



Electronically issued : 10-Jan-2022
Délivré par voie électronique : 10-Jan-2022
Ottawa

**ONTARIO
SUPERIOR COURT OF JUSTICE**

N. BUIS

Plaintiff

- and -

KEURIG CANADA INC.

Defendant

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANT

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

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

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

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

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

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: January 10, 2022

Issued by

Local Registrar

Address of
court office:

161 Elgin Street
2nd Floor
Ottawa, ON K2P 2K1

TO: **Keurig Canada Inc.**
44 Chipman Hill, Suite 1000
Saint John, New Brunswick
E2L 4S6

DEFINED TERMS

1. In this Statement of Claim, in addition to the terms that are defined elsewhere herein, the following terms have the following meanings:

- (a) “**Keurig Recyclable Pod(s)**” and/or “**Pod(s)**” means the **K-Cups** which claim to be recyclable;
- (b) “**K-Cup(s)**” means the single-serve plastic beverage pods which were designed, developed, formulated, tested, licensed, manufactured, packaged, distributed, marketed, promoted, advertised, labelled and/or sold by the **Defendant**;
- (c) “**Class**”, “**Proposed Class**” or “**Class Members**” means all persons residing in Canada who purchased **Keurig Recyclable Pods**;
- (d) “**Class Proceedings Act**” means the *Class Proceedings Act*, SO 1992, c 6, as amended;
- (e) “**Sale of Goods Act**” means the *Sale of Goods Act*, RSO 1990, c S.1, as amended, including ss. 15 & 51;
- (f) “**Sale of Goods Legislation**” means:
 - (i) The *Sale of Goods Act*, RSBC 1996, c 410, as amended (British Columbia);
 - (ii) The *Sale of Goods Act*, RSA 2000, c S-2, as amended (Alberta);
 - (iii) The *Sale of Goods Act*, RSS 1978, c S-1, as amended (Saskatchewan);
 - (iv) The *Sale of Goods Act*, CCSM c S10, as amended (Manitoba);

- (v) The *Sale of Goods Act*, RSNL 1990, c S-6, as amended (Newfoundland);
 - (vi) The *Sale of Goods Act*, RSNB 2016, c 110, as amended (New Brunswick);
 - (vii) The *Sale of Goods Act*, RSNS 1989, c 408, as amended (Nova Scotia);
 - (viii) The *Sale of Goods Act*, RSPEI I 988, c S-1, as amended (Prince Edward Island);
 - (ix) The *Sale of Goods Act*, RSY 2002, c 198, as amended (Yukon);
 - (x) The *Sale of Goods Act*, RSNWT 1988, c S-2, as amended (Northwest Territories and Nunavut);
- (g) “**Consumer Protection Act**” means the *Consumer Protection Act, 2002*, SO 2002, c. 30, Sched. A, as amended, including ss. 8, 11, 14, 15 & 17;
- (h) “**Consumer Protection Legislation**” means:
- (i) The *Business Practices and Consumer Protection Act*, SBC 2004, c.2, as amended, including ss. 4, 5 & 8-10 (British Columbia);
 - (ii) The *Consumer Protection Act*, RSQ c. P-40.1, including ss.219, 228, 253 & 272 (Quebec);
 - (iii) The *Consumer Protection Act*, RSA 2000, c C-26.3, as amended, including ss. 5-9 & 13 (Alberta);
 - (iv) The *Consumer Protection and Business Practices Act*, SS 2014, c. C-30.2, as amended, including ss. 5-9, 16, 18-23, 26, & 36 (Saskatchewan);
 - (v) The *Business Practices Act*, CCSM, c B120, as amended, including ss. 2-9 & 23 (Manitoba);

- (vi) The *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, as amended, including ss. 7-10, and the *Trade Practices Act*, RSNL 1990, c T-7, as amended, including ss. 5-7 & 14 (Newfoundland and Labrador);
 - (vii) The *Consumer Product Warranty and Liability Act*, SNB 1978, c 18.1 at ss. 4, 13, 15, & 23 (New Brunswick);
 - (viii) The *Consumer Protection Act*, RSNS 1989, c 92, including ss. 26-29 (Nova Scotia);
 - (ix) The *Business Practices Act*, RSPEI 1988, c B-7, as amended, including ss. 2-4 (Prince Edward Island);
 - (x) The *Consumers Protection Act*, RSY 2002, c 40, as amended, including ss. 58 & 86 (Yukon);
 - (xi) The *Consumer Protection Act*, RSNWT 1988, c C-17, as amended, including ss. 70 & 71 (Northwest Territories); and
 - (xii) The *Consumer Protection Act*, RSNWT (Nu) 1988, c C-17, as amended, including ss. 70 & 71 (Nunavut);
-
- (i) “**Competition Act**” means the *Competition Act*, RSC 1985, c. C-34, as amended, including ss. 36 & 52;
 - (j) “**Negligence Act**” means *Negligence Act*, R.S.O. 1990, c. N. 1, as amended, including s. 1;
 - (k) “**Defendant**” means Keurig Canada Inc.;
 - (l) “**Plaintiff**” means N. Buis; and

(m) “**Representation(s)**” means the **Defendant’s** false, misleading or deceptive representations that **Keurig Recyclable Pods** (a) have performance characteristics, uses, benefits and/or qualities which they do not have, being that they are recyclable and become recyclable when certain steps are performed to prepare the Pods, (b) are of a particular standard or quality which they are not, being that they are made of recyclable material and are an environmentally friendly alternative, and (c) are available for a reason that does not exist, being to offer a recyclable product.

THE CLAIM

2. The proposed Representative Plaintiff, N. Buis, claims on her own behalf and on behalf of the members of the Class as defined in paragraph 5 below (the “Class”) as against Keurig Canada Inc. (the “Defendant”):

- (a) An order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as Representative Plaintiff for the Class Members;
- (b) A declaration that in designing, developing, formulating, testing, licensing, manufacturing, packaging, distributing, marketing, promoting, advertising, labelling and/or selling the Keurig Recyclable Pods, the Defendant committed the following:
 - (i) Breach of contract,
 - (ii) Breach of express and/or implied warranties;

- (iii) Fraudulent concealment;
 - (iv) Negligence;
 - (v) Intentional and/or negligent misrepresentation;
 - (vi) Unfair practices in violation of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation as well as the *Competition Act*, and the *Sale of Goods Act* and the Sale of Goods Legislation;
- (c) A declaration that the present Statement of Claim is considered as notice given by the Plaintiff on her own behalf and on behalf of “persons similarly situated” and is sufficient to give notice to the Defendant on behalf of all Class Members;
- (d) In the alternative, a declaration, if necessary, that it is in the interests of justice to waive the notice requirement under Part III and s. 101 of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation;
- (e) General damages in an amount to be determined in the aggregate for the Class Members;
- (f) Special damages in an amount that this Honourable Court deems appropriate to compensate Class Members for, *inter alia*, the purchase price of the Keurig Recyclable Pods (based *inter alia* on revocation of acceptance and rescission);

- (g) Punitive (exemplary) and aggravated damages in the aggregate in an amount to be determined as this Honourable Court deems appropriate;
- (h) An order for an accounting of revenues received by the Defendant resulting from the sale of the Keurig Recyclable Pods;
- (i) A declaration that any funds received by the Defendant through the sale of the Keurig Recyclable Pods are held in trust for the benefit of the Plaintiff and Class Members;
- (j) Restitution and/or a refund of all monies paid to or received by the Defendant from the sale of Keurig Recyclable Pods to members of the Class on the basis of unjust enrichment;
- (k) In addition, or in the alternative, restitution and/or a refund of all monies paid to or received by the Defendant from the sale of their Keurig Recyclable Pods to members of the Class on the basis of *quantum valebant*;
- (l) A permanent injunction restraining the Defendant from continuing any actions taken in contravention of the law, whether tortious, statutory, and/or equitable;
- (m) An order directing a reference or such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (n) An order compelling the creation of a plan of distribution pursuant to ss. 23, 24, 25 and 26 of the *Class Proceedings Act*;

- (o) Pre-judgment and post-judgment interest on the foregoing sums in the amount of 2% per month, compounded monthly, or alternatively, pursuant to ss. 128 and 129 of the *Courts of Justice Act*;
- (p) Costs of notice and administration of the plan of distribution of recovery in this action plus applicable taxes pursuant to s. 26 (9) of the *Class Proceedings Act*;
- (q) Costs of this action on a substantial indemnity basis including any and all applicable taxes payable thereon; and
- (r) Such further and other relief as counsel may advise and/or this Honourable Court may deem just and appropriate in the circumstances.

THE PARTIES

The Representative Plaintiff

3. The Plaintiff, N. Buis, is a 62-year-old individual residing in the city of St. Thomas, in the province of Ontario.

4. The Plaintiff purchased a Keurig single-serve beverage machine, the Keurig K Slim, on September 2021 from Amazon. Since September 2021, the Plaintiff has purchased multiple packs of Keurig Recyclable Pods at the Real Canadian Superstore in St. Thomas, Ontario and Costco Wholesale in London, Ontario.

The Class

5. The Plaintiff seeks to represent the following class of which she is a member (the “Proposed Class”):

All persons residing in Canada who purchased Keurig Recyclable Pod(s).

The Defendant

6. The Defendant, Keurig Canada Inc. (hereinafter “Keurig Canada”), is a Canadian corporation with its principal place of business in Saint John, New Brunswick.

7. The website www.keurig.ca is owned and operated by Keurig Green Mountain, Inc., which lists Keurig Canada Inc. as an affiliate organization.

8. Keurig Dr Pepper Canada is the business name under which the Defendant and Canada Dry Mott’s Inc. operate, and lists its locations as being in Montreal, Quebec and Mississauga, Ontario. Under this name, it markets hot and cold beverages of more than 60 brands, including Van Houtte, Timonthy’s, Green Mountain Coffee Roasters, Barista Prima Coffeehouse, the Original Donut Shop Coffee, Brûlerie Mont-Royal, Brûlerie St-Denis, Tully’s Coffee, Krispy Kreme Doughnuts, Donut House Collection, Newman’s Own Organics, Kahlúa, Orient Express Coffee, Emeril, Adagio, and Laura Secord, all offered in K-Cup format compatible with Keurig single-serve beverage machines. It also includes the major soft drink brands, such as Canada Dry, Crush, Dr Pepper, Schweppes, Stewart’s, and Snapple.

9. The Defendant is a subsidiary of Keurig Dr Pepper Inc., a Delaware corporation and the leading coffee and beverage company in North America. When Keurig Green Mountain and Dr

Pepper Snapple Group merged in 2018, the transaction created the third-largest beverage company in North America, with annual revenues of \$11 billion.

10. The Defendant is the registrant of *inter alia* the trademarks “VAN HOUTTE” (TMA673233), “TIMOTHY’S” (TMA333699), “TIMOTHY’S WORLD COFFEE” (TMA472673), “TIMOTHY’S ORIGINAL DONUT BLEND” (TMA817794), “BRÛLERIE MONT-ROYAL” (TMA673103, TMA671281), “BRULERIE ST. DENIS” (TMA362023), “ADIAGO” (TMA962421), and “ORIENT EXPRESS” (TMA256018).

11. Keurig Green Mountain, Inc. is the registrant of *inter alia* the trademarks “KEURIG” (TMA494158, TMA1107121, TMA957677, TMA1085116), “KEURIG BREWED” (TMA815746, TMA558551), “K-CUP” (TMA867757, TMA818086), “MY K-CUP” (TMA702901), “MYKEURIG” (TMA583762), “MY K BOX” (TMA975729), “TULLY’S” (TMA669028), “TULLY’S COFFEE” (TMA839409), “DONUT HOUSE COLLECTION” (TMA858884), “THE ORIGINAL DONUT SHOP COFFEE CAFÉ” (TMA959245), “KEURIG GREEN MOUNTAIN” (TMA990046) and “BREWING A BETTER WORLD” (TMA897961). It is also the applicant for “K-Cycle” (1948070) trademark, pending registration.

12. The Defendant has no listed Canadian patents.

13. Keurig Green Mountain, Inc. is the patent holder of *inter alia* “A BEVERAGE CARTRIDGE” (Patent 2718195), “BEVERAGE CARTRIDGE” (Patent 2810237), “BEVERAGE CARTRIDGE FOR BEVERAGE MAKING MACHINE” (Patent 3037706), and “AUTOMATED BEVERAGE BREWING SYSTEM” (Patent 2290601).

14. The Defendant is and has been at all relevant times, either directly or indirectly, engaged in the business of designing, developing, formulating, testing, licensing, manufacturing, packaging, distributing, marketing, promoting, advertising, labelling and/or selling the Keurig Recyclable Pods in Canada.

THE NATURE OF THE CLAIM

15. Canadian consumers have, in the last decade, become increasingly sensitive to the environmental crisis which is upon us. Local, provincial and federal governments have also become more sensitive to the issue, moving to ban large contributors like single-use plastic products. The situation we find ourselves in is dire. Despite making up less than 0.5% of the global population, Canadian use 1.4% of all plastic produced. This is especially unfortunate as only 9% of plastic waste in Canada is actually recycled. Another 12% is shipped outside of North America to be “recycled”, where it is normally either burned or placed in a foreign landfill. This is especially true of low quality or hard to recycle plastics (Plastics #3 to #7).

16. Canadian consumers are looking to live more sustainably, by opting for products which are recyclable, lower in plastic waste, compostable, organic, or reusable.

17. The Defendant manufactures and/or distributes beverage products, including single-serve plastic beverage pods, exclusively designed for Keurig brand beverage brewing machines.

18. This class proceeding concerns the Defendant’s false and misleading statements as to the recyclability of the Keurig Recyclable Pods.

19. In response to growing consumer criticism as to the environmental impact of disposal K-Cups after a boom in popularity, the Defendant launched “recyclable” K-Cup pods as an alternative in Canada (“Keurig Recyclable Pods”) and pledged to make 100% of K-Cups produced in Canada recyclable by 2018.

20. The Defendant failed to disclose and/or actively concealed, despite longstanding knowledge, the reality that the Keurig Recyclable Pods are not recyclable, have low potential recyclability, and/or are not being recycled.

21. In fact, not only did the Defendant fail to disclose and/or actively conceal that the Keurig Recyclable Pods were, in fact, not recyclable, but it was actively engaged in a “greenwashing” campaign in order to induce the purchase of Keurig products in the face of environmentally-driven consumer backlash.

22. The Defendant packaged, marketed, promoted, advertised, labelled, and sold the Keurig Recyclable Pods to consumers as an environmentally friendlier alternative to their original product.

23. The Defendant knew or should have known that the Keurig Recyclable Pods were, in fact, not recyclable, low in potential recyclability, and/or likely not to be recycled by the municipalities in which they were being used, but they nevertheless failed to disclose to consumers, including the Plaintiff, that the representations made, being that Keurig Recyclable Pods (a) have performance characteristics, uses, benefits and/or qualities which they do not have, being that they are recyclable and become recyclable when certain steps are performed to prepare the Pods, (b) are of a particular standard or quality which they are not, being that they are made of recyclable material

and are an environmentally friendly alternative, and (c) are available for a reason that does not exist, being to offer a recyclable product (“Representations”).

24. Canadian consumers reasonably expected that the Keurig Recyclable Pods would, in reality, be recyclable and recycled. Nevertheless, the Keurig Recyclable Pods, in an investigation by the federal government of Canada, were found to be widely unaccepted by recycling facilities across Canada. This is commonly due to the size, weight, plastic material, and potential for contamination of the Keurig Recyclable Pods, which make them incredibly inefficient to sort and process. Even where accepted, the instructions provided by the Defendant to consumers would be inadequate in properly preparing the Pods for recycling, and they would therefore be rejected. If by this point, a Keurig Recyclable Pod was both accepted and appropriately prepared by the consumer, it is still unlikely that it would actually be recycled given the type of plastic used.

25. The Plaintiff and the Class Members have suffered from the Defendant’s Representations and were misled into purchasing and using these products of a quality and value different from what was promised. It was only upon investigation by the Competition Bureau that the Defendant was forced to modify its deceptive marketing practices in Canada.

26. The Plaintiff, on behalf of the Class Members, seeks an award of damages against the Defendant for breach of contract, breach of express and/or implied warranties, negligence, fraudulent concealment, intentional and/or negligent misrepresentation, unfair practices in violation of the unfair practices in violation of the *Consumer Protection Act* and the parallel provisions of the Consumer Protection Legislation, as well as the *Competition Act*, and the *Sale of Goods Act* and the Sale of Goods Legislation.

I. Corporate History of Keurig and Development of the K-Cup

27. Although the idea of simple brew espresso was originally conceptualized in 1975, it was only in 1986 that Nestlé patented the first capsule-based beverage machine under the brand name Nespresso. Nespresso, however, struggled to make strides in the North American market, where consumers mostly drank drip-coffee, rather than espresso.

28. The single-serve plastic beverage pods which would come to be known as K-Cups, and the Keurig single-serve beverage brewing machines for which they were fitted, were created by Keurig-founders John Sylvan and Peter Dragone in 1992 as a solution for the notoriously plagued North American communal office drip coffee-machine. However, it was only in 1997 that the first Keurig “K-Cup” pod emerged on the market, carrying the product of an early investor, Green Mountain Coffee Roasters (“Green Mountain”).

29. By 2006, Green Mountain, historically an environmentally and socially conscious Vermont coffee company, acquired the entirety of Keurig.

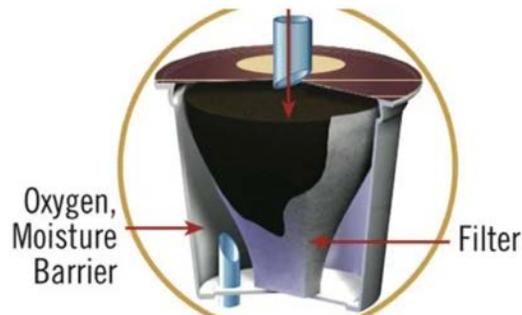
30. When single-serve beverage capsule patents began to in 2012, new competitors were able to enter the market and put a huge strain on Keurig’s market share.

31. In 2014, the company Green Mountain was renamed Keurig Green Mountain, Inc. when Coca-Cola purchased a 16% stake in the company, due to the popularity of the K-Cup

32. In 2018, Keurig Green Mountain, Inc. merged with Dr Pepper Snapple Group, becoming Keurig Dr Pepper.

II. Functionality of K-Cups

33. The single-serve beverage pod sold by the Defendant is a small, foil-sealed, plastic cartridge, packed with beverage grounds, such as coffee or tea, and fitted with a paper micro-filter (“K-Cups”). It is designed to produce a single cup of beverage and discarded in its entirety after use. The packaging is designed to keep oxygen, light, and moisture out, ensuring freshness.



34. The K-Cups are designed to be used in a Keurig beverage brewing machine. A user places a chosen pod into a Keurig single-serve beverage machine, which is designed to puncture through the pod's entire cartridge and then inject the pod with a flowing stream of pressurized hot water, which is stored and pre-heated within the machine. The beverage will then flow through the pod's filter and into the user's cup almost instantly.



35. The Defendant offers many different beverage brands and flavours in the K-Cup format. It either owns the brands or has licensed vendors, such as Starbucks and Kahlúa, in order to provide users with as much variety as possible.

36. The following brands and flavours, *inter alia*, are currently offered to Canadian consumers by the Defendant through the website www.Keurig.ca :

- The Folger Coffee Co. 1850™: Pioneer Blend, Midnight Gold;
- Barista Prima Coffeehouse®: Colombia, Italian Roast;
- Bigelow®: Early Grey, English Breakfast, Green Tea;

- Donut House Collection®: Regular;
- Eight O’Clock®: 100% Colombian Peaks, Hazelnut, Original;
- Emeril’s®: Big Easy Bold;
- Folgers Gourmet Selections®: Black Silk, Caramel Drizzle, Classic Roast, Lively Colombian, Morning Cafe, Vanilla Biscotti;
- Green Mountain Coffee®: Caramel Vanilla Cream, Dark Magic, French Vanilla Decaf, Half Caff, Island Coconut, Nantucket Blend;
- Kahlúa®: Original;
- Krispy Kreme Doughnuts®: House Roast;
- Laura Secord®: Regular Hot Chocolate, Mint Hot Chocolate, Vanilla Cream Hot Chocolate;
- Lavazza®: Classico, Espresso Classico, Espresso Intenso, Gran Selezione;
- McCafe®: Premium Roast, Premium Roast Decaf, Espresso Roast;
- Starbucks®: Caffè Verona, Pike Place, True North Blend;
- Tetley® Tea: Green Tea, Orange Pekoe, Pure Peppermint;

- The Original Donut Shop®: Regular;
- Tim Hortons®: Bold Roast, Dark Roast, Decaf, French Vanilla, Hazelnut, Original Blend, Espresso Roast, Steeped Tea, French Vanilla Cappuccino, Hot Chocolate;
- Timothy's®: Chai Latte, Chai Tea, Cinnamon Pastry, Colombian Excelencia, Colombian La Vereda, Colombian Decaf, Earl Grey, French Roast, French Vanilla, French Vanilla Latte, German Chocolate Cake, Hazelnut, Italian Blend, Mocha Java, Original Donut Blend, Parisian Nights, Pumpkin Spice, Sugar Bush Maple, Toffee, Firecracker;
- Tully's®: Italian Roast;
- Van Houtte®: Amazonia, Breakfast Blend, Butterscotch, Chocolate Raspberry Truffle, Colombian Medium, Costa Rica, Crème Brûlée, French Roast, Espresso Dolce Crema, Espresso Superiore, French Vanilla, Honduras, House Blend Dark, Mexico, Midnight Express, Moka Java, Original House Blend, Original House Blend Decaf, Sumatra, Swiss Water Process Decaf, Vanilla Hazelnut, Vanilla Hazelnut Decaf, Napoletano, Amaretto Light, and Irish Cream.

III. Popularity of Single-Serve Beverage Machines

37. The popularity of single-serve beverage machines and capsules has increased at an unimaginable rate since the 1990s. In 2018 alone, 59 billion coffee capsules were produced globally. It is estimated that 13.2 billion of those 59 billion were K-Cups. The growing popularity

of single-serve beverage capsules was unexpected by many, given the per unit cost of such a habit. At \$0.62 a pod for a Green Mountain Breakfast K-Cup, the price of the actual coffee being purchased is 68\$ per kilogram, up to four times higher than the price of ground coffee.

38. Although initially designed for the workplace, by 2018, 46% of Canadians had a single-serve beverage machine at home. This is a stark increase from the 7% who owned one in 2010.

39. In an article written by the Defendant, it claimed: “There are few certainties in life: the sun will rise tomorrow, platform shoes will go out of fashion and Canadians love coffee. We are the third-largest per capita drinkers of brew in the world, consuming an average of 376.7 cups per capita a year according to Euromonitor International. ... The Coffee Association of Canada’s *Canadian Coffee Drinking Study – 2017* report says 71 percent of us will drink the beverage today. We like it more than tap water and three-quarters of us make it at home. Over a third of Canadians have a single-cup coffee maker and for most, that means using Keurig® K-Cup® pods.”

40. In 2016, it was estimated that Canadians discarded 2.8 million pods per day, over 1 billion in the year.

41. In 2018, Canadian Plastics held a conference on “Single-Serve Capsules”. It explained that, “[f]rom a niche market, single-serve beverage capsules have grown to be one of the most important sub-applications of the ambient thin wall packaging segment in the past 5 years.” It warned, however, that “[w]ith the growing number of capsules in landfills, the industry is under pressure from environmentalists as well as more conscientious consumers. There is an urgent need

to review the materials used for capsules conversion in search of more sustainable options, as well as to explore end-of-life solutions.”

42. Of single-capsule machine owners in Canada, Keurig was the leading brand in 2019, with 67% of the market share, according to the Coffee Association of Canada. It was also the leading brand among those without a single-capsule beverage machine but who would like to buy one, in terms of which brand they would select (64%).

43. The Coffee Association of Canada indicated that the presence of a global pandemic has dramatically affected where Canadians prepare their coffee, now being in-home more than ever.

44. Despite high demand and competition, the Keurig Dr Pepper group maintains an enormous market share. In fact, in Keurig Dr Pepper’s 2021 Investor Day presentation, it stated that in 2020, 86% of the single-serve beverage pod market in Canada were manufactured by Keurig Dr Pepper and that Keurig is the #1 single-serve coffee brewing system in all of Canada.

IV. Keurig’s Rebrand, Recycling Initiatives, and Defendant’s Warranties

45. As single-serve beverage pods became increasingly popular worldwide, consumers began to look for improved sustainability and transparency, focusing on quality and environmental impact.

46. In the early 2010s, facing new competition as patents expired, increased public scrutiny, and a viral online media campaign called #killthecup, Keurig began an environmental rebrand.

47. In its 2013 Sustainability Report, Keurig pledged to make 100% of K-Cup packs recyclable by 2020. In accomplishing this goal, Keurig sought to make modifications to the design of the K-Cup which would allow the components to be easily separated and ready to be recycled. Within, Keurig's C.E.O. Brian P. Kelley admitted that "consumers today, particularly younger generations of consumers, purchase a company's values as much as they buy a company's product. ... And what about those areas where we can do better? The lack of recycling options for used K-Cup® packs stands out front and center".

48. In 2015, as an example of the headway being made, Keurig stated to the public "right now, our Vue packs use polypropylene (#5) plastic, which is accepted by 60% of communities in the U.S. and *93% of communities in Canada*. The pack's plastic cup can be separated from the lid and filter for recycling. We now use this same technology in our K-Carafe packs for the Keurig 2.0 platform, and in our BOLT system for offices. This is the same direction we're taking with our K-Cup packs."¹

49. In 2015 alone, Keurig sold 10.5 billion K-Cups, none of which could be recycled. Experts and activists warned consumers through media campaigns that the number of K-Cups sold in 2015 alone would circle the earth more than 10 times if lined up end-to-end.

50. In response to the rising environmental awareness, some cities, like Hamburg, Germany, began banning single-serve beverage pods completely.

¹ Emphasis added.

51. The Defendant, facing mounting negative feedback from the consumer market in regard to environmental concerns relating to K-Cups, expedited its mission to make K-Cups 100% recyclable. This was going to be particularly challenging given that the K-Cups were made of a mixed plastic polymer and was composed of four different layers of materials which would all have to be separated and sorted. Keurig decided, in 2016, to convert the K-Cup capsules from the mixed plastic polymer (classified as a #7 plastic) to polypropylene (classified as a #5 plastic) in order to make the claim that the capsules were now recyclable.

52. Keurig Canada launched its first “recyclable” K-Cup product made of Plastic #5 polypropylene in Canada in 2016, available in the Van Houtte Original House Blend. In announcing this launch, the Defendant claimed:

- “Each pod is made from polypropylene (#5 plastic), which is commonly used in yogurt and butter containers and can be recycled in the *majority of communities in Canada.*”²
- “The new recyclable K-Cup® pods have been tested in real world recycling and recovery facilities to ensure that they can be effectively recycled.”
- “The recycling process is simple.”

53. In Canada, in 2017, Keurig ambitiously revised the target date for 100% recyclability from 2020 to 2018, which it announced on the main page of its website “DISCOVER KEURIG®: RECYCLABLE K-CUP® PODS. SAME PERFECT TASTE, NOW RECYCLABLE. ... DOING

² Emphasis added.

IT THE RIGHT WAY, FOR THE LONG TERM”. It explained that “Our solution is simple: the pods are designed so you can peel off the foil lid, compost the coffee grounds, and recycle the plastic cup, alongside other recyclable containers from your home, in local community recycling programs.”

54. The marketing material emphasized “We are determined to reduce our environmental footprint, but knew there would be challenges along the way ... we pursued innovative strategies to make sure our K-Cup pods were not only recyclable, but could actually be recycled.”

55. In order to recycle the Keurig Recyclable Pods, the Defendant instructed consumers to peel away the foil lid, dump out the beverage contents, and recycle the lid and main plastic cartridge separately. It finished with “It’s that simple!”.



56. In a website update on www.keurig.ca, Keurig wrote “Did you know that our Keurig® K-Cup® pods are now recyclable in Canada? Our K-Cup pods are made from plastic #5, a material

accepted in *most municipal recycling programs*, and can be found throughout the country in your favourite brands and varieties.”³

57. In marketing material released by Keurig Dr Pepper, it stated that Keurig “[t]ested K-Cup® pods at 12 facilities across North America”, “90% of K-Cup® pods had the potential to be recovered”, and “#5 K-Cup® Pods are a valuable addition to the existing polypropylene stream.” It also claimed that as of 2018, 100% of K-Cup pods produced in Canada have been recyclable.

58. It is of note that an internal Keurig Green Mountain conference presentation gives more context to these marketing sound-bites. For example, “90% of K-Cup® pods had *the potential* to be recovered” came from a finding that between 40%-90% of K-Cups tested only in facilities with screening machines with openings of 2 inches or less (which is meant to remove small broken glass) were able to make it into a plastic bale which had the potential to then be recycled should the bale be viable and the market exist.

59. The “recyclability” of Keurig Recyclable Pods was marketed *inter alia* on several sides of the product’s exterior packaging, the top of the capsule packaging, on the Keurig Canada website main page, and in the product descriptions.



³ Emphasis added.



60. The product packaging has generally consisted of a green banner (an “environmental” colour) on the face of the product, which reads “RECYCLABLE” and has the triangle with three chasing arrows (known as a modius loop), commonly understood by consumers to mean recyclable. Sometimes the modius loop contained a #5 within it, potentially making it confusing for consumers to differentiate between “recyclable” and “#5 plastic”, as plastic categorization also uses the modius loop, regardless of whether the plastic can be recycled. The side of the product packaging commonly had the three-step recycling instructions of “Peel. Empty. Recycle.”. The pods themselves also contained a modius loop to remind the consumer of the recyclability.



61. In addition to heavily marketing the recyclability of the Keurig Recyclable Pods on the packaging itself, Canadian consumers were specifically targeted with a digital campaign of banners, including videos, landing pages, social media posts, a brand influencers campaign, an eco-influencers activation, in-store advertisement, and mass media video advertisement including a 15 second television placement and a 6 second social media placement.

62. The marketing of the product as “RECYCLABLE” has been relatively uniform over the past years, with slight changes being made to vague and almost unreadable qualifications including “currently recyclable in select locations” and “not recycled in all communities”. These qualifications were used across the entire country, regardless of local recycling facilities. The Defendant offered no information to consumers which would materially help consumers to understand (i) the pressing need to check their local recycling policy, (ii) how to check their local policy, and (iii) that it is unlikely their local policy accepts Keurig Recyclable Pods. In addition, the size, style, and color of font used to convey the qualifications made are virtually unnoticeable. The qualified environmental claim is therefore equivalent to being unqualified, as the qualifications provide no useful information, fail to convey a meaningful qualification, and are almost unreadable.

63. Finally, the Defendant expected consumers (and consumer did), pay a premium for the recyclability of the product.

64. In 2017, when the Defendant had released at least 8 beverage flavors of the Keurig Recyclable Pods in Canada, they were sold at a per unit price which was higher than their non-recyclable counterparts, either through reducing the size of the packages or through increasing the price. For example, and the most common pattern detected across products, the Timothy’s French Vanilla K-Cup was available in a 24-pack for \$16.99 (\$0.71/pod), whereas the Keurig Recyclable Pod of the same brand and flavor was only available in a 12-pack for \$9.99 (\$0.83/pod). Even where bought in larger quantities, the Keurig Recyclable Pod could be slightly more expensive, where you would expect it to actually be less expensive. The Van Houtte Colombian Medium Roast was regularly available in a 24-pack for \$16.99 (\$0.71/pod), whereas the Keurig Recyclable

Pod of the same flavor was only available in a 30-pack for \$21.49 (\$0.72/pod). Only the Van Houtte Original House Blend was available as a Keurig Recyclable Pod for the same price and quantity as its non-recyclable alternative.

65. Although the price per pod may not seem significant in isolation, much like the impact of a single K-Cup on the environment or the waste management system, it has a large impact based on the consumer consumption level of the product. If a household of two consumers each use two pods per day for the entire year, a completely reasonable scenario, the household would pay potentially pay an extra \$175 in the year for a recyclable product, rather than a non-recyclable one, despite the product being recycled in a publicly funded local facility.

66. In addition, although consumers may purchase non-Keurig machines or non-Keurig pods for their Keurig machines due to *inter alia* a more advantageous price or a different product offering, the Representations of the Defendant, that their Pods were in fact easily and widely recyclable creates leverage over alternatives, given the increasing environmental priorities of consumers.

67. By 2020, 100% of the Defendant's products were Keurig Recyclable Pods. Presently, however, almost all traces of "recyclability" have been removed from www.keurig.ca.

V. Plastic Pods and Recyclability of Plastic

68. The Defendant's K-Cups, unlike other pods on the market, are made of a rigid plastic cartridge, rather than aluminum. The top layer of the capsule, however, is a thin foil layer which must be peeled off.

69. Plastic capsules come with natural disadvantages. Firstly, plastic capsules come with the risk of plastic leaching, whereby the capsule, undergoing high pressure and hot water infusion, gradually leaks toxic chemicals into the organic material contents. Plastic, unlike aluminum, also often proves difficult to recycle. Unlike aluminum, plastic does not maintain its consistency or physical integrity when recycled, weakening significantly. The success of recycling plastic also heavily depends on the type of plastic material.

70. In Canada, the number symbol found in a modius loop symbol (commonly understood to mean recyclable) found on plastic material does not actually indicate that the material is recyclable (nor recycled) but acts as an indication code for what kind of plastic the material is made of.

71. Plastic #1 (Polyethylene Terephthalate) and #2 (High Density Polyethylene) are the most commonly recycled plastics and are generally accepted at all recycling facilities. Plastics #3, #4, #5, #6, and #7 are tougher to recycle and do not have the same universality. Plastic #7, for example, the original demarcation of K-Cups, refers simply to plastic material that is not otherwise classified, a catchall category, and generally has no recyclable value.

72. The type of plastic that a local recycling program accepts at its recycling facility, and is therefore actually *able* to recycle, varies across municipalities.

73. The major change, according to the Defendant and its marketing material presented to the public, in transforming K-Cups to “100% recyclable”, was the shift from #7 plastic to #5 plastic (Polypropylene). Polypropylene is advantageous for food and beverage products, given its chemical resistance to degradation, moisture, and heat, its lightweight composition, and material strength.

74. However, although polypropylene *can* theoretically be recycled, in reality, it is not recyclable nor recycle in Canada, as there are major obstacles in doing so. According to the Plastic Action Center of Canada, Plastic #5 (Polypropylene) is “one of the least recycled post-consumer plastics at a rate less than 1%”. It is commonly found in bottle caps, yogurt containers, medicine bottles, and straws. It is labor intensive to recycle due to its high melting point and must be blended with new a minimum of 50% *new* polypropylene plastic. If recycled and blended, it can be used for items such as battery cables, shipping pallets, oil funnels, bicycle racks, and brooms.

75. Thus, more than 99% of Plastic #5 polypropylene is sent to landfills, where it takes 20-30 years to decompose and leaches plastic chemicals into the environment.

VI. Reality of K-Cup Recyclability in Canada

76. To preface, although heavily marketing the Defendant’s efforts towards sustainability and reduction of environmental impact, the Keurig Recyclable Pods are not reusable, biodegradable, nor compostable. Therefore, despite the “greenwashing” efforts to improve corporate and product reputation, the Defendant was still using the same billions of K-Cups worth of virgin plastic every year.

77. Unfortunately, the Keurig Recyclable Pods are not recyclable, cannot be recycled, and have not been recycled, given at least five major obstacles in the process.

78. The five main obstacles in the recyclability of the Keurig Recyclable Pods are as follows:

79. First and most significantly, a key step in the recycling process is ensuring that similar materials are sorted and processed together, in an efficient manner. K-Cups, although sold in the

billions every year, are individually quite small, making it difficult for sorting systems at recycling plants to isolate them among the rest of the incoming material. The process of recycling such small items, especially one which are as susceptible as K-Cups to being crushed and mangled, can actually make the recycling process so inefficient that it materially raises the cost of recycling. For this reason, single-serve beverage capsules are widely rejected by local recycling facilities and are immediately discarded.

80. As demonstrated in the tracing test performed by Keurig Green Mountain, while Material Recovery Facilities (“MRF”s) normally sort incoming material into the correct bale for recycling, for example, cardboard or type 1 plastic, at a rate of 90% accuracy, due to the size and weight of K-Cups, the Keurig Recyclable Pods experienced as low as 40% accuracy. Where incoming material is not properly sorted, it can contaminate other recycling bales, undermining the potential of the entire bale of material to be recycled and repurposed.

81. Second, even where it is accepted and correctly sorted, although Plastic #5 material is technically recyclable, less than 1% of it is recycled in Canada due to the many issues faced in transforming it, as explained herein above at paragraph 74. Most of the time, it is bundled with #3-#7 plastics and is destined to be placed in a landfill or burned. This is especially so since the implementation of “Operation Green Fence” and the “National Sword” policy by the Chinese government, which banned the sale of “recyclable” material from origins like North America to China, in order to reduce the amount of contaminated recyclable products being sent to Chinese landfills. These measures substantially reduced the end-market for the plastic in the few Pods that could have otherwise been recycled in Canada.

82. Third, and as stated herein above, even where Plastic #5 material is recycled, it requires a minimum of 50% virgin plastic to ensure product integrity and cannot be used for food and beverage products. Therefore, it requires actually creating more new virgin plastic to reuse, while not reducing any of the Defendant's pre-existing use of virgin plastics, the net total actually being an increase in virgin plastic usage.

83. Fourth, the residual metal and food contaminants that are likely to appear render the Keurig Recyclable Pods non-recyclable or even more difficult to recycle. The foil itself is incredibly difficult for consumers to completely remove, so much so that specialized devices for removing the foil properly from K-Cups are sold online to consumers to help with the recycling preparation process. The beverage product, usually coffee or tea grounds, is equally difficult to completely remove, especially as the paper filter attached to the capsule clings onto the organic material. The contamination of organic material can also contaminate other viable recyclable material and the recycling process generally.

84. Fifth, even if Keurig Recyclable Cups are locally accepted *and* actually recyclable/recycled due to municipal drive and innovation, the steps provided by the Defendant to the consumer to prepare the product for recycling are not sufficient, and the Keurig Recyclable Cups cannot be considered recyclable until additional steps are taken. For example, despite the problematic role of the paper filter, consumers are not instructed by the Defendant to remove it.

85. Throughout this incredibly inefficient and fruitless process, the Defendant relies on the consumer and local municipalities to bear the burden of the inconvenience, cost, contamination and waste that attempting to recycle Keurig Recyclable Pods brings.

86. Other major single-serve capsule brands have developed recycling systems in which they can guarantee their products will be recycled and which place the burden and cost on themselves. For example, Nespresso developed a centralized mail-back recycling program for consumers with free pod-recycling bags and prepaid Canada Post shipping labels. Nespresso then works with private recycling companies to optimize the recycling of its aluminum capsules.

87. The Defendant offers a similar program to workplace locations, K-Cycle, but at a significant cost, approximately \$75-\$130 every 2-3 weeks for the recycling service. It is not available to, marketed to and/or affordable for everyday consumers. Considering the Defendant's claims about the Keurig Recyclable Pods to consumers at issue herein, it is also not clear what success the K-Cycle program actually has in its sustainability efforts.

88. As stated by the co-founder and creator of Keurig and K-Cups, John Sylvan, in 2015: "I don't care what Green Mountain says. You can't recycle that package".

VII. Definition of Recyclable in Canada

89. Canada's Competition Bureau archived the "*Environmental Claims: A Guide for Industry and Advertisers*" on November 21, 2021. It was created to "provide assistance to industry and advertisers in complying with certain provisions of the *Competition Act*, the *Consumer Packaging and Labelling Act*, and the *Textile Labelling Act*".

90. It is useful in understanding what was acceptable considered "recyclable" within the industry, from June 2008 until very recently.

91. Under Clause 10.7 “Recyclable”, it states that in order to use the term “recyclable”, “[i]t is not enough to confirm that there are municipal or industry collection systems where the product is sold in order to make a claim of "recyclable" — there must also be facilities to process the collected materials and reuse them as an input to another product that can be marketed and used (see Clause 10.1.3 of this Guide).”

92. It warns that “[w]hen making a recycling claim, environmental impacts resulting from recycling products should be considered, including collection, transport, processing, proximity to recycling facilities, and type of material, including weight”

93. Clause 10.1.3 specifies that “[c]laims that a product is recyclable, reusable, and refillable always depend on the existence of systems and facilities. Further, systems or facilities must be conveniently available to a *reasonable proportion* of purchasers, potential purchasers, and users in the area that the product is to be sold; otherwise, such claims could be considered false or misleading. It is not considered adequate to state "where facilities exist" after a claim that is dependent on the existence of such facilities. It is important to obtain information on the availability of the necessary infrastructure from municipalities or distributors before making this claim or any such generalized qualifications”⁴

94. Regarding what constitutes a “reasonable portion”, the guide states that, given the over 1000 municipal recycling programs in Canada, “it is recommended that if *at least half the population* has access to collection facilities, a claim of "recyclable" may be made without the use of any qualification. In the case of limited availability of recycling facilities, or in cases where

⁴ Emphasis added.

such facilities are not available to a reasonable proportion of purchasers, potential purchasers, and users, the specific location of the recycling programs or facilities should be identified whenever it is possible and practical to do so.”⁵

95. The *Guide*, under Clause 5, sets out rules regarding self-declared environmental claims, including any explanatory statements.

96. Clause 5.13 stated that environmental claims “shall only relate to an environmental aspect that either exists or is likely to be realized, during the life of the product”. It provides the example that “Non-packaging-related plastics or ‘engineered plastics’ that are part of a product are typically either land-filled or burnt at the end of a product's life because they are expensive to separate, ship, and sort into the different plastic material types. *Making a recycling claim for these materials would not be appropriate unless it became feasible in the marketplace to recycle them.*”⁶

97. As described hereinabove, Keurig Recyclable Pods are unlikely to be accepted by local facilities, are then unlikely to be properly sorted, and are then incredibly unlikely to be recycled.

98. By definition, Keurig Recyclable Pods are not recyclable as (i) a reasonable (if not very large) portion of purchasers, potential purchasers, and users do not have facilities which can process items of that size or weight, (ii) are of a size and weight which make them impractical to recycle, and (iii) are made of a material that is not (99% of the time) actually recyclable/recycled.

⁵ Emphasis added.

⁶ Emphasis added.

Overall, Keurig Recyclable Pods are, much like their plastic #7 K-Cup predecessor, destined to be burned or placed in a landfill.

99. Therefore, despite polypropylene #5 plastic being theoretically possible to recycle in certain forms and in certain sizes at certain facilities, to incorporate in certain other products, Keurig Recyclable Pods are not by any reasonable definition recyclable.

VIII. Repercussions of Greenwashing

100. Greenwashing is the practice of corporations, businesses, and brands advertising products and services as environmentally conscious, eco-friendly, and “green”, in an effort to promote themselves as aware of and engaged in climate change issues, but where the product actually undermines what is promoted. It includes deflecting attention away from the environmental harm being caused by their products by casting themselves as allies to the environment, when they are not.

101. In 2017, Canada’s Competition Bureau published a news release entitled “It’s not easy being green. Business must back up their words.”. It warned: “The green wave is gaining momentum. Consumers want to do what’s right and they are increasingly conscious of the dramatic environmental consequences of their lifestyle. They are seeking greener, cleaner products and services, even if it means paying more. Naturally, this represents a great opportunity for businesses. Ads, slogans, logos and packaging now often feature environmental statements such as “organic”, “eco-friendly”, “biodegradable” or “safe for the environment”. If your business is

one of those seeking to catch the curl, know that greenwashing, the practice of making false or misleading environmental ads or claims, *is illegal.*”⁷

102. The Competition Bureau advised businesses to (1) understand their legal responsibilities, (2) use explanatory statements to accompany environmental claims, (3) update environmental claims as further testing is done or new information becomes available, and (4) make accurate and easy to understand verification material publicly available.

103. In the same publication, it explained that false or misleading environmental ads or claims, i.e., greenwashing practices, “harms competition and innovation because consumers are being misled and are therefore unable to make an informed purchasing decision. Businesses who actually offer a product that has a lower environmental impact may see their potential consumers being misled into purchasing products and services from competitors that made false or misleading claims.”

104. Recently, Canada’s Competition Bureau and the Defendant came to an agreement whereby the Defendant will pay \$3 million because of its alleged deceptive business practices regarding the recyclability of the Keurig Recyclable Pods. A settlement of \$3.8 million was announced on January 6, 2022.

105. The investigation conducted by the Competition Bureau concluded that across the majority of provinces, K-Cup pods are not widely accepted in municipal recycling programs. In addition,

⁷ Emphasis added.

it found that even where accepted, additional steps to the three the Defendant provided to consumers (Peel, empty, recycle) were required to prepare the product for recycling.

106. In announcing the Defendant's payment, the Competition Bureau stated: "Portraying products or services as having more environmental benefits than they truly have is an illegal practice in Canada. False or misleading claims by businesses to promote "greener" products harm consumers who are unable to make informed purchasing decisions, as well as competition and businesses who actually offer products with a lower environmental impact."

107. In the Defendant's Consent Agreement, dated January 6, 2021, it states:

- The Commissioner concluded that the Recyclable Representations created the general impression that K-Cup pods are recyclable in each location where those representations are being made to the public;
- The Commissioner has concluded that, *notwithstanding that K-Cup pods are made of polypropylene, they are not currently widely accepted for recycling in municipal residential recycling programs* outside of the provinces of British Columbia and Quebec;⁸
- The Commissioner concluded that the representations of recyclability are false or misleading in a material respect in locations where the K-Cup pods are not in fact recyclable in municipal recycling programs;

⁸ Emphasis added.

- The Commissioner concluded that the instructions for disposal, being disposal representations, provided for K-Cup pods create the general impression that consumers can prepare K-Cup pods for recycling in their own municipalities by peeling the lid off and emptying out the coffee grounds before putting a K-Cup pod in their recycling containers, even though additional steps which are not described are needed. The Disposal Representations are, therefore, false or misleading in a material respect wherever additional steps are required to properly prepare K-Cup pods for recycling;
- The Defendant advised the Commissioner that the representations of recyclability and the disposal representations are made on the packaging of approximately 269 different product types (stock-keeping units) made available by the Defendant or its partners. Revisions will require new packaging for millions of products;
- The Defendant recognizes the importance that many consumers place on recycling and sustainability for the protection of the environment;
- The Defendant will correct all of the Representations on all packages and K-Cup pods as necessary, starting with the highest-volume products.

108. The Corrective Notice to be issued by the Defendant reads: “The Competition Bureau concluded that the claims create the impression that the pods can be recycled in each municipality where the claims are made. However, the K-Cup® pods are not widely recycled in municipal recycling programs outside of British Columbia and Quebec. As part of the settlement, Keurig has agreed to make changes to the packaging of K-Cup® pods and brewers as well as its advertisements going forward. Canadian consumers need to be aware that K-Cup® pods are only

recyclable in select locations and are therefore encouraged to check with their local program to find out if the K-Cup® pods are recyclable, and if they are, then how to recycle them.”

109. The Defendant’s website page for Keurig Recyclable Pods is now disabled and sends the user to the general “Beverage” page.

IX. Knowledge of Defendant

110. The Defendant has been, or ought to have been, aware that (i) its Keurig Recyclable Pods were not 100% recyclable and were likely to not be recycled even where a consumer followed the instructions provided, and (ii) that there are major environmental concerns at stake, that consumers are making decisions, at least in part, based on these environmental concerns, and that (iii) single-use beverage capsules are intrinsically environmentally unfriendly, especially at the quantity with which they are currently consumed.

111. The Defendant was aware in 2014, as it stated publicly, when it began its environmental campaign to make K-Cups recyclable, that “[s]olutions will need to involve municipal governments, companies, consumers, and recyclers”.

112. Given the corporate manufacturing sophistication of the Defendant and its parent company, along with an enormous amount of available resources, the Defendant was or should have been aware that the Keurig Recyclable Pods were, in fact, not recyclable and/or not being recycled in Canada.

113. In a 2017 Keurig Green Mountain internal conference presentation, it listed questions and statements it knew would be made in regards to the recyclability of K-Cups: “What about the

grounds?”, “No value”, “It’s too small”, “It will contaminate glass and paper”, “Brands just throw things at us and we have to ‘deal’”, “What about the lids?”. Its approved messaging in response to these included:

- Pods are not too small to be recovered (*at facilities with glass screens up to 2-inch minus);
- Filter paper being attached to the pod is not a problem for recovery or recycling;
- Polypropylene (#5) plastic is a highly recyclable and desirable material;
- Preference to have grounds emptied from the pod prior to collection.

Keurig was, therefore, clearly aware in 2017 of the many of the major obstacles that the Keurig Recyclable Pods would be facing, including size, separation, contamination, and type of plastic, and was preparing messaging accordingly.

114. In fact, in 2020, in a Keurig-sponsored article on Vox which Keurig reposted on its own website, the author wrote: “Despite a widespread commitment to recycling in communities all over the world, the quality of recycled plastic is generally not up to the standards of most manufacturers for reuse — and that’s especially true for food and beverage companies like **Keurig Dr Pepper.**”

115. In terms of acute awareness of the present climate change crisis and the role businesses play in either hindering or helping society to address it, the Defendant and its parent company, Keurig Dr Pepper, Inc. were both aware and marketing themselves as such as part of their greenwashing practices.

116. In 2019, in its Climate Policy, the Defendant's parent company, Keurig Dr Pepper, wrote: "Keurig Dr Pepper recognizes that global climate change poses a serious threat to communities, businesses, farmers and ecosystems across the world. Climate change is already resulting in significant changes to local weather patterns and water availability. The scientific community's assessment, according to analyses such as the Intergovernmental Panel on Climate Change's (IPCC) 5th Assessment Report and 2018 Special Report on Global Warming of 1.5 degrees C, indicates that dramatic and rapid reduction in greenhouse gas emissions to limit warming to well below 2 degrees C or 1.5 degrees C above pre-industrial levels is necessary to avoid the worst impacts of climate change. Increasing average global temperatures will result in severe, pervasive and irreversible impacts for people and ecosystems. ... Businesses must embrace the reality that climate change poses risks to global food security and human populations, as well as to their core operations and value chains."

117. Similarly, in its two paragraph Environmental Policy from the same year it wrote: "Keurig Dr Pepper recognizes that our business depends upon environmental resources. ... With that as our aim, we work to design, source and manufacture products that benefit the environment as a whole. We commit to: Understanding and working to reduce our impacts, from the design of our packaging and brewers and the cultivation of beverage ingredients, all the way through end-of-life product disposal ..."

118. As to the non-recyclability of its "recyclable" product, Keurig has long been aware of allegations, if not the reality, that its environmental claims are false and misleading.

119. Keurig Green Mountain has recently reached a tentative settlement in the United States over similar allegations. A class action lawsuit was filed in November 2018 in the United States

District Court for the Northern District of California (*Kathleen Smith et al. v. Keurig Green Mountain, Inc.*). Keurig Green Mountain moved to have the class action dismissed, but the motion was denied. A similar class action was filed in September 2020 in the United States District Court for the District of Massachusetts (*Matthew Downing, et al. v. Keurig Green Mountain Inc.*).

120. As described herein above, the Defendant has been under investigation by Canada's Competition Bureau and has been found guilty of making false and misrepresentative claims as to the recyclability of the Keurig Recyclable Pods in Canada and has been agreed to pay \$3 million dollars.

121. Given the American lawsuits, Keurig Green Mountain and the Defendant, have, at the very least, been aware of public concerns regarding the recyclability of Keurig Recyclable Pods since November 2018. However, Keurig Green Mountain and the Defendant claimed that in creating the Keurig Recyclable Pods in 2016, they conducted research and testing of North American recycling facilities to ensure "actual recyclability". Therefore, unless appropriate research and testing was not actually conducted in the Canadian context, it would have been made clear by recycling facilities and experts that the Keurig Recyclable Pods, although technically made of a potentially recyclable material, were not recyclable in Canada by any commonsense definition.

122. Despite the Defendant's knowledge, or what the Defendant ought to have known, the Defendant continued, knowingly or recklessly, to heavily promote the recyclability of the Keurig Recyclable Pods to Canadian consumers, for the sole purpose of inducing purchase.

X. The Defendant's Fault

123. The Defendant has consistently, falsely, and deceptively packaged, marketed, promoted, advertised, labelled, and sold the Keurig Recyclable Pods as recyclable in Canada. These deceptive claims have been made across a variety of medias, including on the Keurig Recyclable Pod itself, on the exterior packaging, on the Defendant's website, on publicly distributed promotional material, and on social media.

124. The Defendant knew, or should have known, that consumers would assume that Keurig Recyclable Pods were generally and widely recyclable, given the Defendant's Representations. The Defendant's claim that the Keurig Recyclable Pods are recyclable in Canada is false, misleading, and deceptive.

125. The Defendant knowingly permitted the manufacturing, distribution, and sale of Keurig Recyclable Pods, which they knew to be unfit for purpose, as they were not recyclable. The Defendant knew or should have known, prior to the sale and distribution of Keurig Recyclable Pods that due to their size, weight, material composition, and risk of contamination, they would not be widely accepted by local recycling facilities in Canada. Even more, in the rare chance that they were accepted and properly sorted, the instructions provided by the Defendant were inadequate to address the needs of those facilities. Finally, even where the consumer had an appropriate facility and took it upon themselves to learn and apply the additional steps required, the chances were incredibly low that the Keurig Recyclable Pods would ever actually be recycled into another form due to a lack of market. For all intents and purposes, and according to a commonsense definition of "recyclable", the Keurig Recyclable Pods *are not recyclable*. The Defendant failed to provide any appropriate warnings or meaningful qualifications as to the actual recyclability of the Keurig Recyclable Pods, being that they were not generally recyclable.

126. The Defendant knew or, but for their reckless indifference, would have known prior to the Class purchasing the Keurig Recyclable Pods that the Pods were not recyclable in Canada.

127. The Defendant knew, or, but for its reckless indifference, would have known that the consumers expected the Keurig Recyclable Pods to be recyclable, that the consumers were unaware and unadvised of the fact that they were not recyclable, and that the consumers had a reasonable expectation that the Defendant would not sell a non-recyclable product as a recyclable alternative to its original product.

128. Along with the implicit expectation that recyclable products sold to consumers, without any warning or qualification as to the lack of viability of the statement when used as instructed, would be recyclable, are the explicit assurances by the Defendant that their focus was on “actual recyclability”, that they worked with recycling facility partners, that the material used was widely accepted in Canada, and that award-winning testing of the recyclability was done.

129. Consumers, including the Plaintiff and Class Members, detrimentally relied on the Defendant’s Representations.

130. In marketing the Keurig Recyclable Pods as recyclable, the Defendant engaged in conduct likely to mislead and/or deceive consumers, including the Plaintiff and Class Members.

XI. Summative Remarks

131. The Defendant designed, developed, formulated, tested, licensed, manufactured, packaged, distributed, marketed, promoted, advertised, labelled and/or sold the Keurig Recyclable Pods, intending for consumers to rely on their Representations of recyclability, in an effort to

rebrand their corporate image through greenwashing practices. Canadian consumers did, in fact, rely on these representations, which are often the only source of available information on which consumers can make their decision to purchase.

132. Keurig is the number one single-serve beverage machine manufacturer in Canada, and according to the Defendant, currently manufactures 86% of the single-serve beverage pods on the Canadian market. The Defendant is a subsidiary of a highly sophisticated company, Keurig Dr Pepper Inc., who owns a significant portion of the North American beverage market share. Keurig Dr Pepper Inc., with a portfolio of over 125 major brands distributed worldwide, deals almost entirely in single-use packaging.

133. The Defendant markets itself as “Canada’s #1 Most Trusted Single Serve Coffee Maker Brand”, and consumers rely on the research, testing, and representations it makes as being true.

134. The Defendant used greenwashing practices to improve its corporate reputation, maintain its market share, and convince consumers that they were participating in an environmentally friendly alternative to the original K-Cups.

135. The everyday consumer lacks the ability to test or independently research the local recyclability of every combination of product size, weight, and material content purchased, and must rely on the representations provided. The Defendant had a duty to honestly represent its products so that consumers could make an informed decision prior to purchase or use.

136. As the manufacturer, marketer, advertiser, distributor and/or seller of the Keurig Recyclable Pods and as a company with such a level of experience and resources as are available

to the Defendant, the Defendant and the Keurig Dr Pepper group more generally are long-time sophisticated experts in single-use plastic material field.

137. The Plaintiff and Class Members did, in fact, reasonably rely on the Defendant's Representations when they decided to purchase the Keurig Recyclable Pods.

138. As a result of the deceptive and misleading marketing and labeling tactics used by the Defendant, the Plaintiff and the Class Members purchased the Keurig Recyclable Pods, at a premium and with additional required disposal steps, under the impression they would be recyclable and recycled, when they were not, in fact, recyclable.

139. The Plaintiff and Class Members have suffered damages as a result of the Defendant's conduct. The Plaintiff and Class Members did not receive the benefit of their bargain as purchasers of the Keurig Recyclable Pods, which was held out to be generally and widely recyclable, when in reality, it was not.

140. The Plaintiff and Class Members would not have purchased the Keurig Recyclable Pods, or perhaps even a Keurig beverage machine, had they known that they were not actually recyclable. When the Plaintiff and Class Members purchased the Keurig Recyclable Pods, they relied on their reasonable expectation that the Pods were recyclable. They were misled by the Defendant's Representations.

141. The Defendant failed to disclose and/or actively concealed, despite longstanding knowledge, that the Keurig Recyclable Pods were not recyclable or going to be recycled in Canada, despite expediting its own target of 100% recyclability in Canada from 2020 to 2018.

142. The Defendant gave inadequate warnings about the true recyclability, i.e., non-recyclability, of the Keurig Recyclable Pods in its online and print advertisements as well as on the product packaging and pods themselves, even though they knew its Representations were false, misleading, and that the real information would be important to a reasonable consumer.

143. The Defendant placed the Keurig Recyclable Pods into the stream of commerce in Ontario and elsewhere in Canada with the expectation that consumers, such as the Plaintiff and Class Members, would purchase and use them as instructed.

THE REPRESENTATIVE PLAINTIFF

144. The Plaintiff, N. Buis, purchased a Keurig single-serve beverage machine, the Keurig K Slim, in September 2021 from Amazon for 129.99\$ plus tax.

145. Since September 2021, the Plaintiff has purchased several bulk-sized packs of Keurig Recyclable Pods from the Real Canadian Superstore in St. Thomas, Ontario and the Costco Wholesale in London, Ontario. The Plaintiff purchased a variety of K-Cup brands, including Tim Horton's, McCafé, and Folger's.

146. The Plaintiff purchased the Keurig K Slim after seeing the large "RECYCLABLE" banner and recyclable symbol on a pack of Tim Horton's branded Keurig Recyclable Pods. The Plaintiff was aware that many options were available for single-serve coffee machines but knowing the Keurig pods were recyclable was a significant reason as to why she chose to purchase a Keurig machine and the Keurig Recyclable Pods.

147. The Plaintiff, after using the Keurig Recyclable Pods, followed the instructions on the packaging as to how to prepare the Pods for recycling. The Plaintiff found the process quite difficult and messy, but performed it regardless, thinking it would lead to the Keurig Recyclable Pods being recycled.

148. The Plaintiff purchased the Keurig Recyclable Pods, and the Keurig K Slim, based on the Defendant's Representations that the Keurig Recyclable Pods would be recyclable and recycled when prepared according to the instructions and left for local curbside pickup.

149. At all relevant times, the Plaintiff was under the impression that she was purchasing and using a recyclable product that could and would be recycled locally.

150. Had the Plaintiff known that the Keurig Recyclable Pods were not in fact recyclable, she would not have purchased the Keurig Recyclable Pods, nor would she likely have purchased a Keurig brand single-serve beverage machine, as there are many alternatives on the market.

151. The Plaintiff has suffered damages as a result of purchasing and using the Keurig Recyclable Pods and feels deceived by the greenwashing practices used by the Defendant to induce her to purchase its products.

CAUSES OF ACTION

A. Breach of Contract

152. The Defendant is a "merchant" in the business of selling single-serve beverage machines and capsules to foreseeable consumers, such as the Plaintiff and the Class Members.

153. Upon purchasing the Keurig Recyclable Pods from the Defendant, the Plaintiff and Class Members entered into a contract with the Defendant whereby a monetary benefit was conferred onto the Defendant in exchange for single-use beverage pods which were recyclable and in conformity with the representations, including purchased from a third-party point-of-purchase, but who were induced to make said purchase based on the representations of the Defendant, being the labelling and marketing of the Keurig Recyclable Pods, on which they relied, constituting collateral contract warranties. They were induced by the representations that the Keurig Recyclable Pods were recyclable should the Defendant's instructions for making them recyclable be followed.

154. The Defendant materially breached the contracts with the Plaintiff and Class Members by selling them Keurig Recyclable Pods which were in fact, not generally or widely recyclable or recycled.

155. Class Members were unable to receive a substantial benefit from the Keurig Recyclable Pods to their detriment in that, instead of purchasing a more environmentally friendly alternative to the original K-Cups, seeing as they would be recycled, the Keurig Recyclable Pods were not recyclable and/or recycled.

156. The Defendant's breach of contract has resulted in economic losses and damages to the Plaintiff and Class Members.

157. The aforesaid loss suffered by the Plaintiff and the Class Members was caused by this contractual breach, particulars of which include, but are not limited to the fact that the Class paid

money for a product that did not perform as represented. The Defendant failed to adequately perform the object of the contract.

158. By virtue of the acts and omissions described above, the Plaintiff and Class Members are entitled to recover damages from the Defendant.

i. Breach of Express Warranty

159. The Defendant expressly warranted that the Keurig Recyclable Pods were recyclable.

160. First, the Defendant explicitly warranted that all of the Keurig Recyclable Pods were “Recyclable” and put the symbol indicating the product was recyclable on the Pods, on the packaging, on the website, and in advertisements. The Defendant explicitly warranted it was “Making 100% of K-Cup® pods in Canada Recyclable by the end of”. It later claimed that “100% of K-Cup® pods produced in Canada are recyclable” and explained “What makes these K-Cup® Pods Recyclable?”. The Defendant advertised that polypropylene #5 plastic, of which the Keurig Recyclable Pods were made, was accepted at 93% of Canadian recycling facilities. The Defendant made the assurances that “the new recyclable K-Cup® pods have been tested in real world recycling and recovery facilities to ensure that they can be effectively recycled”, that the Defendant is “determined to reduce [its] environmental footprint”.

161. The Defendant created a video to be featured on its website, www.keurig.ca, which is introduced as showing how the Defendant “pursued innovative strategies to make sure [its] K-Cup pods were not only recyclable, *but could actually be recycled*”.⁹ The video is called “Truly

⁹ Emphasis added.

Recyclable K-Cup® pods”. A second video “Recycling Community”, was introduced by the Defendant as “Recyclability Done Right: We wanted to make sure that our pods were not only recyclable, but also recycled. That is why we partnered with key players in the industry, particularly recyclers, to develop a solution that really works.”

162. It also explicitly warranted that the steps required to make the Keurig Recyclable Pods recyclable were “Peel. Empty. Recycle.” and that “It’s that simple!” or “The recycling process is simple”.

163. Finally, the Defendant used the mobius loop symbol with the plastic grade indication on its marketing material and product packaging in a way expressed that the plastic composition of the Keurig Recyclable Pods could and would be recycled, despite being deceptive.

164. The Keurig Recyclable Pods designed, developed, formulated, tested, licensed, manufactured, packaged, distributed, marketed, promoted, advertised, labelled and/or sold by the Defendant did not conform to these express representations, as the Pods were, in reality, not generally recyclable at Canadian facilities, nor were they in fact recycled due to the product size and plastic grade. Even where exceptionally accepted by certain municipalities, the instructions provided to prepare the Keurig Recyclable Pods were then inadequate.

165. This is evidenced by the recent finding of Canada’s Competition Bureau, who concluded that Keurig Recyclable Pods are not widely accepted for recycling in municipal residential recycling programs in Canada, and that additional steps were required in the municipalities that had taken initiative to address the recyclability of the Keurig Recyclable Pods.

166. The Keurig Recyclable Pods are not recyclable, are not commonly accepted at local Canadian recycling facilities, are not simple to recycled, and are not actually recycled.

167. As a direct and proximate result of the Defendant's breach of warranty, the Plaintiff and Class Members have suffered damages, and economic loss and will continue to suffer such damages and economic loss in the future, as they either need to purchase a new beverage machine or find an alternative but compatible product for their existing machine.

ii. Breach of Implied Warranties

168. At all times relevant hereto, applicable law imposed a duty that requires that the Keurig Recyclable Pods be fit for the ordinary purposes for which they are used and be of merchantable quality.

169. The Keurig Recyclable Pods were not of a recyclable quality at the time they left the Defendant's possession, as set forth hereinabove. At all times relevant hereto, the Defendant knew of that the Keurig Recyclable Pods were not in fact widely recyclable, as advertised at the time that these transactions occurred. Thus, the Keurig Recyclable Pods, when sold and all times thereafter, were not in merchantable condition or quality and were not fit for their ordinary intended purpose, which was to offer a single-serve beverage capsule which was recyclable and able to be recycled.

170. The Defendant clearly knew that consumers, including the Plaintiff and Class Members, would expect the Keurig Recyclable Pods to be a recyclable quality, would follow the instructions clearly provided to prepare them for recycling, and would send them to be recycled. As such, the

Defendant impliedly warranted that the products were fit for such use, especially so as the Defendant marketed them for this particular purpose. The Plaintiff and Class Members relied on this warranty, and reasonably believed that the Keurig Recyclable Pods were recyclable and could be recycled.

171. The Defendant knew, or should have known, that their Keurig Recyclable Pods were not widely accepted by recycling facilities in Canada, were made of a plastic that was almost never recycled, and that the instructions provided would not be sufficient if a local recycling facility were to accept the Keurig Recyclable Pods, particularly so given the level of research and testing they claim to have done in real-life recycling scenarios. The unrecyclable quality of the Keurig Recyclable Pods is contrary to the Defendant's Representations made to induce purchase, is not of the quality promised, and fails to perform to the reasonable expectations of the average buyer.

172. Consequently, the Defendant breached the implied warranty of merchantability, as they failed to sell a recyclable product that was able to be recyclable, able to be recycled, and would be recycled.

173. The Defendant has been put on notice of the Keurig Recyclable Pods' failure to be recyclable for many years, through research, testing, lawsuits, and investigations, and has failed to acknowledge or correct them. The Defendant has instead left the burden on consumers to fulfill recycling steps which are not fruitful, and recycling facilities to sort and process millions of unrecyclable products to landfills, while risking the contamination of other recyclable materials.

174. As a direct and proximate result of Defendant's breach of the implied warranty of merchantability and fitness for purpose, the Plaintiff and Class Members have suffered damages.

B. Fraudulent Concealment

175. Despite explicit Representations by the Defendant about the Keurig Recyclable Pod's recyclability, the Keurig Recyclable Pods designed, developed, formulated, tested, licensed, manufactured, packaged, distributed, marketed, promoted, advertised, labelled and/or sold by the Defendant were defective in that, when they left their possession, they were not of a recyclable material, nor would they be recycled in Canada.

176. The Representations made by the Defendant are therefore misrepresentations, made falsely and fraudulently, as evidenced by the fact that Keurig Recyclable Pods are frequently not accepted by recycling facilities, less than 1% of polypropylene #5 plastic is ever even recycled in Canada, and the "recycling" instructions provided to consumers were inadequate. Additionally, the introduction of the Keurig Recyclable Pods into local recycling facilities actually increases inefficiency, contamination, and the overall success of recycling incoming material, the complete opposite of what consumers intended to do in purchasing the Keurig Recyclable Pods. These misrepresentations constitute a material misrepresentation such that a major aspect of the contractual obligation between the Defendant and a consumer is that the Keurig Recyclable Pods are, in reality, recyclable.

177. In addition to material misrepresentations, the Defendant also made material omissions regarding the Keurig Recyclable Pods.

178. The Defendant knew that these Representations were false at the time they were made, as the designer, developer, researcher, manufacturer, distributor, promotor, and advertiser of Keurig

Recyclable Pods who purposefully developed this product as a recyclable alternative to its original K-Cup pod.

179. The Defendant fraudulently concealed and/or intentionally failed to disclose to the Plaintiff, the Class Members, and all others in the chain of distribution, the true recyclability of Keurig Recyclable Pods, i.e., that they were not widely recyclable, even less likely to be recycled, and would, if anything, put an unnecessary strain on local recycling facilities, despite the best intentions of consumers.

180. The Defendant had a duty to disclose material facts regarding the true nature of the Keurig Recyclable Pods because the Defendant had exclusive knowledge as to the true properties, i.e., recyclability in Canada, of the Keurig Recyclable Pods at the time of sale. This defect is latent and not something that the Plaintiff or Class Members could, in the exercise of reasonable diligence, have discovered on their own prior to purchase.

181. The Defendant had a duty to disclose these omitted material facts because they were known and/or accessible only to the Defendant who have superior knowledge and access to the facts and the Defendant knew they were not known to or reasonably discoverable by the Plaintiff or Class Members.

182. The Defendant actively concealed and/or suppressed these material facts, in whole or in part, with the intent to induce the Class Members to purchase and to use the Keurig Recyclable Pods, perform the steps to prepare the Keurig Recyclable Pods for the local recycling facility, knowing that the consumer would feel morally relieved by the idea that their frequently consumed single-use plastic capsules were being recycled, that they were part of the process, and that the

consumer would never know the true fate of the Keurig Recyclable Pods, which is inevitably the landfill.

183. The Class Members were unaware of these omitted material facts and would not have acted as they did if they had known of the concealed and/or suppressed facts. The Plaintiff and Class Members' actions were reasonable and justified. The Defendant was in exclusive control of the material facts concerning the Keurig Recyclable Pods defect and such facts were not known to the public or to the Class Members until published by the Canadian Competition Bureau.

184. The facts concealed and/or not disclosed by the Defendant to the Plaintiff and Class Members are material facts, in that a reasonable person would have most definitely considered them important in deciding whether to purchase the Keurig Recyclable Pods.

185. In addition, Class Members relied on the Defendant's Representations, and they purchased the Keurig Recyclable Pods. Said reliance was reasonable. The Class Members were without the ability to determine the truth on their own and could only rely on the Defendant's statements and representations.

186. As a result of the concealment and/or fraudulent misrepresentation of material facts, the Class members have sustained damages, entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

C. Negligence

187. The Defendant had a positive legal duty to use reasonable care to perform their legal obligations to the Plaintiff and Class Members, including, but not limited to, designing, researching, developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Keurig Recyclable Pods in a reasonably acceptable manner and without misrepresentation.

188. The Defendant knew and it was reasonably foreseeable that in purchasing the Keurig recyclable Pods, the Plaintiff and Class Members would trust and rely on the Defendant's skill and integrity. The Defendant also knew, and it was reasonably foreseeable that, if the Keurig Recyclable Pods misrepresented the quality which induced purchase, being the recyclable nature of the product, that the Plaintiff and Class Members would suffer damages, such as those detailed herein.

189. The standard of care reasonably expected in the circumstances required the Defendant to act fairly, reasonably, honestly, candidly and with due care in the course of designing, researching and developing, testing, manufacturing, importing/exporting, distributing, supplying, marketing, advertising, promoting, packaging, labelling, and/or selling the Keurig Recyclable Products. The Defendant, through their employees, officers, directors, and agents, failed to meet the reasonable standard of care. The aforesaid loss suffered by the Class Members was caused by this negligence.

190. The Defendant failed to properly market, advertise, promote, package, label, and/or sell the Keurig Recyclable Products such that they failed to provide a product which was recyclable, as claimed in its Representations made to induce purchase.

191. The Defendant was negligent in the acts and omissions described above and caused damage to the Class Members. The damages and economic loss were foreseeable.

E. Fraudulent and/or Negligent Misrepresentation

192. The tort of fraudulent misrepresentation can be made out as:

- i. A representation of fact by the Defendant was false, untrue, inaccurate and/or misleading;
- ii. The Defendant had knowledge the representation was false, lacked belief in its truth, or were recklessness as to its truth;
- iii. The Defendant intended for the Plaintiff and Class Members to rely on said representation;
- iv. The Plaintiff and Class Members did rely on the representation, and, as such, acted on the representation; and
- v. The Plaintiff and Class Members sustained damages as a result.

193. In the alternative, the tort of negligent misrepresentation can be made out as:

- i. A special relationship created between the manufacturer/vendor and the consumer which creates a duty of care through proximity;
- ii. A representation made by the Defendant was false, untrue, inaccurate and/or misleading;
- iii. The Defendant was negligent in making the representation;

- iv. The Plaintiff and Class Members relied and, as such, acted on the representation;
and
- v. The Plaintiff and Class Members sustained damages as a result of their reliance.

194. The Defendant, as accused herein, committed fraudulent and/or negligent misrepresentation in representing that the Keurig Recyclable Pods were recyclable, by means of marketing and promotion, including product packaging, knowing at the time the Representations were made that they were false as the Keurig Recyclable Pods were (i) frequently rejected by local recycling facilities in Canada, (ii) were normally not recyclable due to their size, weight, and material composition, (iii) that the generic “recycling” instructions provided to consumers were insufficient, and (iv) that, overall, Keurig Recycles Pods would not and could not be recycled. The Representations were, therefore, false and untrue statements.

195. At the time the Defendant made the misrepresentations herein alleged, it had no reasonable grounds for believing the Representations to be true. The Defendant is an expert in the single-use beverage and plastic industry and claims to have conducted ample research and testing related to the recyclability of K-Cups in Canada. The Defendant knew, or, alternatively, were reckless and/or negligent in not knowing, that the Keurig Recyclable Pods were not recyclable.

196. The Defendant intended for the Plaintiff and Class Members to rely on the Representations in order to induce the purchase of the Keurig Recyclable Pods in the competitive, lucrative and environmental-conscious Canadian market.

197. The Plaintiff and Class Members did rely on the Representations that the Keurig Recyclable Pods were normally recyclable, and in reliance upon them, purchased and/or used the Keurig Recyclable Pods. Said reliance was reasonable.

198. The Plaintiff and Class Members were without the ability to determine the truth of these statements on their own and could only rely on the Defendant in this regard.

199. Had the Plaintiff and the Class Members known the true facts, they would have not purchased the Keurig Recyclable Pods, and certainly would not have paid such a high price.

200. As a direct and proximate result of the foregoing acts and/or omissions, Class Members have suffered damages entitling them to compensatory damages, special damages, punitive damages and, in the alternative, equitable and declaratory relief as elaborated further below.

STATUTORY REMEDIES

201. The Defendant is in breach of the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, and/or other similar/equivalent legislation.

202. The Plaintiff pleads and relies upon trade legislation and common law, as it exists in this jurisdiction and the equivalent/similar legislation and common law in the other Canadian provinces and territories.

A. Breach of the *Sale of Goods Act* and the Sale of Goods Legislation

203. At all times relevant to this Claim, the Class Members were “buyer[s]”, the Defendant a “seller”, the Keurig Recyclable Pods were “goods”, and the transactions by which the Class Members purchased the Keurig Recyclable Pods were “sale[s]” within the meaning of that term as defined in s.1 of the *Sale of Goods Act*.

204. Class Members who purchased the Keurig Recyclable Pods are buyers for the purposes of the Sale of Goods Legislation. The Defendant carried on business was, among other things, a seller for the purposes of the Consumer Protection Legislation.

205. The Defendant was aware that consumers would be induced to purchase and did purchase the Keurig Recyclable Pods due to their recyclability and it is therefore an implied warranty or condition that the goods will be reasonably fit for such purpose and/or would be in merchantable condition.

206. The Defendant was aware that the customers purchased the Keurig Recyclable Pods based on the Defendant’s Representations and based on their marketing and advertising and therefore there is an implied warranty or condition that the goods will perform as presented.

207. Pursuant to s. 15 of the *Sale of Goods Act*, there were implied conditions as to merchantable quality or fitness of the Keurig Recyclable Pods whose purpose was obviously to be recyclable, and whose true nature could not have been revealed upon examination. The Keurig Recyclable Pods, when sold and at all times thereafter, were not merchantable and were not fit for the ordinary purpose for which they are used.

208. The Keurig Recyclable Pods were sold by the Defendant in the ordinary course of its business.

209. The Plaintiff and Class Members reasonably relied on the Defendant's skill and judgment in making the Representations.

210. The Defendant committed a fault or wrongful act by breaching the implied condition as to quality or fitness for a particular purpose. By placing into the stream of commerce a product that was unfit for the purpose for which it was marketed, the Defendant is liable for damages relating thereto. The Class is entitled to maintain an action for breach of warranty under s. 51 of the *Sale of Goods Act*.

B. Breach of the *Consumer Protection Act* and Consumer Protection Legislation

211. The Defendant is a resident in Ontario for the purpose of s. 2 of the *Consumer Protection Act*.

212. At all times relevant to this action, many of the Class Members were "consumer[s]", the Defendant was a "supplier", and the transactions by which many of the Class Members purchased the Keurig Recyclable Pods were "consumer transaction[s]" within the meaning of that term as defined in s. 1 of the *Consumer Protection Act*.

213. Class Members who purchased the Keurig Recyclable Pods for personal, family or household purposes and/or not for resale or for the purpose of carrying on business (as those concepts apply in the various provinces and territories), are consumers for the purposes of the Consumer Protection Legislation. The Defendant carried on business in those provinces and

territories and were, among other things, suppliers for the purposes of the Consumer Protection Legislation.

214. The Defendant has engaged in an unfair practice by making a Representation to Class Members which was and is “false, misleading or deceptive” and/or “unconscionable” within the meaning of ss. 14, 15 and 17 of the *Consumer Protection Act* as follows:

- (a) Representing that the Keurig Recyclable Pods have performance characteristics, uses, benefits and/or qualities, which they do not have;
- (b) Representing that the Keurig Recyclable Pods are of a particular standard or quality which they are not;
- (c) Representing that the Keurig Recyclable Pods are available for a reason that does not exist, namely, being a recyclable alternative product; and
- (d) Using exaggeration, innuendo and ambiguity as to a material fact or failing to state a material fact regarding the recyclability of the Keurig Recyclable Pods as such use or failure deceives or tends to deceive.

215. The Representations made by the Defendant were and continue to be unconscionable because *inter alia* the Defendant knew or ought to have known that consumers are likely to rely, to their detriment, on Defendant’s misleading statements as to the recyclability of the Keurig Recyclable Pods.

216. The Class Members relied on the Representations.

217. The reliance upon the Representations by the Class Members is established by his or her purchase of the Keurig Recyclable Pods. Had the Class Members known that the Representations were false and misleading, they would not have purchased the Keurig Recyclable Pods, and would certainly not have paid such a high price.

218. The Representation was and is false, misleading, deceptive and/or unconscionable such that it constituted an unfair practice which induced the Class to purchase the Keurig Recyclable Pods as a result of which they are entitled to damages pursuant to the *Consumer Protection Act*.

C. Breach of the *Competition Act*

219. At all times relevant to this action, the Defendant's design, development, formulation, testing, licensing, manufacturing, packaging, distribution, marketing, promotion, advertising, labelling, and/or selling was a "business" and the Keurig Recyclable Pods were "product(s)" within the meaning of that term as defined in s. 2 of the *Competition Act*.

220. The Defendant made the Representations to the public and in so doing breached s. 52 of the *Competition Act* because the Representations:

- (a) Were made for the purpose of promoting, directly or indirectly, the use of a product or for the purpose of promoting, directly or indirectly, the business interests of the Defendant;
- (b) Were made knowingly or recklessly;
- (c) Were made to the public;

(d) Were false and misleading in a material respect; and

(e) Stated a quality of recyclability that was false and not based on adequate and proper testing.

221. The Plaintiff and Class Members relied upon the Representations by buying the Keurig Recyclable Pods and suffered damages and loss.

222. Pursuant to s. 36 of the *Competition Act*, the Defendant is liable to pay the damages which resulted from the breach of s. 52.

223. Pursuant to s. 36 of the *Competition Act*, the Class Members are also entitled to recover their full costs of investigation and substantial indemnity costs paid in accordance with the *Competition Act*.

224. The Plaintiff and Class Members are also entitled to recover as damages or costs, in accordance with the *Competition Act*, the costs of administering the plan to distribute the recovery in this action and the costs to determine the damages of each Class Member.

CAUSATION

225. The acts, omissions, wrongdoings, and breaches of legal duties and obligations of the Defendant are the direct and proximate cause of the Plaintiff's and Class Members' losses.

226. The Plaintiff and Class Members plead that by virtue of the acts, omissions and breaches of legal obligations as described above, they are entitled to legal and/or equitable relief against the

Defendant, including damages, consequential damages, specific performance, rescission, attorneys' fees, costs of suit and other relief as appropriate in the circumstances.

DAMAGES

227. By reason of the acts, omissions and breaches of legal obligations of the Defendant, the Plaintiff and Class Members have suffered injury, economic loss and damages, the particulars of which include, but are not limited to, the following general, special, and punitive damages:

A. General Damages (Non-Pecuniary Damages)

228. The general damages being claimed in this Statement of Claim include stress, embarrassment, trouble, and inconvenience, caused by the deception that the products purchased by Class Members were more environmentally friendly than they actually were, the trouble of preparing products for recycling which were never recyclable, the distrust in what companies claim of their products, and the replacement of the Keurig Recyclable Pods, and even perhaps the entire Keurig machine, with an environmentally friendlier alternative, given the climate crisis at hand and impending ban on single-use plastics.

B. Special Damages (Pecuniary Damages)

229. The special damages being claimed in this Statement of Claim include the purchase price of the Keurig Recyclable Pods and any device purchased to help in the preparation of the Keurig Recyclable Pods for recycling.

C. Punitive (Exemplary) and Aggravated Damages

230. The Defendant has taken a cavalier and arbitrary attitude towards its legal and moral duties to the Class Members and has knowingly been selling the Keurig Recyclable Pods while actively misrepresenting facts concerning their recyclability.

231. In addition, it should be noted that it is imperative to avoid any perception of evading the law without impunity. The Defendant holds a portfolio of over 60 beverage brands in Canada and is the subsidiary of a major worldwide beverage conglomerate. It is and will continue to be heavily involved in the single-use packaging industry, reaching way beyond the Keurig K-Cup. Should the Defendant only be required to disgorge monies which should not have been retained and/or withheld, such a finding would be tantamount to an encouragement to their future selves and other businesses to continue deceptively and misleadingly greenwashing products to induce purchase. Punitive and aggravated damages are necessary in the case at hand to be material in order to have a deterrent effect on other corporations.

232. At all material times, the conduct of the Defendant as set forth was deliberate and oppressive towards its customers and the Defendant conducted itself in a wilful, wanton and reckless manner.

UNJUST ENRICHMENT AND CONSTRUCTIVE TRUST

233. The Defendant has been unjustly enriched as a result of the revenues generated from the sale of the Keurig Recyclable Pods, as detailed herein:

- a) The Defendant have obtained an enrichment through:
 - i) Revenues and profits from the sale of the Keurig Recyclable Pods;

- ii) The saving of costs of not actually designing, developing, testing, manufacturing, marketing, and distributing a product which is actually recyclable, in accordance with Canadian local recycling facilities;
 - iii) The saving of costs of not creating and implementing an independent and functional recycling program for consumers;
 - iv) The saving of costs of replacing the Keurig Recyclable Pods with Keurig Recyclable Pods which are recyclable in Canada.
- b) The Plaintiff and Class Members have suffered a corresponding deprivation; and
- c) The benefit obtained by the Defendant and the corresponding detriment experienced by the Plaintiff and Class Members has occurred without juristic reason. Since the monies that were received by the Defendant resulted from the Defendant's wrongful acts, there is and can be no juridical reason justifying the Defendant's retaining any portion of such money paid.

234. Further, or in the alternative, the Defendant is constituted as a constructive trustee in favour of the Class Members for all of the monies received because, among other reasons:

- a) The Defendant was unjustly enriched by receipt of the monies paid for the Keurig Recyclable Pods;
- b) The Class Members suffered a corresponding deprivation by purchasing the Keurig Recyclable Pods;
- c) The monies were acquired in such circumstances that the Defendant may not in good conscience retain them;

- d) Equity, justice and good conscience require the imposition of a constructive trust;
- e) The integrity of the market would be undermined if the court did not impose a constructive trust; and
- f) There are no factors that would render the imposition of a constructive trust unjust.

235. Further, or in the alternative, the Plaintiff claims an accounting and disgorgement of the benefits which accrued to the Defendant.

EFFICACY OF CLASS PROCEEDINGS

236. The members of the proposed Class potentially number in the tens of thousands and are geographically dispersed. Because of this, joinder into one action is impractical and unmanageable. Conversely, continuing with the Class Members' claim by way of a class proceeding is both practical and manageable and will therefore provide substantial benefits to both the parties and to the Court.

237. Members of the proposed Class have no material interest in commencing separate actions. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Defendant. Even if the Class Members themselves could afford such individual litigation, the court system could not as it would be overloaded and, at the very least, it is not in the interests of judicial economy. Further, individual litigation of the factual and legal issues raised by the conduct of the Defendant would increase delay and expense to all parties and to the court system.

238. This class proceeding overcomes the dilemma inherent in an individual action whereby the legal fees alone would deter recovery and thereby in empowering the consumer, it realizes both individual and social justice as well as rectifies the imbalance and restore the parties to parity.

239. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory and inconsistent judgments on questions of fact and law that are similar or related to all members of the Class.

240. In these circumstances, a class action is the only appropriate procedure and the only viable means for all of the members of the Class to effectively pursue their respective rights and have access to justice.

241. The Plaintiff has the capacity and interest to fairly and fully protect and represent the interests of the proposed Class and has given the mandate to her counsel to obtain all relevant information with respect to the present action and intends to keep informed of all developments. In addition, class counsel is qualified to prosecute complex class actions.

LEGISLATION

242. The Plaintiff pleads and relies on the *Courts of Justice Act*, the *Class Proceedings Act*, the *Sale of Goods Act*, the *Consumer Protection Act*, the *Competition Act*, and other Sale of Goods Legislation and Consumer Protection Legislation.

JURISDICTION AND FORUM

Real and Substantial Connection with Ontario

243. There is a real and substantial connection between the subject matter of this action and the province of Ontario because:

- (a) The Defendant engages in business with residents of Ontario;
- (b) The Defendant derives substantial revenue from carrying on business in Ontario;
and
- (c) The damages of the Plaintiff and several Class Members were sustained in Ontario.

244. The Plaintiff proposes that this action be tried in the City of Ottawa, in the Province of Ontario as a proceeding under the *Class Proceedings Act*.

SERVICE OUTSIDE ONTARIO

245. The originating process herein may be served outside Ontario, without court order, pursuant to subparagraphs (a), (c), (g), and (p) of Rule 17.02 of the *Rules of Civil Procedure*. Specifically, the originating process herein may be served without court order outside Ontario, in that the claim is:

- (a) In respect of personal property situated in Ontario (rule 17.02(a));
- (b) For the interpretation and enforcement of a contract or other instrument in respect of personal property in Ontario (rule 17.02 (c));
- (c) In respect of a tort committed in Ontario (rule 17.02(g));

- (d) Authorized by statute, specifically, the *Sale of Goods Act*, the *Competition Act* and the *Consumer Protection Act* (rule 17.02(n)); and
- (e) Against a person carrying on business in Ontario (rule 17.02(p)).

Date: January 10, 2022

CONSUMER LAW GROUP P.C.

251 Laurier Ave. West
Suite 900
Ottawa, Ontario
K1P 5J6

Jeff Orenstein
LSUC# 59631G
jorenstein@clg.org

Andrea Grass
LSUC# 65051R
agrass@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiff

N. BUIS
Plaintiff

KEURIG CANADA INC.
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED IN OTTAWA
Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

CONSUMER LAW GROUP P.C.
251 Laurier Ave. West, Suite 900
Ottawa, Ontario, K1P 5J6

Jeff Orenstein
LSUC# 59631G
jorenstein@clg.org

Andrea Grass
LSUC# 65051R
agrass@clg.org

Tel: (613) 627-4894
Fax: (613) 627-4893

Lawyers for the Plaintiff