 2021 and 2022. Of course, this only reflects the branded Rx; generic Rx was subject to generic deflation. He then looked at the growth rate of sales by Walmart between 2017-2020 reflecting that Walmart exceeded the general inflationary increase.

[133] In considering the appropriate scenario to assess the damages, I am satisfied that, by itself, an inflationary increase undervalues what K&F's sales revenue would have been for the period March 31, 2021 to December 31, 2022. Inflation is but one of three identified growth potentials. During this damage calculation period, I accept that there would have been growth in K&F's sales revenue due to both Walmart capturing more of the market and the overall growth of the market for prescription drugs (Rx and generic), OTC and Non-OTC products.

[134] In my view, the calculation in Scenario 2 provides a reasonable reflection of the additional variables that contribute to the growth of expected sale in the damage period. In contrast, Scenario 3 undervalues the projected sales by blending Scenario 2 with Scenario 1. Accordingly, when considering the damage calculations, I have relied on and accept Scenario 2 as set out in Mr. Williams' report.

NFI Payments

[135] By the time Walmart terminated the Agreement on March 31, 2021, K&F had performed its obligations from June 30, 2018, to March 31, 2021. K&F earned NFI payments over the period that had been withheld of \$10.813 million, being the NFI above the \$600,000 absorbed every year. There is no dispute that K&F is entitled to NFI payments in that amount.

[136] K&F is also entitled to the NFI payments to December 31, 2022. This includes being compensated for the \$600,000 that would ordinarily have been absorbed during 2022. This is consistent with my finding that Walmart could perform that portion of the Agreement after March 31, 2021 by paying out the entirety of the NFI. Mr. Williams sets out the NFI for the period April, 2021 to December 31, 2022 at Schedule 25. That amount is \$8.678 million.

[137] Accordingly, Walmart shall compensate K&F \$19.509 million (i.e. \$10.831 million + \$8.678 million) in respect of NFI payments.

Lost Contribution Margin

[138] In calculating K&F's lost profit for the period from March 31, 2021 to December 31, 2022, the experts agree that the lost contribution margin is the appropriate measure. The calculation begins with the revenue that K&F would have generated during this period. As determined, I accept Scenario 2 as the appropriate approach in calculating that revenue.

[139] To arrive at the lost contribution margin, the variable costs are deducted from the revenue. These are costs that theoretically K&F was able to shed because the Agreement was terminated. This included severing employees, terminating excess warehouse space and other costs savings. Mr. Williams' calculation of these variable costs was not challenged by Mr. Rosen.

[140] The claim for lost contribution margin includes a claim for lost sales of Branded Rx, Generic Rx and OTC products. The claim also includes other lost revenue which will be addressed below.

[141] K&F is entitled to its lost profit on those sales from March 31, 2021 to December 31, 2022. Utilizing the above formula, the lost contribution for Scenario 2 was easily calculated by the experts. Unfortunately, the schedules provided do not allow me to easily locate the contribution margin for the period from March 31, 2021 to December 31, 2022. Having determined that these damages are owing, I leave it to the parties to agree on that number or to attend before me to address the appropriate amount.

Other Claimed Amounts

[142] K&F seeks compensation for other lost revenue that it says were derived from the Agreement.

- i) *Other Margin Benefits and MR Benefits*

[143] The first of these other claims is described as “other margin benefits”. This included four items:

- a. Price Increases: K&F states it earned additional margin when an opportunity arose where K&F could purchase goods in advance of a supplier price increase and sell the goods after the supplier price increase.
- b. Damages Allowance: K&F earned a margin when damaged goods returned were less than the allowance received from manufacturers.
- c. Walmart Pricing Contractual: K&F purchasing power allowed it, at times, to purchase goods below Walmart’s contractually stipulated price, resulting in additional margin.
- d. Pre-Expired Returns: Walmart sometimes returned pre-expired goods to K&F, who in turn returned these pre-expired goods to the suppliers for credit.

[144] The next item is described as “MR Revenues”. These are revenues earned from K&F’s suppliers which participated in K&F’s advertising and other vendor programs. Mr. Frisch described that suppliers would advertise on K&F’s website. Because of the value of being exposed to “Walmart eyes”, he explained that K&F could charge more to its suppliers because Walmart was a customer. There was also a small amount made by K&F in providing inventory management systems to the suppliers which K&F asserts was diminished due to the loss of Walmart’s business. Frankly, the evidence on this revenue was rather thin.

[145] It was suggested that Mr. Muir was aware that K&F earned these revenues. Mr. Muir testified that during his tenure he wanted to know about the incremental benefits received by K&F. The evidence, however, was that he was unaware of the actual incremental benefits K&F received. In particular, the evidence does not establish that Mr. Muir was aware of either the detail or extent of these revenues at the time of negotiating the Agreement. Similarly, Ms. Kiroff testified that she was aware that K&F had arrangements with their suppliers but there was no evidence that she knew of any of the details. However, Ms. Kiroff was not involved in the negotiation of the Agreement and while her evidence is consistent with Mr. Muir it is not particularly helpful.

[146] Mr. Frisch also testified that Walmart would not have any insight into what K&F’s arrangements were with its suppliers. This was echoed by Ms. Russell who like Ms. Kiroff was not involved in negotiating the Agreement.

[147] The other margin benefits and MR benefits are not damages that flow naturally from the Agreement. These damages relate to revenue earned by K&F from arrangements it made with third parties. These damages fall into that category of loss where K&F has the obligation to establish that Walmart knew of these special circumstances at the time of contracting and expressly or impliedly agreed to be responsible for such losses. In my view, K&F has not established that Walmart had sufficient knowledge of these arrangements such that it could be said to have acquiesced at the time of contracting to be responsible for these types of damages: *Remington Development Corporation v Canadian Pacific Railway Company*, 2025 ABCA 244, at para. 86; *YG Limited Partnership and YSL Residences Inc.*, at para. 77. In my view, these damages are too remote.

ii) *Lost Cash Flow Benefit*

[148] There is a claim for the lost cash flow benefit from Walmart's prompt payment of K&F's accounts. The Agreement provided that K&F's invoices were payable four days from the date of invoicing. In consideration for paying within four days, Walmart was entitled to a 2% prompt payment discount. The Agreement further provided that K&F had the right to charge interest at the Royal Bank's prime rate on any past due account. These provisions were also in the 2007 Agreement.

[149] Because Walmart always paid within the four days, but K&F did not pay its suppliers for roughly 27 or 28 days, K&F had an ongoing float for 23 or 24 days due to Walmart's payment within four days. Mr. Frisch stated that due to the volume of sales with Walmart the float was in the range of \$80-90,000,000 which K&F used to finance the business. He described it as "like a GIC". At the time of contracting, Mr. Muir was aware that K&F was using the early payment as a float to finance its operations. Mr. Muir testified that this float was very important to K&F. As he put it "it enabled [K&F] free cash flow to be a sustainable business". At the time the Agreement was executed, I find that Walmart was aware that the early payment of K&F's invoice was of value to K&F. In my view, Walmart had sufficient knowledge that a wrongful termination of the Agreement would cause K&F to lose this benefit and that a wrongful termination would result in it compensating K&F for such a loss.

[150] The Agreement also required K&F to maintain 15 days of inventory. As such, the float would be used in part to maintain the required inventory under the Agreement. In his calculation of the loss, Mr. Williams accounted for the inventory and calculated that K&F would have eight days of float for financing purposes. He describes this as a "Cash Flow Benefit". He extrapolated the interest payments from K&F's financial statements which included interest paid to operate the business. Using the extrapolated daily interest rate, Mr. Williams calculated the financial benefit derived from the Cash Flow Benefit. Mr. Williams testified, and I accept that this loss was not captured in his contribution margin analysis. I find Mr. Williams' calculation to reasonably reflect the loss of the Cash Flow Benefit.

[151] It was suggested the Cash Flow Benefit is the same as prejudgment interest. I disagree. The Cash Flow Benefit is a real loss at a point in time. It is not interest on an award and it does not reflect the time value of money in the way prejudgment interest operates. It reflects a real loss which is distinct from an award of prejudgment interest.

[152] Finally, it was suggested that this was a loss that should be subject to the minimum performance doctrine. Walmart submits this loss only arises because it pays its invoice in four days. In respect of the period March 31, 2021 to December 30, 2022, it asserts it could have performed the Agreement by paying the invoices much later, thus there would be no float and no Cash Flow Benefit. This argument is not compelling. First, Walmart's obligation under s. 7.1 of the Agreement was to pay within four days- "all invoices are payable to K&F four (4) days from the date of receipt...". The minimum performance doctrine assumes performance of the contract. Second, if Walmart chose not to pay in four days, it would lose the 2% discount and be subject to interest charges. The entire analysis of the experts would need to be redone as K&F's revenue numbers would increase and would yield higher damages.

[153] I accept that the calculations by Mr. Williams as to the Cash Flow Benefit is a fair assessment of what is owing under this head of damage. Again, I would ask the parties to either

agree on the correct Cash Flow Benefit using Mr. Williams' method of calculation for the damage period from March 31, 2021 to December 31, 2022 or arrange to address the calculation with me.

iii) *Lost Data Reporting Revenues*

[154] There was a further claim for lost data reporting revenues. This claim relates to K&F selling Walmart related data to third parties. This loss does not naturally flow from a breach of the Agreement.

[155] In my view, this claim is too remote. This is a financial benefit that arises from Walmart being a customer but not from the Agreement. There is no evidence to suggest that Walmart knew that or acquiesced to the data being sold. In addition, there is no evidence to suggest that Walmart explicitly or impliedly agreed to bear the risk of such a loss. This claim is dismissed.

v) *Non-OTC Revenues*

[156] This claim relates to K&F's argument that it sold products to Walmart during the currency of the Agreement as OTC which it now says were not OTC products. It will be recalled that OTC products have an effective service fee of 0.59%. Non-OTC products do not have a prescribed service fee in the Agreement. K&F charged a mark-up of anywhere from 7%-14% on non-OTC products. Section 3.2 of the Agreement provides that the parties may "designate other products which are to be distributed on terms and conditions mutually agreed upon by Walmart and K&F". In other word, the Agreement did not include non-OTC products but rather the parties were free to negotiate to add specifics products on agreed upon terms to be distributed by K&F to Walmart.

[157] K&F did sell non-OTC products to Walmart on occasion. Both the product and fees were negotiated with Walmart as required by the Agreement.

[158] Mr. Frisch produced a list of products which he now says, after Walmart repudiated the Agreement, K&F would not have agreed to sell to Walmart at the OTC rate. Instead, K&F says it would have insisted on selling these products as non-OTC products, thereby resulting in a higher fee. In calculating its damages, it now seeks to include these higher fees in its contribution margin analysis. To be clear, the calculation of the contribution margin by Mr. Williams, which I have accepted, currently includes these products as part of the lost revenue but at the lower OTC fees. I am rejecting this claim and do so for several reasons.

[159] First, the evidence was inadequate as to what products are OTC or non-OTC. The definition of OTC is broad. It includes "all products recognized as having therapeutic or prophylactic properties when applied to, or taken into the human body as well as canes, humidifiers, vaporizers, heating pads and other related products; and, all durable medical equipment as well as such other nontraditional items not normally carried by K&F that are not Rx and that the parties mutually agreed from time to time shall constitute OTC". The Agreement included a list of products in Appendix D that were considered OTC including tea, footcare, smoking cessation, cough cold allergy, incontinence, adult nutrition, etc.

[160] I heard varying descriptions from both sides as to what OTC products comprised. For example, I was told by a Walmart witness that OTC products include any product that a pharmacist might be asked her opinion on. It was said that this might include Tylenol, energy bars or condoms- all of which K&F points out could be found at a convenience store. Clearly, the broad nature of the definition and how it is understood by those using the term does not provide much clarity.

[161] Nonetheless, Mr. Frisch's list included items such as incontinence products, canes and other items that clearly met the definition of OTC products. The list was compiled in anticipation of a future negotiation with Walmart. When asked whether the list was intended to capture non-OTC as defined by the Agreement, Mr. Frisch said he did not believe so which was at odds with the claim. In my view, the evidence is insufficient to establish the list of products were indeed non-OTC products.

[162] Moreover, and in any event, s. 3.2 of the Agreement clearly contemplated the parties agreeing on what non-OTC products would be and negotiating a distribution fee for K&F. The products on Mr. Frisch's list were not subject to any agreement by Walmart. In my view, the list provided by Mr. Frisch was aspirational; there was no agreement that the products on that list were to be treated as non-OTC.

[163] Further, the minimum performance doctrine applies to non-OTC products. The Agreement does not require Walmart to purchase non-OTC products. Accordingly, if these products were non-OTC, there is no basis to include these products in the damage calculation as Walmart had no obligation to purchase them.

[164] In the end, in the absence of any compelling evidence to the contrary, I am satisfied that these products were correctly categorized as OTC products and were properly included in Mr. Williams' lost contribution margin calculation as such. The claim for an increase in damages for reclassification of these products is denied.

Mitigation

[165] Walmart argues that K&F was able to add new customers and expand sales to existing customers during the damage calculation period. It states that K&F's non-Walmart revenue growth increased at a greater rate after termination than before termination. It asserts that this non-Walmart revenue growth would not have been possible if K&F had to continue servicing Walmart from April 1, 2021 to December 31, 2022. Accordingly, it asserts that this revenue from other customers must be deducted as a form of mitigation.

[166] After termination, K&F expanded its sales to its existing customers and added new customers. K&F states it did not have capacity constraints that would have prevented it from either expanding services to existing customers or adding new customers while still servicing Walmart.

[167] Mr. Frisch testified that K&F had invested in new technology, such as the A-frame line, which provided tremendous capacity in packaging pharmaceuticals which increased K&F's capacity. He testified that K&F invested in an advanced warehouse system that allowed it to service its customers more efficiently. He testified that K&F has added large customers in the past. Indeed, when it received the national mandate from Walmart it had to acquire a national footprint which Mr. Frisch said had to be "set up quickly". In addition, during the currency of the Agreement, K&F expanded by way of an acquisition of the Canadian operation of AmersourceBergen, which greatly expanded its customer base, demonstrating it had the ability to absorb and service new business. In short, the evidence was that K&F had the capacity and the experience to meet new demand, including adding new and significant accounts.

[168] As reviewed earlier in these reasons, the onus to establish a failure to mitigate rests with Walmart: *Southcott Estates Inc.*, at para. 45. Walmart did not adduce any expert evidence or other evidence on the issue of K&F's capacity to service Walmart and other customers. Instead, as part

of his critique, Mr. Rosen criticized Mr. Williams for failing to do a more fulsome review of K&F's ability to expand its capacity. For example, Mr. Rosen notes that Mr. Williams failed to consider that "K&F may have faced capacity issues if they [sic] had to service the Walmart business and their [sic] increased/new customers sales...". Of course, this type of criticism does not meet the onus of proof. Walmart elected to call no evidence on the issue of mitigation, including any perceived capacity constraints at K&F that would prevent it from servicing new business while still servicing Walmart. As the Court of Appeal noted in *Saramia Crescent General Partner Inc. v. Delco Wire and Cable Limited*, 2018 ONCA 519, at para. 80, a defendant cannot complain that a court when addressing mitigation is unable to consider evidence that was not called.

[169] To the contrary, this court is left with the evidence that K&F had the capacity to meet this new non-Walmart business while servicing Walmart. This conclusion is supported by K&F's track record of having expanded its sales in the past to new clients and meeting the increased demand from existing clients. As a result, in the absence of any compelling evidence to the contrary, I am satisfied that the increased non-Walmart revenue over the period from April 1, 2021, to December 31, 2022 should not be deducted as mitigation.

Reliance Damages

[170] K&F seeks reliance damages. It claims unrecoverable (i.e. wasted) costs, because of the termination of the Agreement on March 31, 2021, rather than December 31, 2022. K&F says it could have avoided these costs had the Agreement ended in accordance with its terms. There are four heads of reliance damages being claimed by K&F.

[171] The first was described as "salary continuance costs". In this category, K&F claims it was not provided sufficient time to wind down its operations and as such incurred employee severance costs which it could have avoided by providing working notice to its employees. K&F claims \$3,962,235 for this head of damage.

[172] The second head of reliance damages are warehouse costs. The warehouses were leased. K&F claims that had it been given adequate notice, it could have managed its leases better. As it happened, it took some time to either rationalize its the warehouse space or for the leases to be terminated. K&F claims \$4,429,000 for this head of damage. The third and fourth heads of reliance damages are transportation costs and vendor settlement payments. K&F claims \$169,000 and \$245,000 for these heads of damages.

[173] It will be recalled "reliance damages amount to wasted expenditures – expenses that the injured party incurred in reliance on the contract but would not have incurred had it known that the contract would be or had been breached": *PreMD Inc.*, at para 65. Reliance compensation is only warranted where the "costs are truly wasted" and where the expenses would not have been wasted regardless of the breach: *PreMD Inc.*, at paras. 67-68. In addition, the court must ensure there is no double recovery.

[174] I accept Mr. Williams' explanation that these amounts were not captured in the contribution margin analysis. That analysis excluded these variable costs. As such, if these are recoverable losses, they would not amount to double recovery.

Severance

[175] In late 2020, particularly over the holidays and into January, senior K&F staff were making plans to address its employees. It will be recalled on December 24, 2020, K&F wrote Walmart

acknowledging Walmart's intent to terminate the Agreement on March 31, 2021. Ms. Russell for K&F testified that she and her team began to prepare for the departure of "300-plus employees" (elsewhere it was said to be 290) and, to do so, in short order in the middle of Covid. The 300-plus employees ran the day-to-day business of Walmart for K&F. Mr. Frisch described how counsel was consulted regarding K&F's severance obligations of each employee. Records were kept of these terminations in the "salary continuation notebook". The notebook sets out the employees' status and the severance granted. I accept that the severance given was based on legal advice. There was no challenge to the general approach taken by K&F or to the records demonstrating how K&F dealt with the departure of its employees.

[176] Walmart submitted that it advised K&F that it intended to terminate the Agreement on March 31, 2021 as early as July 2018. If its statements in July 2018 were not clear enough, Walmart says that it made it crystal clear in August 2020 when it advised that it would be retaining McKesson as of April 2021 to replace K&F. In either event, Walmart submits that if K&F began its severance process with its employees in August 2020, K&F could have given sufficient working notice that no severance claim would be owing to its employees.

[177] First, as already discussed, the duty to take mitigating steps only presumptively arises upon breach of the Agreement which happened March 31, 2021. In this case, I am satisfied that the steps taken by K&F were reasonable if the duty to mitigate arose on March 31, 2021. As it was, K&F took steps as early as December to wind down its employees.

[178] Even if K&F had a duty to mitigate earlier, it would not have been reasonable for them to take steps to do so until December when all prospects of an extension were gone. As noted, it would not be reasonable to terminate employees while there was a prospect of an extension. The evidence establishes that K&F worked diligently from December forward to address its employees who would be redundant now that the relationship with Walmart would end on March 31, 2021. As noted, K&F retained counsel to advise on its obligations for severance. Addressing notice and exiting this many people was undoubtedly a significant undertaking. I was not persuaded by either the evidence or Walmart's argument that K&F acted other than with diligence in parting with their many employees.

[179] I am satisfied that K&F acted reasonably in its severance of its employees. I am satisfied that had the Agreement terminated in the ordinary fashion, that K&F would have provided working notice to its employees. Had that been the case, the severance payments would not be required. As matters transpired, K&F did not have an opportunity to give full working notice to its employees. I am satisfied that but for the wrongful termination by Walmart that the severance payments to the employees would not have been necessary. Accordingly, I accept that these are proper reliance damages. I award K&F \$3,962,235 for what it describes as "salary continuance costs".

Warehouse Costs

[180] K&F leased six warehouses across the country. They were identified as Anjou, Calgary, Keele, Regina, Richmond and Winnipeg. The total claim is \$4,429,000. The amount reflects the carrying cost of the warehouses for varying periods of time past March 31, 2021 because it is asserted K&F did not have sufficient time to offload the leases. While this was presented as one claim, this is in fact six claims. The onus is on K&F to establish that it was unable to dispose of each warehouse in an efficient fashion because of the breach of the Agreement by Walmart. In other words, was the cost truly wasted and was Walmart's breach the cause of that loss.

[181] I accept Mr. Williams' evidence that these costs, like employee severance, were not captured in his expectation damage analysis.

[182] During the trial, K&F filed the leases and renewals where applicable for the six warehouses. Those documents, however, do not establish if the warehouse space was no longer needed or whether it could have been disposed of in a more appropriate fashion. As Walmart submitted, even had the Agreement terminated in accordance with its Term, there would inevitably be a period after termination that K&F would spend rationalizing its warehouse needs. Mr. Frisch testified that he reduced the warehouse space by 40%. However, there were no planning documents or analysis, expert or otherwise, describing how the warehouses were used, how much space was used by Walmart, what dealings K&F had with the landlords to offload the space, how K&F utilized the space or arrived at its plan and the reasons for reducing the square footage of its leased warehouse space. Of course, K&F may go about proving its loss in a host of ways, but the evidence on the need for, use and disposal of the warehouse space was less than spotty and was not sufficient to establish the claimed loss. In closing, there was very little said about how the court was to assess this loss. To be clear, I was directed to Mr. Williams' calculation but his was nothing more than a mathematical exercise.

[183] In the case of the Anjou warehouse, there was no evidence from any K&F witness as to the status of that lease. Mr. Williams in his report comments it was still being used by K&F, but his knowledge is not firsthand. In any event, there is absolutely no evidence by which this court can assess what, if any, part of the Anjou warehouse was no longer needed due to the termination of the Agreement. In my view, K&F has failed to meet its onus to establish reliance damages in respect of the Anjou warehouse.

[184] In respect of the Richmond warehouse, there was nine months remaining on that lease. Again, there was a dearth of evidence of what space in the Richmond warehouse was occupied by product for Walmart and the impact of the termination on that space. K&F stopped using the Richmond warehouse and the inventory was moved to Calgary. There was no detail as to how it was determined that the warehouse was now redundant or if the warehouse serviced K&F's other customers (although presumably nine months after termination the inventory moved was not for Walmart). In short, I am unable to assess what amount of space was redundant due to the termination of the Agreement. Accordingly, I cannot verify or assess whether the loss claimed was the result of the breach. K&F has not met its burden as it relates to the Richmond warehouse.

[185] In the case of the Winnipeg warehouse, K&F renewed the lease in January 2021, after it accepted Walmart's pending termination of the Agreement. It did so because it still needed to service Walmart to March 31, 2021. It claims 13 months of additional rent. There was no evidence as to the reasonableness of signing a lease of that length. In the absence of further evidence, I am unable to conclude that Walmart ought to be responsible for the remaining portion of the Winnipeg lease. Like Richmond, the Winnipeg warehouse was subsequently closed, and the operations were consolidated in Calgary. Again, there is no evidence of how this decision was made or the reasonableness of that decision. As such, I am not satisfied on a balance of probabilities, that this is truly wasted.

[186] In the case of the Keele warehouse, the lease was month to month. There was no evidence as to what occurred at Keele and why notice could not have been given to avoid all losses. Walmart submits that under the Agreement, K&F had an obligation to supply product to the end of the

Agreement. I agree with Walmart that one would expect that there would be a period required to empty and return the warehouse to the landlord even if the Agreement terminated in the ordinary course. As I heard no evidence on this, it is not clear whether one month or many more would be an appropriate time frame for this transition. In the absence of any explanation, I cannot conclude that this was an inevitable loss attributable to the wrongful termination.

[187] In Regina, K&F leased 46,000 square feet of space. Mr. Frisch testified that K&F could operate with only 15,000 square feet after the termination. They were left with 31,918 square feet of redundant space. He advised that K&F could not terminate the space and thus was stuck with the space for the remainder of the four months of the lease. However, there was no detail provided as to how K&F assessed its warehouse needs and whether the space was redundant. There was no insight as to how it was concluded that the 31,918 was redundant and why the costs were necessarily wasted. In the circumstances, there was insufficient evidence by which the court could reasonableness of the claim.

[188] In respect of Calgary, the lease was renewed on March 2021. Some product was shipped there from other warehouses. It is said that this lease was renewed because of the intricacies of certain automated equipment which made moving difficult. This difficulty would have existed regardless of when and how the Agreement terminated. Moreover, the Calgary warehouse was receiving product from other warehouse but there is no analysis as to what space was redundant and whether the space was used to service other customers, including the growing list of customers that I addressed earlier in these reasons. Again, there was insufficient evidence to accept that the renewal of the Calgary lease was a loss attributable to the breach of the Agreement.

[189] To be clear, I do not doubt that K&F may have had difficulty disposing of space after the termination of the Agreement or that warehouse space was consolidated. While damages need not be proven with exactitude, the evidence does not allow me to provide an assessment of whether the loss was avoidable or what a reasonable loss might be, if indeed there was a loss.

Transportation Costs and Vendor Settlements

[190] There was little or no evidence regarding these two claims. In closing submissions, I was directed to no evidence as to the vendor settlement payments. In respect of the transportation costs, I was directed to evidence by Mr. Frisch that K&F relies on their own fleet and independent carriers and that there would be an impact on both in respect of the termination. There was no explanation as to why these costs are attributable to Walmart's termination of the Agreement. I agree with Walmart, there is no evidence that supports these claims, including whether these costs, if incurred, were truly wasted or caused by the termination. These claims are denied.

Pre-Judgment Interest

[191] K&F requests this court to use its discretion to provide an increased rate of prejudgment interest to 3.03% from the statutory 0.5%. For the following reasons, I decline to do so.

[192] The calculation of pre-judgment interest is governed by *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (the "CJA") and applicable *Rules*. Pre-judgment interest awards vary depending on the nature of the award. Section 128 of the CJA provides for awards of prejudgment interest on payments of money as follows:

128 (1) A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order.

[193] “Prejudgment interest” is defined as “the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the proceeding was commenced, rounded to the nearest tenth of a percentage point”: s. 127(1) of the CJA. The rate is published by the Attorney General’s office. In this case, the applicable rate is 0.5%.

[194] Under s. 130(1)(b) of the CJA, the court may disallow or vary interest “where it is just to do so.” The discretion is exercised based on a mandatory list of factors in s. 130(2):

(2) For the purpose of subsection (1), the court shall take into account,

- (a) changes in market interest rates;
- (b) the circumstances of the case;
- (c) the fact that an advance payment was made;
- (d) the circumstances of medical disclosure by the plaintiff;
- (e) the amount claimed and the amount recovered in the proceeding;
- (f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
- (g) any other relevant consideration.

[195] Notwithstanding the discretion provided by s. 130(2), the presumption is that a plaintiff is entitled to the prescribed interest rate: *Henry v. Zaitlen*, 2024 ONCA 614, at paras. 16 and 20. The presumption is only to be dispensed with when the court “considers it just to do so”. As the Court of Appeal stated in *Aubin v. Synagogue and Jewish Community Centre of Ottawa (Soloway Jewish Community Centre)*, 2024 ONCA 615, 174 O.R. (3d) 509, at para. 32, the section creates a “rebuttable presumption that should only be deviated from where the party seeking a higher or lower rate demonstrates that there are unusual or special circumstances sufficient to justify such a departure, having regard to the mandatory criteria under s. 130(2) of the CJA”. As the Court of Appeal noted in *Aubin*, it was the “will of the legislature to establish a coherent scheme that sacrifices perfection ‘in the interest of consistency and certainty’” and that is why courts must only depart from this standard where it is just to do so: at paras. 33-34. To deviate from the prescribed rate requires a “full and balanced application of the factors set out in s. 130(2)”, at *Aubin*, para. 50.

[196] In seeking to vary the pre-judgment interest rate, K&F relies exclusively on the first criteria, being “market interest rates”. In establishing market interest rates, the parties may agree on an applicable market interest rate but absent an agreement, evidence is required as to market interest rates and the fluctuation of those rates over the relevant time. As stated in *Henry v. Zaitlen*, at para. 60:

In the absence of such an agreement, the party seeking to have the court exercise its discretion to deviate from the presumptive interest rate in issue must produce evidence of rates available in the market over the relevant period. This goes back to the purposes of prejudgment interest rates – to fairly compensate a plaintiff for the loss, to encourage

settlements and efficiently run proceedings, and to deprive the defendant of the benefit derived from the use of the funds ultimately awarded.

[197] K&F called no evidence as to the general market on interest rates over the applicable period. Instead, Mr. Williams took the average of the prejudgment interest rates from January 1, 2021, to June 30, 2025. As noted in *Aubin*, the market interest rate is not the same as the prejudgment interest rates: at paras 53, 57-58. Simply averaging the prejudgment interest rates is not evidence of market rates. Reference was made to the fact that Mr. Williams had regard to K&F's interest rates when addressing the Cash Flow Benefit involving the early payment of invoices. It is submitted by K&F that its cost of borrowing reflects market rates by which the reasonableness of the proposed blended prejudgment interest rate may be assessed. However, Mr. Williams never used that information to arrive at a market rate for pre-judgment interest and, as such, he never opined on how K&F's bank rate relates to the wider market. Moreover, there is no basis to conclude that K&F's own interest obligation on borrowing is reflective of market rates. Indeed, there was no evidence of K&F's credit rating or what type of security it might provide in exchange for its borrowing rate. K&F's borrowing rate is not the equivalent of market interest rates.

[198] K&F's reliance on the prejudgment interest rates as representative of the "changes in market interest rates" criterion under s. 130(2)(a) of the CJA is not sufficient. I have not been directed to any of the other factors under s. 130(2) in support of an increase in the rate. In my view, K&F has not met its onus to justify a deviation from the prescribed prejudgment interest rate, and I am not persuaded that it is just to do so.

[199] Accordingly, prejudgment interest shall be calculated in accordance with the prescribed CJA rate. Again, it is hoped that the parties will agree on the applicable PJI amounts but if there is a dispute the parties may seek an attendance to resolve any dispute.

Counterclaim

[200] Walmart has several claims against K&F. Walmart seeks OTC rebates withheld by K&F. It seeks the return of monies prepaid by Walmart and retained by K&F. Finally, it seeks damages for the failure of K&F to use "best efforts" to service Walmart during the transition period.

OTC Rebates

[201] The Agreement provides that Walmart was entitled to a 2.26% rebate on purchased OTC products. Because Walmart was not honouring the obligation to compensate K&F for NFI, K&F withheld its approval of the rebates, effectively denying Walmart of this contractual benefit. Walmart seeks judgment in the amount of \$20.8 million for this head of damages, which is higher than the \$18.9 million claimed in its statement of claim.

[202] Walmart brings a motion, if necessary, to amend its prayer for relief in its pleading to capture this higher amount. I have been advised of no prejudice to K&F in respect of the amendment. As such there is no basis to deny the amendment: *Tribute (Springwater) Limited v. Atif*, 2021 ONCA 463, 33 R.P.R. (6th) 1, at para. 23; *Evans v. The Catholic Children's Aid Society of Toronto et al.*, 2025 ONSC 5652, at para. 14; *M.B. v. 2014052 Ontario Ltd*, 2012 ONCA 135, 109 O.R. (3d) 351, at paras. 72-74.

[203] Having rejected K&F's argument that it should be able to categorize certain products as non-OTC, the calculation of the rebate is predicated on all products that were sold being OTC. Aside from the pleading argument above, K&F did not contest the entitlement or the amount. Accordingly, Walmart is entitled to judgment in the amount of \$20.8 million in respect of withheld OTC rebates.

Prepayment Amount

[204] After Mr. Frisch's "rules of the road" email of December 24, 2020, there ensued communication as to how Walmart and K&F would wind down their relationship. K&F was concerned with having too much product left at the end of the relationship and wanted to ensure it had the necessary cashflow from Walmart during the transition.

[205] The parties agreed that Walmart would prepay \$9 million and top up as required to cover three days of orders. In proposing a prepayment amount, K&F wrote Walmart that it would "return the unused portion or, with your agreement, apply it to subsequent orders".

[206] After all was said and done, there was an unused amount of approximately \$3 million which was retained by K&F, ostensibly for contingencies. Since the commencement of the litigation, there have been two further repayments by K&F. The amount currently owing is \$1,117,095.

[207] K&F states it withheld this amount due to various alleged losses. In closing, it limited its argument to totes and Telxons which were supplied to Walmart during the relationship but not returned. Telxons are a brand of optical scanner used by Walmart. Totes are containers in which it delivers the products to Walmart. Some totes are temperature controlled as some pharmaceuticals are required to remain at a specified temperature. The credits sought are in the amounts of \$521,000 and \$342,000 respectively. As such, K&F only acknowledges that it should return \$168,103.29 of the prepayment.

[208] Aside from disputing the appropriateness of these two setoffs, Walmart asserts that equitable set-off was never pleaded and therefore is not before the court. Further, it asserts the two year limitation period for making such a claim has long since passed. There was no claim for these amounts by K&F and no mention of them in the statement of defence.

[209] In *Canada Trustco Mortgage Co. v Pierce* (2005), 254 D.L.R. (4th) 79 (Ont. C.A.) leave to appeal refused, [2005] S.C.C.A. No. 336 (Pierce), [2005] S.C.C.A. No. 337 (Canada Trustco Mortgage Co.), the Court held that equitable setoffs are not generally subject to limitation periods; see also *Grand Financial Management Inc. v. Solemio Transportation Inc.*, 2016 ONCA 175, 395 D.L.R. (4th) 529, at para. 94. As such, the expiry of the limitation period is not fatal so long as the doctrine applies. However, to the extent that equitable setoff is raised to defeat a claim, it is an affirmative defence and, as such, consistent with rule 25.07(4) of the Rules, it must be pled: *Midland Resources Holding Ltd.*, at paras. 109-11; *Watt v. TD Insurance*, 2022 ONSC 1514, at paras. 29-39. In *Pierce*, the defendant had her plea struck and could not avail herself of an equitable set-off defence.

[210] In this case, there is no plea either in the defence or otherwise of equitable set-off. However, the rule is not absolute. As stated by the Court of Appeal in *Midland Resources*, at para. 111:

The rule is not absolute. This court has excused defendants from their failure to raise an affirmative defence in the pleadings where the issue was otherwise clearly raised and put

in issue before trial. However, raising a potentially dispositive issue during closing submissions, after the close of evidence, may well prove too late. [Citations omitted].

[211] There are circumstances where a party is taken by surprise, such that the party may have conducted the case differently, because equitable set-off was not pled. But that is not this case. Like the issue regarding minimum performance, Walmart was not surprised by this argument. K&F has been claiming to set off amounts since 2023. Each side called evidence on the issue and clearly anticipated the argument from the outset. As such, I am not prepared to deny the claim for equitable set off because it was not pled as an affirmative defence.

[212] The Court of Appeal in *Canada Trustco Mortgage Co. v. Pierce*, at para. 40 set out the test for equitable set off as follows:

The requirements for proving equitable set-off in Canada are enunciated in *Holt v. Telford* at p. 212 and are drawn explicitly from English authorities:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: *Rawson v. Samuel*, [1841] Cr. & Ph. 161, 41 E.R. 451 (L.C.).
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: ... [*Br. Anzani (Flexistowe) Ltd. v. Int. Marine Mgmt (U.K.) Ltd.*, [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: ... [*Fed. Commerce and Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
4. The plaintiff's claim and the cross-claim need not arise out of the same contract: *Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct); *Br. Anzani*.
5. Unliquidated claims are on the same footing as liquidated claims: [*Nfld. v. Nfld. Ry. Co.*, [1888] 13 App. C. 199 (P.C.)].

[213] In addressing equitable set-off, the Supreme Court in *Holt v. Telford*, [1987] 2 S.C.R. 193 (S.C.C.) at p. 213 referred to Lord Denning in *Federal Commerce and Navigation Co. v. Molena Alpha Inc.* wherein he commented:

This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one

thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

[214] In *PIA Investments Inc.v. Deerhurst Ltd. Partnership* (2000), 20 C.B.R. (4th) 116 (Ont. C.A.), at para. 31, Justice O'Connor described the test this way:

In determining whether equitable set-off should be allowed it is necessary to first look at the connection between the claims involved and to then consider the effect the set-off would have on the equities between the parties. Equitable set-off arises when there are cross obligations which are so closely connected or related that it would be unjust to permit one party to enforce its obligation without permitting a set-off to the other.

[215] Put shortly, are the amounts claimed for the Telxons and totes so clearly connected with the amounts owing under the prepayment agreement that it would be manifestly unjust to enforce repayment without taking into account any amounts which may be owing in relation? See *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.), at para. 27.

[216] The prepayment arrangement was a simple agreement whereby Walmart agreed to prepay \$9 million on account of three days of invoices. The agreement did not expressly contemplate any set offs by K&F. Instead, it expressly provided if money was unused, it could be used for future invoices or was to be returned. The agreement had nothing to do with totes or Telxons. As such, the requested equitable set off for totes and Telxons does not go to the "very root" of the prepayment amounts, nor is the set off claim so clearly connected with the prepayment agreement that it would be unjust to permit Walmart to enforce its prepayment claim without the setoff.

[217] In addition, I do not think disallowing the setoff is manifestly unjust to K&F. K&F could well have included the claim for the totes and Telxons in its claim. It chose not to do so.

[218] As I have concluded that the requested set offs are not appropriate, I award the entire amount owing on the prepayment claim of \$1,117,095 to Walmart.

Lost Sales Claim

[219] Walmart claims that K&F failed to meet its obligations under s. 9.1 to use its "best efforts" to supply the necessary product to its stores when the relationship was winding down, particularly between February and March 2021. It also states that K&F failed to meet its obligation under s. 4.2 to "work collaboratively and to use reasonable commercial effort to ensure an orderly transition and minimize the costs on the termination of the Agreement". According to Walmart, K&F breached the implied duty of honest performance by failing to take meaningful steps to meet its contractual obligations. Walmart further asserts that K&F misrepresented that it would meet its obligations to service Walmart in accordance with the Agreement until April 1, 2021. Walmart seeks damages for lost sales of OTC products. The relevant facts, some of which have been canvassed elsewhere, are set out below.

December-March 2021

[220] By December 2020, it was apparent that the relationship was coming to an end. K&F was concerned that it would be left with excess inventory at the end of March 2021. At the same time,

it had to prematurely unwind its relationship with its employees, suppliers and other business partners such as landlords. For its part, Walmart was concerned that K&F continue to meet its service obligations in s. 9.1 of the Agreement. In addition, it wished to have an orderly transition. Section 4.2 of the Agreement provided that the parties would “work collaboratively and to use reasonable commercial efforts to ensure an orderly transition and minimize the costs on the termination of this Agreement, including the resolution of all Products held for Wal-Mart in K&F inventory.”

[221] As already mentioned, Mr. Frisch sent Ms. Kiroff the December 24, 2020 “rules of the road” email. The email set out what K&F expected in the transition. It expected to continue to be paid within four days without set offs. It would cease to perform if there were set offs or non-payment. K&F sought prepayment for deliveries the week of March 24, being the last week before Walmart was to terminate the Agreement. This was set at \$30 million. It was proposed that there would be no deliveries past March 31, 2021. K&F sought a commitment from Walmart to purchase any remaining inventory existing on March 31. Absent such a commitment, K&F would “manage inventory levels so as to be close to zero on that date as is practicable.”

[222] Ms. Kiroff responded that Walmart would reply to K&F’s “proposal” by January 5, 2020. Walmart then proceeded to accelerate the onboarding of McKesson. Walmart entered a letter of agreement (“LOA”) with McKesson on December 31, 2020. The LOA provided a section entitled Transitionary Start Activities. The section provided that “beginning immediately,” the parties would integrate their systems so as to facilitate the supply and distribution of products, being the same products covered by the Agreement. Walmart agreed to “use reasonable efforts with its current vendor [i.e. K&F] to keep the level of inventory leading up to the Transition as low as reasonably practicable to maintain [Walmart’s] continuity of supply.” The LOA went on to provide that Walmart and McKesson “would cooperate reasonably with [K&F] as it pertains to the transition of the Products in inventory.” There was never any three-way cooperation as envisioned by the LOA and, indeed, Walmart never advised K&F of the LOA or its transition arrangements with McKesson.

[223] On January 3, 2021, with the LOA in place, Ms. Kiroff responded to Mr. Frisch’s letter. She advised that Walmart was open to discussing transition issues. She cautioned that any cessation of supply through the end of the transition, which included 15 days post-termination, would be viewed as a breach of the Agreement. She further advised that Walmart would abide by the payment terms of the Agreement which did not prohibit setoffs or require security. She advised that Walmart was willing to consider purchasing any remaining merchantable product equivalent to 15 days of supply. Aside from its own private label, Walmart had no appreciation as to what the 15 day inventory would consist of and was not prepared to make a commitment without more detail. She proposed a meeting that week.

[224] Mr. Frisch responded that he was disappointed that Ms. Kiroff had not addressed all the items in his December 24, 2020. He reiterated that Walmart was in breach of the Agreement. He wrote that K&F would act in “accordance with its legal rights, powers and obligations.” He saw no point in a meeting with Walmart unless “issues of payment, inventory and timing” are resolved in a way to preserve the parties’ respective rights. He suggested that the lawyers attempt to resolve matters. The lawyers did communicate and did exchange offers on a number of points, including the supply of product. It was noted that if inventory was kept at historical levels, inventory may be as high as \$90-120 million when all was said and done. As noted by counsel for Walmart, the

parties were “very close” on how to reduce the inventory. It was noted that both parties had the “same goal” of minimizing the inventory at the end of the transition, being the third week of April. The discussions, however, floundered on other issues. No agreement on transition issues was reached between the lawyers. Their communications ceased in mid-January.

[225] As early as January 6, 2021, in an internal email from Chris Lloyd to Ms. Kiroff, Walmart recognized that a transition goal was for K&F to have only 2-3 weeks of product on hand at the end of March 31 to service the transition period, which was to end April 21, 2021. The email stated that Walmart would “work with K&F to help them to determine when to stop purchasing inventory” based on Walmart’s forecasts. It was planned that McKesson would begin to purchase product to fill the pipeline. I take this email to acknowledge that by the time the relationship ended (i.e. after the transition) it was anticipated by Walmart that K&F would have little or no inventory left and that McKesson would have transitioned to fill any void.

[226] There were attempts by Walmart representative Catherine Theberge-Conner to address the matter with K&F representative Antoinette Russell. It was clear that neither one had authority to resolve the impasse. Ms. Russell made it clear any resolution rested with Mr. Frisch and Ms. Kiroff. In my view, given the state of affairs, this was a proper and well founded response.

[227] Without a transition agreement, both parties began to independently protect their respective interests. K&F sought agreements from suppliers that they would accept the return of product after the Agreement ended. Some agreed, some did not. Walmart was aware of this initiative but took a hands off approach. Walmart began to be concerned about service levels. In February, the fill rate levels dropped. Rumours circulated of cancelled orders, although no direct evidence on this point was called by Walmart. Walmart sought to shore up its supply relying on the LOA and McKesson. However, for reasons not articulated, McKesson failed to meet a large portion of Walmart’s orders. There was also communication within Walmart that stores sought to order OTC products from McKesson in this transition period but were advised not to do so directly. As noted, Walmart never sought to engage the portion of the LOA that required McKesson to cooperate with K&F.

[228] Notwithstanding Ms. Russell’s view that the senior people needed to engage, there was no engagement until March. Through emails between Mr. Frisch and Ms. Kiroff, they did address some elements of transition in March. These included the prepayment agreement referenced above. The prepayment agreement addressed the payment for shipped product. At that time, Mr. Frisch wrote that the prepayment did not alter his concerns about the inventory at termination. Those concerns were initially set out in his December 24 email. Absent an agreement on inventory at termination, K&F would attempt to make arrangements with individual suppliers, referencing the prospect of suppliers taking a return of inventory. Otherwise, as stated in the December 24 email, K&F would manage the inventory as close to zero as practicable. He noted that as of early March the fill rates of Rx products were 99% but OTC was less because suppliers were not co-operating.

[229] While the Agreement contained a transition period of fifteen business days which would end after the third week of April, the parties agreed to end the relationship without a transition period. Walmart’s counsel aptly quotes K&F’s counsel’s opening in this case that after the parties “cobbed together” a type of transition in early March that they “had enough of each other” and agreed to part ways as of March 31, 2021.

[230] Mr. Rosen provided an analysis of fill rates or service rates referenced in s. 9.1. His analysis was just for OTC products. Rx products were not included. The fill rate calculation has several

moving parts which I need not review. His calculation showed a fill rate less than 95% in many months but the rate drops precipitously in February and March to 28% and 22% of what Walmart ordered. However, these rates were not calculated on a consecutive six-month basis as set out in s.9.1 but rather only a monthly basis. As discussed, s. 9.1 envisioned that service levels would be assessed on a six month rolling average, not monthly, weekly or daily.

[231] In calculating what he claimed to be the loss, Mr. Rosen first deducted 5% to reflect that K&F had a 95% service requirement. In my view this is not correct. As the claim is limited to OTC products, the service requirement is some amount less than 95%. The 95% fill rate was for all Products, and Pharmaceuticals had a 97% fill rate and Pharmaceuticals accounted for 60% of all sales. Next, Mr. Rosen deducted another 5% as K&F received credit for returned product, which he calculated to be the average return rate. He then calculated what those sales would have been to Walmart.

[232] For reasons that were never explained, Mr. Rosen was not provided with any of the actual sales data by Walmart. Instead, he assumed a failure of the service requirements necessarily resulted in a loss of sales for Walmart. However, the shelf life of OTC products is in the range of 38 days. That is, a short delivery in March would result in less product for sale over the next 38 days. It is of note that in March Walmart ordered and delivered some \$44.5 million of products from McKesson. Even more products were ordered but as already mentioned McKesson failed to deliver on those orders and stores were discouraged from making direct orders.

[233] There was no explanation as to why Walmart's sales data by product was not produced. Walmart did provide some revenue data for its Health and Wellness business segment, but it is not detailed in a way that the court can conclude that K&F's service levels, in fact, resulted in less sales at Walmart stores.

[234] Mr. Rosen initially calculated lost profits on K&F's alleged failure to supply OTC product at the Agreement's stipulated service levels as \$20,581,577. However, this amount included Walmart's private brand Equate, which was expressly excluded from the Agreement's service levels. Mr. Rosen adjusted the claimed amount to \$15,381,577.

Agreement Provisions

[235] This claim engages several provisions of the Agreement.

[236] The Agreement contains service requirements in s. 9.1. That section provides:

K&F will be required throughout the Term to use its best efforts to provide satisfactory regular service levels to Stores up to a minimum of 95% overall service level in all Products on a regular replenishment basis in accordance with Section 3.1, except for Pharmaceutical products which will be up to a minimum of 97% service level. In the event that overall service levels for any consecutive six month period are less than 95% as an overall average for such time period, then Wal-Mart shall have the right to require K&F to pay a fee in the amount of \$100,000.00 for such first occurrence and \$200,000.00 for each successive occurrence in order to compensate Wal-Mart for extra costs incurred in procuring Products from other sources. Should three (3) such instances occur, then Wal-Mart may send a written notice to that effect to K&F and K&F shall have a period of thirty (30) days from

the receipt of such notice to remedy the situation by restoring a 95% overall service level. In the event K&F does not remedy the deficiency in regular service levels within such thirty (30) day period and maintain, Wal-Mart's may, at any time thereafter, in addition to the foregoing remedy as well as any other remedy available to it at law or in equity, unilaterally terminate this Agreement by sending a written notice of termination to K&F. This Agreement would then be terminated upon receipt by K&F of said notice of termination. For clarification, "regular replenishment basis" shall be deemed to exclude promotional items, private labels and manufacturer shorts or inability to supply.

[237] The provision requires K&F to use "best efforts" to supply up to 95% of all "Products" (i.e. branded Rx, generic Rx and OTC) and 97% of "Pharmaceuticals" (i.e. branded Rx and generic Rx). This claim relates to OTC product only. Pharmaceuticals accounted for 60% of the sales.

[238] The section expressly set out a liquidated damage amount where service levels are not met in "any consecutive six months". The first breach of the service limits results in a fee owing to Walmart of \$100,000 and a fee of \$200,000 for each successive breach. This amount was to compensate Walmart for the extra costs incurred in procuring Products from other sources. Section 9.1 must be read in connection with s. 3.1 which provides that Walmart would be entitled to purchase Product from others where K&F cannot supply Product. It was clearly anticipated where there was a shortfall in delivery Walmart was free to source product elsewhere without breaching the Agreement.

[239] The Agreement did not provide a remedy other than where the breach was measurable over a consecutive six month period. The six month period was a deliberately chosen timeframe. Presumably, service levels might fluctuate within a six month period but aside from allowing Walmart to source supply elsewhere, the parties did not provide for a remedy. The continued breach of the service levels over successive six month intervals could result in termination at Walmart's behest. Termination did not deny Walmart any other available remedy, however there was no express reservation of rights where termination was not available for a breach of the service levels. To terminate, there needed to be at least two prior breaches, and notice had to be provided. This provision reflects that the parties turned their mind to not only failures of the service levels but created a very measured contractual entitlement to damages and termination. In my view, this type of provision inherently recognizes that service levels may fluctuate but that due to the parties' investment in the relationship the consequences are, as I say, measured.

[240] The next provision relevant to this claim is 4.2 which provides:

Upon the termination of this Agreement, Wal-Mart agrees to continue to purchase from K&F and K&F agrees to continue to supply Wal-Mart's customary inventory operating requirements for a period of fifteen (15) Business Days, or such longer period as the parties may from time to time agree to in writing, which purchases and sales shall be subject to the terms and provisions of this Agreement as though the Term had not expired. Both parties agree to work collaboratively and use reasonable commercial efforts to ensure an orderly transition and minimize the costs on the termination of this Agreement, including the resolution of all Products held for Wal-Mart in K&F inventory. For greater certainty, nothing in the foregoing sentence shall require either party to agree to any longer period of time.

[241] Section 4.2 addresses the specific situation of termination. It refers to a continuation of supply for 15 business days or more if agreed upon after termination. In theory, this would mean that K&F would continue to supply product to the third week of April. As noted, the parties modified this requirement such that the Agreement terminated on March 31, 2021 without requiring the supply of product for 15 business days post-termination. The section requires the parties to work collaboratively to provide an orderly transition and minimize costs. It specifically addresses the inventory being held by K&F which, as mentioned, based on the service levels in s. 9.1 would be considerable. This is undoubtedly the section which motivated Mr. Lloyd's memo. If no steps were taken and inventory was not addressed, the magnitude of the inventory issue was significant.

Discussion

[242] Walmart asserts that K&F breached the service levels in s. 9.1. Further, it says the liquidated damage provisions in s. 9.1 do not apply because K&F did not use its "best efforts". Walmart further states that K&F breached the duty of honest performance in failing to take reasonable or meaningful steps to fulfill contractual duties: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 S.C.R. 908. It also asserts that K&F did not work collaboratively as required by 4.2.

[243] K&F states that the operative section is s. 4.2 and that it was acting reasonably in accordance with that section. Further, it says that it was using "best efforts" in the circumstances and, in any event, s. 9.1 provides liquidated damages of \$200,000 for service breaches over a six month period. The section is the complete remedy and, in any event, is not triggered. Finally, it asserts that even if service levels were not met, Walmart has not established that it suffered any loss.

[244] In advancing its arguments, Walmart relies on the duty of honest performance. It asserts that, K&F breached the duty of honest performance by failing to use "best efforts" as required under s. 9.1 to ensure a supply of product and seeking extracontractual demands. Walmart correctly asserts that a party may not lie or otherwise knowingly mislead its counterparty in respect of matters directly linked to the performance of the contract: *Bhasian*, at para. 73. The duty of good faith must be considered in the context of the circumstances and wording of the applicable contract. A party may still act in its self interest. As the Supreme Court noted in *Bhasin*, at para. 7070:

In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, [2014 SCC 12](#), [2014] 1 S.C.R. 177, at para. [31](#). Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency. [Citations omitted.]: *Bank of America Canada v. Mutual Trust Co.*, [2002 SCC 43](#), [2002] 2 S.C.R. 601, at para. [31](#).

[245] In *Bhasin* the Court explained that the good faith doctrine ought not to lead to palm tree justice, at para. 70:

The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

Moreover, a party is not expected to subvert its own interest in the pursuit of enhancing the opposing party : *C.M. Callow Inc*, at para. 82; *Bhasin*, at para. 65. As the Supreme Court noted the application of the good faith doctrine is a “highly context-specific” analysis: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 ,[2021] 1 SCR 32, at para 52

[246] Of course, the duty of good faith applies to both parties.

Section 4.2

[247] Section 4.2 sets out the parties’ expectation during the transition toward ending the relationship. Section 4.2 clearly envisions the parties working collaboratively and using commercially reasonable efforts to minimize costs, particularly as it relates to “all Products held for Wal-Mart in K&F inventory”. When contracting, the parties recognized that K&F ought not to be left with an unreasonable amount of inventory when the relationship ended. As was discussed amongst counsel, the amount of inventory that could be left at the end of the relationship on the current service levels was in the range of \$100 million.

[248] Section 4.2 recognizes the very issue at the heart of this dispute, which was K&F’s inventory at termination, which in turn impacted on the Walmart service levels. The contractual intention of s. 4.2 is to fairly address the economic consequence at termination, particularly as it relates to inventory. Here, the parties agreed to forego the transition and end the relationship on March 31, 2021, but I do not see that impacting the contractual intention of s. 4.2 that in terminating the relationship that the parties would work together to minimize the cost of termination, including the issue of K&F’s inventory. It is of note that K&F could well have accepted the repudiation by Walmart in December 2020. Had it done so, the Agreement would have come to an immediate end. Instead, K&F agreed to perform to March 31, 2021, in part to mitigate its losses. In doing so, the transition provision must be assessed in light of this reality.

[249] Section 4.2 is a specific section addressing termination of the relationship. The general rule of contractual interpretation is that where there is an apparent conflict between a general term and a specific term, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question: *BG Checo International Ltd. v. B.C. Hydro and Power Authority*, [1993] 1 S.C.R. at p. 23 . As the Supreme Court noted, this will most often result in the general terms of a contract being qualified by specific terms. In that way, the court can give effect to the intention of the parties as evident from the contract as a whole. However, where two sections may not be reconciled, then one section must prevail. In such cases, the court is to favour the clause that was “tailored to their specific situation”: *Fuller v. Aphria Inc.*, 2020 ONCA 403 ,at para. 60.

[250] In my view , s. 9.1 is the general provision relating to service levels. Section 4.2 addresses the specific situation of winding down of the relationship, including inventory. Applying *BG Checo*, s. 4.2 is the specific provision to the general provision in s. 9.1. If K&F was to manage its inventory in anticipation of termination, the service requirements in s. 9.1 could not apply as it would inevitably lead to K&F having excessive inventory, which would be the antithesis of minimizing costs of termination. In my view, s. 4.2 is what was intended to govern at this stage of the relationship. As noted, that provision required the parties “to work collaboratively and use reasonable commercial efforts to ensure an orderly transition and minimize the costs on the termination of this Agreement, including the resolution of all Products held for Wal-Mart in K&F inventory”. The issue then is whether s. 4.2 and s. 9.1 can be reconciled. As it relates to service

levels, I do not think it can be. Maintaining the level of service as set out in s. 9.1 would prevent the orderly winding down “including the resolution of all Products held for Wal-Mart in K&F inventory”. Nonetheless, the obligation is on both parties to “work collaboratively and use reasonable commercial efforts to ensure an orderly transition and minimize the costs on the termination of this Agreement”. While s. 4.2 makes specific note of the inventory left at termination, the obligation to work collaboratively and use commercially reasonable efforts to minimize the costs of transition must also include consideration of Walmart’s need for product.

[251] Each side has its own view as to who was responsible for the breakdown. I do not accept Walmart’s argument that the breakdown falls solely on K&F. I accept, in the absence of a comprehensive plan on the winding down of the relationship, that K&F scaled back its purchase of OTC product. K&F sought suppliers’ agreement that they would take product returns when the Agreement came to an end on March 31, 2021. It was suggested that K&F cancelled orders. However, there was no direct evidence of this and as such I do not give it any weight. Nonetheless, I accept that K&F did not place orders with its suppliers at the same levels as it had previously. The issue however is whether K&F failed to co-operate or to use commercially reasonable efforts.

[252] In this case, the emergent situation to wind down the Agreement was created by Walmart’s intended breach. Moreover, Walmart knew from the outset that inventory levels would impact service levels. This is plainly evident by Walmart entering LAO with McKesson which included a transition provision that contemplated three-way co-operation. It was the very issue raised by Mr. Lloyd. Mr. Lloyd anticipated a plan that would allow K&F to wind down its inventory and have it replaced by McKesson. Mr. Lloyd’s expectation at termination was consistent with Mr. Frisch’s intent as expressed in his December 24 email, which was that Walmart inventory at K&F would be close to zero. The magnitude of the inventory risk for K&F was set out plainly between the lawyers with the prospect of K&F inventory for Walmart being in the \$100 million range at the end of the relationship. In the face of this, it is hard to comprehend why Walmart never advised K&F that McKesson was available to assist with a transition nor did they engage any three-way discussion. This was clearly the logical and most commercially reasonable approach to addressing both the inventory and the service levels. In my view, having plunged the parties into an early termination, Walmart had a good faith obligation to bring all the resources it had available to address the winding down of inventory which impacted service levels. It failed in this regard.

[253] There is no doubt both sides could have done more to work collaboratively to minimize the cost of the termination of the Agreement. In my view, it is of some importance that the termination arises because of the breach of the Agreement by Walmart. In my view, where the actions of Walmart gave rise to an unlawful termination, K&F was entitled to significant leeway to achieve the contractual intention of rationalizing its inventory to minimize costs.

[254] In the end, the obligation was to collaborate and to use commercially reasonable efforts. Collaboration is the act of working together; it takes two. Walmart is not without a significant amount of blame. In the circumstances, I cannot conclude that K&F is in breach of s. 4.2 in its response to the unlawful termination of the Agreement by Walmart.

Section 9.1

[255] While I believe this claim is governed by s. 4.2, I will briefly address Walmart’s argument on s. 9.1. Walmart’s argument on “best efforts” has two parts. It states that K&F had an obligation

to use “best efforts” to meet the service level and because it did not, the liquidated damage provision in that section is not an exclusive remedy for failing to meet the service obligations.

[256] If s. 9.1 does apply, it must be interpreted in the context of the wrongful termination and the intention to minimize costs of the inventory in s. 4.2. As discussed, K&F was balancing meeting the requested deliveries by Walmart, winding down the inventory to minimize the cost of termination. As mentioned, the actual service levels in s. 9.1 were incompatible with the requirement of s. 4.2.

[257] I was presented with several definitions of “best efforts”. In my view, “best efforts” requires a party to do all that can reasonably be done in the circumstances to meet the objective to which best efforts applies: *Bruce v. Waterloo Swim Club* (1990), 73 O.R. (2d) 709, at para. 40. The obligation is “not boundless. It must be approached in light of the particular contract, the parties to it and the contracts overall purpose as reflected in its language”: *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.*, [1994] 5 W.W.R. 719, at para. 71. Consistent with *Bhasin*, best efforts includes an obligation to act honestly and to act fairly when addressing the task at hand: *CAE Industries Ltd. v. R.* (1982), [1983] 2 F.C. 616 (T.D.), affirmed (1985), 20 D.L.R. (4th) 347 [1985] 5 W.W.R. In addition, an assessment of whether a party uses its best efforts is to be assessed on an objective, not subjective standard: *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 12 O.R. (3d) 675 (Ont. C.A.). Frankly, it was never made clear as to whether or how the good faith contractual obligation would augment the contractual obligation of “best efforts”. There may be some small distinctions but none which I was directed to by counsel.

[258] I have already reviewed the performance of K&F relative to the terms of the Agreement in s. 4.2. The provisions of s. 9.1, if they apply, and “best efforts” must be interpreted having regard to the pending termination of the Agreement. Maintaining the service levels that are cited by Mr. Rosen would have left significant inventory with K&F. As already pointed out, this is the import of Mr. Lyons email and the communication between counsel which estimated at current service levels that K&F could end up with an inventory of approximately \$100 million. This is not what the Agreement contemplated. The parties understood there would be a winding down. As such, in the circumstances, if “best efforts” is a gating provision that qualifies the remedy provisions in s. 9.1 as submitted by Walmart then I accept best efforts was used by K&F in the circumstances.

[259] Moreover, s. 9.1 does not address a failure to meet service levels in any given day, week or month. It addresses a failure to meet the prescribes service levels over “any consecutive six month period”. Mr. Rosen’s calculations of service levels was not based on a six month period. As such, there was no breach of s. 9.1.

[260] In addition, s. 9.1 provides a specific liquidated damage amount. I agree with K&F that had there been any breach, damages would be capped at the amounts stipulated in s. 9.1. Parties are free to negotiate liquidated damage provisions, being a “genuine covenanted pre-estimate of damage”: *Bidell Equipment LP v. Caliber Midstream GP LLC*, 2020 ABCA 478, at para. 24. In my view, s. 9.1 contemplated a breach of the service levels would result in Walmart buying product elsewhere and then being compensated for the extra cost and expense which was stipulated as \$100,000 on the first occasion and \$200,000 thereafter. This fits with the intent of s. 3.2 which contemplated that Walmart would source product elsewhere when required. There was no evidence that these amounts were not genuine estimates for the extra costs incurred by Walmart in procuring

products from other sources, as was expressly stipulated in s. 9.1. As noted, this was a measured response which was intended to be the sloe remedy.

[261] In its closing, Walmart relied on the purchase order terms and conditions which are attached as an Appendix to the Agreement. The purchase order states that K&F may “recover from the Seller any damages sustained by Purchaser as a result of the Seller’s breach or default”. In my view, this provision is intended to apply to the purchase of specific product. I was directed to no specific purchase order issued by Walmart. No specific purchase order was pled in support of the counterclaim and the provisions of the purchase order in the Appendix were not pled. The alleged breach in question was the service levels in s. 9.1. This was the basis of Mr. Rosen’s damage calculation. In any event, in my view, the Appendix does not oust the parties’ agreement as to the consequences of breaching the service levels as set out in s. 9.1, which is the premise of Walmart’s claim.

[262] Finally, and in any event, I am not satisfied that Walmart has established that it suffered any damages because of any short supply of product by K&F in February and March 2021. Mr. Rosen’s damage analysis is based on deliveries, not sales. Product is not sold on delivery. The product resides in the stockroom or on the shelf before being sold. By way of example, product delivered in February would sell in February, March and April. Mr. Williams, using the same analysis as Mr. Rosen, points out that pre-COVID, Walmart had product on hand for 32.3 days. This rose to 37 days from March to December 2020. This dipped to 34.7 days in January 2021 and to 31.4 days in February and March 2021. It increased to 40.2 days in April as McKesson comes on board. As Mr. Williams notes, the February and March period is just a day less than the Covid period. In his view, it was not clear why Walmart claims it did not have product to sell.

[263] Walmart did not provide Mr. Rosen or Mr. Williams with access to its sales data. There was no analysis to establish that the stores actually lost sales due to a lack of product delivered by K&F. There is no data as to what McKesson delivered or failed to deliver, particularly in the period after April 1, 2021. There was also an issue that may have resulted in duplicate orders being counted due to computer system irregularities. In the absence of any analysis of the actual sales and product delivered by McKesson, I agree with Mr. Williams that it is not clear why Walmart would not have sufficient product to meet its demand over the period in question. Had I found any liability on K&F, I would have found that Walmart had failed to prove it suffered any loss.

[264] Walmart also advances a negligent misrepresentation claim. It pleads that, “despite the disagreement over the Term of the Supply Agreement, [K&F] represented it would continue to perform its contractual obligations until April 1, 2021. K&F failed to do so.” There is no allegation that K&F made any representation, aside from stating that it would meet its contractual obligations.

[265] Frankly, in these circumstances, I fail to see how the misrepresentation claim adds anything to the contract claim already addressed above. Walmart’s argument is simply that K&F represented that it would fulfill its contractual obligation. As I have found that K&F did not breach the Agreement, it follows that I dismiss the misrepresentation claim. Further, I disagree that Walmart was solely relying upon K&F during the transition for product. Walmart knew that supply would be an issue as K&F attempted to manage its inventory. In its written submissions it states that it made plans with McKesson “to transition business after April 1, 2021”. This is not entirely correct. It arranged McKesson to fill the projected gap during the transition before April 1, 2021 and, indeed, had that commitment from McKesson as early as December 2020. Again, both the LOA

and Mr. Llyod's establish this. There was also evidence that McKesson filled some orders and did not fill others. It was clear that Walmart was not relying on K&F during the transition or that Walmart was misled by K&F as to its ability to ensure supply. Finally, for the reasons stated, Walmart has not established any loss in respect of this alleged misrepresentation.

[266] The claim by Walmart for lost revenue due to K&F's alleged failure to deliver product is dismissed.

Conclusion

[267] Because of the lack of damage calculations, I am unable to make a final decision at this time. As I have already noted, the parties will have to confer to determine if they can agree on the damage amounts for those damages I have been unable to calculate. If they cannot agree, they may speak to me about a further attendance. I expect to hear from the parties within the next 21 days. Costs will be addressed after the finalization of this decision.

Callaghan J.

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