

Federal Court



Cour fédérale

**Date: 20140110**

**Docket: T-696-10**

**Citation: 2014 FC 17**

**Ottawa, Ontario, January 10 2014**

**PRESENT: The Honourable Mr. Justice Rennie**

**CERTIFIED CLASS PROCEEDING**

**BETWEEN:**

**MARK CUZZETTO**

**Plaintiff**

**and**

**BUSINESS IN MOTION INTERNATIONAL  
CORPORATION, ALAN KIPPAX,  
and ASHIF MOHAMED**

**Defendants**

**REASONS FOR JUDGMENT AND JUDGMENT**

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## OVERVIEW

[1] The plaintiff moves for default judgment against the defendants Alan Kippax (Kippax) and Business in Motion International Corporation (BIM). The action was certified as a class proceeding against Kippax and BIM on November 10, 2011, on behalf of the plaintiff and a class defined as:

All persons resident in Canada who purchased a Perpetual Motion Product from or through BIM (the Class Members).

[2] The plaintiff alleges breaches of Part VI of the *Competition Act*, RSC, 1985, c C-34 with respect to a multi-level marketing plan or plan of pyramid selling operated by the defendants, and claims damages for those breaches pursuant to paragraph 36(1)(a) of the *Competition Act*, on his own behalf and on behalf of the other Class Members.

[3] The plaintiff seeks default judgment on the common questions certified by Order of this Court on November 10, 2011. The common questions to be determined are:

- a. Did BIM or Kippax establish, operate, advertise, or promote a scheme of pyramid selling, contrary to subsection 55.1(2) of the *Competition Act*?
- b. Did BIM or Kippax operate a multi-level marketing plan, as defined in subsection 55(1) of the *Competition Act*? If so, did BIM or Kippax make representations to the plaintiff or the other Class Members relating to compensation? If so:
  - i. Were those representations contrary to subsection 55(2) of the *Competition Act*?  
and
  - ii. Were those representations consistent with the due diligence requirements set out in subsection 55(2.1) of the *Competition Act*?

- c. To the extent that BIM and Kippax breached subsections 55.1(2), 55(2) or 55(2.1) of the *Competition Act*, are BIM and Kippax jointly and severally liable to pay to the plaintiff and to the other Class Members the damages they suffered as a result of the breaches?
- d. Should the Court assess damages in the aggregate, in whole or in part? If in the aggregate, what is the proper amount of the aggregate damages award?
- e. Did the conduct of BIM or Kippax meet the standard for an award of punitive damages? Once compensatory damages are determined, in what amount and to whom should punitive damages be paid?

[4] On a motion for default judgment where no defence has been filed, every allegation in the statement of claim must be taken as denied. Evidence must be led that enables the Court to find, on a balance of probabilities, that there is liability and that the plaintiff is entitled to the remedies sought. For the reasons which follow, questions (a) – (d) are answered in favour of the Class Members and default judgment is granted in the amount of \$6,560,000. The question of the punitive damages (e) is answered in the negative.

## **FACTUAL BACKGROUND**

### ***Corporate History of BIM***

[5] BIM was incorporated under the *Canada Business Corporations Act*, RSC, 1985, c C-44, on March 13, 2006 by Mark Wilson (Wilson). On that same day, 100 shares in BIM were issued to Wilson, who was appointed as President, Secretary and Treasurer.

[6] A year later, on March 5, 2007, Wilson resigned as a director. On that same day, Kippax was appointed as a director of BIM and Wilson transferred his shares in BIM to Kippax.

[7] The following day, March 6, 2007, Kippax resigned as director and transferred his shares in BIM to Colin Fox (Fox), who was then appointed a director of BIM.

[8] On November 4, 2009, Fox resigned as director and transferred his shares in BIM to the defendant Ashif Mohamed (Mohamed), who was then appointed as a director.

[9] Although Kippax resigned from his position as a director of BIM, he remained in control of the operations of BIM and was an active participant in and promoter of the scheme in question. Kippax held a variety of positions within BIM, including “Global Sales Director.” Indeed, as will be seen, Kippax and BIM were effectively one.

[10] The affidavit of Mark Cuzzetto (Cuzzetto), the representative plaintiff, together with those of Cori Piers, Ellen Aitchison, Jentje Abma, and Ken Chung provide a complete picture of the defendants’ business model in general, and the unfortunate consequences for the Class Members. BIM presented itself as a “Revolutionary Business Opportunity.” BIM hosted regular seminars for potential participants in BIM, typically held in the evenings at hotel conference rooms. Members of BIM were encouraged to bring their friends and families to attend BIM seminars, and were encouraged not to tell those recruits about the BIM business model. I find this fact instructive. It was indeed good advice from BIM’s perspective, as the BIM business model was, at best, opaque.

Much would be lost in the telling, and a good number of questions raised for which there would be no coherent answer. Kippax sought to control the message.



### ***BIM Seminars***

[11] The BIM launch event took place in Etobicoke, Ontario on June 17, 2006. It featured seminars led by Kippax and others which detailed the BIM scheme, a showroom for BIM products and an exotic car show.

[12] As established in the evidence before me, BIM provided materials to BIM distributors for use in their recruiting efforts. BIM provided a script for BIM distributors for voicemail messages to potential recruits. The script promised a "proven system" and claimed participants would "achieve the success you have always dreamed of." The script stated, "[D]istributors are making \$13,000 a month part-time", and offered examples of a truck driver who was able to quit his job and a nurse in Calgary who "has just qualified herself to earn over \$340,000 in less than 6 weeks in the business." It promised that "[y]ou too, can be at the beginning of this massive explosion in network marketing and make a 6-figure income in a very short period of time."

[13] Before bringing recruits to a BIM seminar, BIM distributors were asked to enrol their recruits on the "Pre-Marketing" website; *earnfirm.com*. Registration on *earnfirm.com* generated a

unique identification number that a recruit could later use if they decided to become a BIM distributor. I will return to this fact in consideration of the award of aggregate damages.

[14] BIM seminars incorporated images of wealth and success in its promotional materials, suggesting, in a less than subtle manner, that participation would result in BIM distributors becoming wealthy. Presentations accompanying BIM seminars included images of private jets, expensive homes, tropical resorts, and golf courses.

[15] BIM seminars were between an hour and a half and two hours long. They featured a PowerPoint presentation created and distributed by BIM. BIM seminars were broken into three sections, each delivered by a different speaker. An introductory speaker set the stage for the evening, a second speaker introduced one of the products sold by BIM and a final speaker explained the business opportunity. Roughly 2/3 of a typical BIM seminar was dedicated to discussion of the BIM scheme and testimonials from BIM distributors relating their purported success in the BIM scheme.

[16] Common to all the affiants is the assertion that Kippax instructed trainees to adhere closely to the BIM script and PowerPoint presentations, both of which were prepared by BIM. BIM scripts contained the text to be read verbatim by the presenter. BIM scripts suggested emphasis, pauses, jokes, and even “personal” anecdotes about people said to have succeeded in the BIM scheme.

[17] As a result of these training sessions, standard BIM presentations and BIM scripts, BIM seminars were substantially the same across the various cities they were held and over the period

BIM was in operation. The content remained substantially the same over the course of BIM's operations. This conclusion is reasonably drawn having regard to the similarities in the experiences described in the Class Members' evidence.

[18] BIM hosted regular BIM seminars in larger communities. BIM seminars were also delivered on "tours," especially in western Canada, with stops in major centers advertised months in advance. Kippax and other BIM staff travelled in a customized bus with images of private jets and tropical islands on the sides. Also appearing were the words "I Can't Believe It's True" and the website addresses *icbit.com* or *icantbelieveitstrue.com*. People would have been wise to pay closer attention to that logo.

[19] Drawing from the plaintiff's submissions, I find that these tours included:

- a. The "Kelowna Launch Tour", from August 5-28, 2008. The Kelowna Launch Tour included stops in Winnipeg, MB, Red Deer, AB, Kelowna, BC, and Calgary, AB, and followed a "successful 45-day trip to the West Coast";
- b. The "Waking Up the Neighbours Tour", from November 7, 2008 in Winnipeg, MB, to December 2, 2008 in Burnaby, BC;
- c. The "Pedal to the Metal Tour", from March 23, 2009 in Toronto, ON, to June 12, 2009 in Cobourg, ON, which included 14 stops in Ontario, 26 stops in British Columbia, 13 stops in Manitoba, 5 stops in Saskatchewan, and 22 stops in Alberta. The Pedal to the Metal Tour promotional materials asked potential attendees if they were "serious about making a million dollars this year" and promised "powerful training" delivered by Kippax; and



- d. The “Stepping Up to the Microphone Tour” in September 2009, visited “18 Cities in 18 Days” across western Canada. The Stepping up to the Microphone Tour featured presentations from Kippax and testimonials from BIM distributors “concerned about the future of BIM” but who had been reassured by Kippax.

### ***The BIM Scheme***

[20] The BIM scheme was presented as a classic multi-level marketing plan. Participants purchased a product from BIM and could earn commissions for arranging sales of BIM products to “retail” customers or to a “downline” of BIM distributors which they had in turn recruited to buy from them.

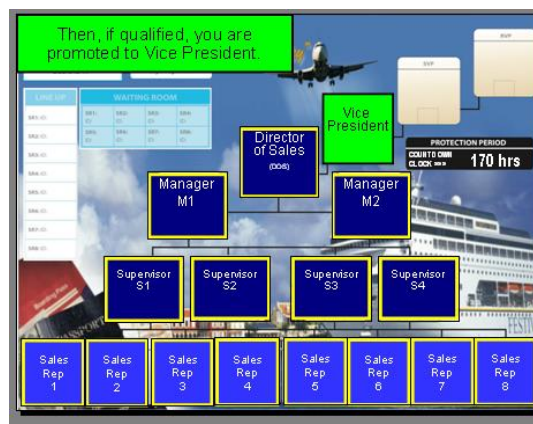
[21] BIM offered several products available for sale. These included vacation rental packages known as Ultra Life Club Memberships, pre-packaged gemstones known as Gem Caches and a “health-promoting” stir stick for drinking water called the Quantum Stylus. These and other products sold by BIM are known as Perpetual Motion Products. I note that “perpetual motion” is a scientific impossibility – yet another sign of things to come.

[22] Participants had two options to acquire a Perpetual Motion Product. First, they could pay the retail price charged by BIM: \$9,000 per Ultra Life Club Membership or other Perpetual Motion Product. Second, they were offered the option to purchase the Perpetual Motion Product for a reduced “wholesale” price - \$3,200 for the Ultra Life Club Membership – if they paid \$80 as a BIM distributor fee to become a BIM distributor entitled to sell Perpetual Motion Products.

[23] By becoming a BIM distributor, participants were eligible to take part in a BIM Corporate Ladder. The only way to participate in a BIM Corporate Ladder was to become a BIM distributor by buying a Perpetual Motion Product and paying the BIM distributor Fee. BIM materials promised BIM distributors would “[g]et compensated for every product sale [they] create.”

[24] BIM provided each BIM distributor a username and password to access the website *bimcorporation.com*, which allowed BIM distributors to log in and view progress in their BIM Corporate Ladder. I will return to this point when considering aggregate damages.

[25] A BIM Corporate Ladder was a hierarchy modeled after a typical sales office environment, consisting of 8 sales representatives at the bottom level, 4 supervisors at the level above the sales representatives, 2 managers above the supervisors, and a director of sales at the top. An overview of the workings of the BIM Corporate Ladder provided in the BIM presentation, along with the accompanying script follows:



When you start, you are in one of the 8 Sales Rep Positions along the bottom. Then you get promoted to Supervisor, then you get promoted to Manager, and then you get promoted to Director of Sales. Did everybody get that? I'd like to make sure, because that's one of the unique things about our company. It is IMPOSSIBLE for you to remain down there, or down there and everybody gets

promoted around you. That's very unique, and as far as I know it's completely unheard of. Everybody gets promoted! You do not need any qualifications for any level on our Corporate Ladder. Though, you do need qualifications to move into our VP position, and we're going to cover what qualification is here in the next few slides.

[26] Supervisors were responsible for ensuring that eight sales were made on each BIM Corporate Ladder. Sales made were indicated on the BIM Corporate Ladder by icons in the shape of a key in one of several colors. Supervisors would earn a Green Key for each sale.

[27] If a supervisor did not make two sales within the first 170 hours that the BIM Corporate Ladder was active, the BIM Corporate Ladder entered "Capture the Key Mode". During Capture the Key Mode, anyone on the BIM Corporate Ladder could make the required sales and earn additional credit for those sales, which were represented by a Gold Key awarded to the BIM distributor who made the additional sale. The supervisor who did not make the required sale received an icon depicting a circle with a red line through it in the place where their Green Key icon would have gone on their online BIM Corporate Ladder.

[28] Once eight sales were made, the director of sales was paid and everyone on the BIM Corporate Ladder was promoted to the next level. The director of sales was moved off the BIM Corporate Ladder or, in certain circumstances, could remain and earn additional commissions on each of the new BIM Corporate Ladders.

[29] At this point, the BIM Corporate Ladder was split, or divided into two. Each manager became the director of sales on a new BIM Corporate Ladder, and the others directly under them on the BIM Corporate Ladder were moved to new BIM Corporate Ladders.

[30] BIM promised payments to BIM distributors who reached director of sales after their supervisors or other members of their BIM Corporate Ladder had made eight sales of Perpetual Motion Products. The director of sales was to be paid \$3,200 for logging into the *bimcorporation.com* website to complete the BIM Corporate Ladder by clicking a button, \$5,000 for each Green Key they had earned, \$5,000 for each additional green key, and could “keep” the Perpetual Motion Product they purchased. This resulted in a successful director of sales receiving what BIM described as \$22,200 in “cash and value” for participation in a BIM Corporate Ladder.

[31] Remarkably, BIM seminars emphasized that even if a BIM distributor did not make any sales, a BIM distributor would nevertheless be promoted to director of sales and recover the \$3,200 spent on a Perpetual Motion Product. Kippax referred to this as a “win-win-win situation.” BIM materials promised “[e]veryone becomes [director of sales], even with 0 Keys!” BIM scripts claimed “[e]verybody gets promoted” and that it is “IMPOSSIBLE for you to remain down there” on the lower levels of the BIM Corporate Ladder as a sales representative, supervisor, or manager.

[32] BIM scripts provided the example of a grandmother who had no interest in the BIM Corporate Ladder, but was still able to get her money back and keep the Perpetual Motion Product. The grandmother would simply not receive commissions for the two sales, which would go to the person on her BIM Corporate Ladder who made the sales in her place once that person reached director of sales.

[33] BIM presentations and BIM scripts emphasized how quickly sales could be made, pointing out that 170 hours was a maximum, but that sales could be made much more quickly. For example, the script states:

[The required sales] could have happened in 3 days, or even 1 day. There's no limitations as to how fast the sales team fills up. The 170 hr protection period is merely there if they REQUIRE IT.

[34] Testimonials delivered at BIM seminars emphasized how quickly BIM distributors moved up the BIM Corporate Ladder to director of sales. For example, in the recorded BIM seminar delivered by Kippax, Kippax asked attendees who had reached director of sales to announce how long it had taken them to reach director of sales, then announced the BIM distributor's purported earnings. This practice was consistent with the evidence of other Class Members.

[35] BIM encouraged BIM distributors to make additional purchases to enter BIM Corporate Ladders more than once. BIM presentations noted that BIM distributors could move through the BIM Corporate Ladder and rise to director of sales multiple times, and emphasized this potential rather than encouraging BIM distributors to build a stable business of repeat customers.

[36] With this background, I turn, finally, to the "It's too good to be true" part of this saga. There was no guarantee that BIM distributors would reach the director of sales position or receive compensation for their work. BIM presentations did not explain that if a BIM Corporate Ladder failed to reach its required eight sales within a specified period of time, no compensation would be paid to anyone on the BIM Corporate Ladder. If the required eight sales were not made within the prescribed period, the BIM Corporate Ladder was "crushed" by BIM, meaning no compensation

was paid to the Director of Sales or anyone else on the BIM Corporate Ladder, regardless of how many sales they made, and no further promotions could occur on that BIM Corporate Ladder.

***BIM Representations with Respect to Earnings***

[37] BIM presentations and other BIM promotional materials emphasized the potential earnings available to BIM distributors. These representations included potential earning figures that were far in excess of the amounts earned by the average Class Member who have contacted Class counsel, as discussed in greater detail below.

[38] As described in the affidavit of Ken Chung, BIM presentations included representations that the BIM scheme:

- a. Was “The Ultimate System” and could “Turn your annual income into a monthly income”, on a slide displaying an image of a private jet;
- b. was an opportunity to “Earn Way, Way More Money!” while displaying a tropical beach;
- c. allowed you to quickly move to director of sales and earn “\$22,200 Cash & Value” for participation, \$36,200 if you became vice president, and \$44,200 if you remained qualified as vice president;
- d. included a “Perpetual Payments Program” valued at up to \$100,000;
- e. would provide “Massive Profitability” and allowed you to “Profit Way, Way More...”, and receive “\$13,200 Cash or more!” and a “Vice President Potential of \$100,000”;

- f. created a system that meant “You Can’t lose!”, and gave “assurance” that participation was “A Win, Win, Win, Situation!”
- g. could deliver “Upfront \$\$\$”, “Mid-Term \$\$\$ (Sleeping Money)”, and “Residual \$\$\$”, while displaying images of large homes, gem-encrusted jewellery, and tropical waters; and
- h. would “teach a system that creates a ‘DREAM LIFESTYLE’ for all mankind!”

[39] BIM scripts also included representations to accompany BIM presentations. I conclude, based on the record before me, including documents, affidavits, audio and video files, that BIM scripts included the following statements or statements to like effect:

- a. “What you have before you is a PROVEN system for average people to make ABOVE AVERAGE income”;
- b. “We can literally turn people’s annual income into a monthly income. I know that sounds like a bold statement to make, but I have met quite a few people who have already achieved that with our program, and others who are well on their way to doing this”;
- c. “Our company has something called Perpetual Motion, that’s UNLIKE ANYTHING you’ve ever seen before, and with it we can all make Way, Way, Way More Money”  
[...] “Capture the key in our business is worth, (pause) \$100,000!!! Did everybody hear that? Way at the back? \$100,000!!!”
- d. “Capture the Key” is worth ONE HUNDRED THOUSAND DOLLARS! Everybody say \$100,000 with me on the count of 3.... 1, 2, 3,..... \$100,000! That was pathetic!

If I threw out a football, baseball or a hockey puck, you would be a lot more enthusiastic. Let's try that again but this time, stand up and YELL IT AT ME! Let's say it like we own it! Okay, on the count of three, yell it at me! – one, two, three (everyone shouts \$100,000). Whoa, doesn't that feel good? You may be seated.”

- e. “So if you were able to get 50% commission of \$1600 on \$3200 sale that would be pretty good right? Especially in conventional business. But we are far, far from conventional. We don't pay 50%. We don't pay 100%. We pay 156%! So for every \$3200 sale that you personally create, you will get (pause) \$5,000!”
  
- f. “So how long did that take? Well the company likes to give very conservative numbers. The company says that for most the average going from here to here is about 5 to 8 weeks. Now they have seen the extreme of both sides of the spectrum. They've seen 3 months, they've actually seen 4 months to go Director of Sales, but they've also seen the opposite, where they've seen 3 weeks, they've also seen 2 weeks. There's a person here in Kelowna that went DOS in 6 days! So it's really unlimited how fast you can go. So going back to our board, neither of our DOS are qualified to become VP, like I said that's very good news for [name omitted]. That means she's going to be VP on 4 more sales teams, that's a total of another \$8,000. So if you add that up you have \$44,200. Now I personally know distributors in this company that smashed this number in 1 month, no problem! Not counting the \$9,000 Ultra Life Club. Cash only, in one month they surpassed this number. There are people making some serious money with our program.”
  
- g. “We have Distributors who have requalified themselves 4, 5, 6 even 9 times over.



That's a total of 8 or 900,000 as soon as their boards split and they pay out all that money. So that's a very simple solution. So what we have is \$13,200 as DOS payout, part time, create 2 or more sales if you choose to, you have our \$9,000 in retail value of the Ultra Life Club, plus our Vice President potential of \$100,000."

- h. "She was able to get her money back by literally click clicking it back with DOS bonuses, and what did you get? \$5,000 commission! So who is out anything!!! Nobody is out anything, that is why we can say you can't lose. It's a complete win, win situation."
- i. "And over here was the BIM corporation, founded by an MBT, Mathematician By Trade, working with a 50-year-old proven time leverage system, improving upon it for 14 years, to make it better and better, perfecting it to the point where you can go out and create 2 sales and get paid on 8."
- j. "No this business isn't for me. Clearly, my bank account could never hold that kind of money."

[40] BIM also distributed promotional materials that included representations with respect to the compensation available to BIM distributors:

- a. Claimed the "VP position has a potential of \$100,000 US!" and "in this race, NOBODY loses".
- b. Offered "an opportunity to earn an additional bonus of up to \$100,000" and "combined potential earnings of the VP and SVP positions to a grand total of \$250,000!".

- c. Promised “Massive Profitability” and claimed “BIM is a WHALE of a program!” with “upfront \$\$\$, midterm \$\$\$ (Sleeping Money), residual \$\$\$”, asking “Why work for a living when you can make money instead?”

***BIM Representations of Legitimacy***

[41] BIM seminars included a brief disclaimer regarding potential income. It was shown on the second slide of the BIM presentation. I note that it was one of approximately 50 slides, over the course of a seminar that lasted on average, 90-120 minutes. The BIM script called for the BIM presenter to speak over the slide, emphasizing that hard work would be rewarded and comparing success in the BIM scheme to a farmer who works hard and plants a lot of seeds as opposed to a farmer who does not plant many seeds. In recorded examples of BIM seminars, some of which were heard in evidence, the disclaimer took less than twenty seconds. The slide and text follow:



**“Income earned will be in direct proportion to the time and effort extended by the participants.”**

**What does that mean? It means we are not a lottery. You DO have to put some time and effort into this. It’s like growing a garden: if you plant a few seeds you get a little return, but when a lot of seeds are planted and cared for, there’s a huge return. Same idea here, we’re just growing a different kind of carat [sic]. [Emphasis in original]**

[42] I also find that Kippax and BIM made representations which were designed to reassure potential BIM distributors that BIM was a legal multi-level marketing plan rather than an illegal pyramid scheme. BIM presentations, scripts, and other materials:

- a. Compared BIM's structure with the structure of corporations, which typically have a president on top, followed by vice-presidents, directors, supervisors and sales representatives;
- b. noted BIM's incorporation "with Industry Canada" and registration "with the Canada Revenue Agency";
- c. claimed a woman who works for "Revenue Canada" and "thought there must be one or two flaws in the system somewhere" after attending multiple presentations "was thoroughly impressed by how well they had put the program together. So she joined Business in Motion";
- d. claimed one individual had "hired a lawyer, and spent \$20,000 doing background research and checked out this company from every angle possible" and, after not finding any problems, signed up; and
- e. offered testimonials from individuals who were purported to be law enforcement officers.

[43] Kippax used these analogies and purported associations to cloak BIM in legitimacy. He claimed participation by and testimonials from "RCMP officers, current police officers, professional business analysts, pastors – we have many pastors," giving rise to the reasonable inference that if those individuals had participated in the BIM scheme, it must be in compliance with the law.

[44] BIM promotional materials also included testimonials from purported BIM distributors who were said to have been sceptical initially but had ultimately profited through participation in the BIM scheme. These testimonials included statements such as:

- a. “I could immediately see how everyone is an instant winner [...] We have never made so much money”;
- b. “We had no idea how great this opportunity really was [...] [I]t provides an incredible source of income beyond our wildest dreams”;
- c. “It has allowed my husband to retire at the age of 42! Our whole family and thousands more cannot just dream again but can actually achieve those dreams”; and
- d. “I became the first ever “skeptic of the week” and days later, I WAS IN!!! Within my first 3 days I had 5 keys. While continuing to work my fulltime job, I reached the [Director of Sales] in 10 days, was receiving [Vice President] Sleeping Money by day 16, and on day 26 had 18 Keys, 3 SVP Qualified Positions, and had turned my annual income into a monthly income!!! I had just over \$49,000 in my account on the 26<sup>th</sup> day!”;

### ***Perpetual Motion Products***

[45] In addition to paying the BIM distributor fee, BIM distributors were required to purchase at least one Perpetual Motion Product. As will be discussed in greater detail, the nature of Perpetual Motion Products differentiates the BIM scheme from a legitimate multi-level marketing scheme, and makes it clear the objective of the scheme was on recruitment of participants rather than

developing repeat customers who actually sought to purchase the products. The products sold by BIM were expensive items unlikely to be the subject of repeat purchases.

[46] Most BIM seminars focused on selling Ultra Life Club Memberships. Ultra Life Club Memberships were represented to be vacation discount packages. In promotional materials and in BIM seminars, BIM claimed Ultra Life Club Memberships were worth over \$75,000, sold at “retail” for \$15,000, but were available to BIM distributors for \$3,200. BIM increased the “wholesale” price of Ultra Life Club Memberships to \$3,600 by March of 2009.

[47] An Ultra Life Club Membership purportedly offered a “Full Access Discount Package” which allowed the purchaser 150 “vacationing weeks”. BIM represented that prices for vacations purchased through the Ultra Life Club Membership were far lower than equivalent vacations purchased without an Ultra Life Club Membership.

[48] In the experience of Cuzzetto, Piers and Aitchison, this was not the case. Cheaper vacation packages at the same destinations were available without an Ultra Life Club Membership on the publicly available websites of the resorts in question, on travel websites such as Expedia.ca, or through travel agents. While I cannot place evidentiary weight on this, the pricing offered to Ultra Life Club Members was the subject of a CBC Marketplace story, which concluded Ultra Life Club Membership prices were higher than prices available to the general public through vacation websites such as Expedia.ca. I do however, rely on the affidavit evidence of Class Members.

[49] Ms. Piers purchased an Ultra Life Club Membership at the wholesale price as a BIM distributor but was later informed she was not permitted to sell the Ultra Life Club Membership as it had been registered in her name. She eventually convinced BIM staff to allow her to “remove her name” from the membership and to sell her membership. However, no one expressed interest in purchasing her Ultra Life Club Membership despite numerous attempts to sell it at a deeply discounted rate. The evidence that the Membership was essentially valueless lends weight to the conclusion that the purchase and sale of Perpetual Motion Products was not the purpose of the scheme, but a diversion from its real purpose of recruiting more members.

[50] BIM distributors could also purchase Gem Caches, pre-packaged gemstones with what BIM claimed was the appraised values printed on the package. BIM promotional materials represented that Gem Caches were “valued by the widely recognized and reputable founder of The Jewellery Judge, Mr. Steven A. Knight-GG, RMV, CJI-APP”, whose “conservative appraisal techniques have been utilized by the RCMP, Canada Customs, Banks, Trust Company’s [sic] as well as many lawyers. Steven is also a forensic Gemologist/Appraiser as well as a certified expert witness in Supreme Court.”

[51] BIM distributors were not able to return Perpetual Motion Products when they attempted to do so or obtain a refund for those products.

### ***Collapse of BIM***

[52] On February 6, 2009, CBC Marketplace aired a story on BIM. Kippax was interviewed, as were disaffected participants in the BIM distributorship. The Marketplace story was highly critical of BIM and observed that if each generation of BIM Corporate Ladders required eight sales, it

would only run for slightly over 20 levels before the entire population of Canada was enrolled. The Marketplace story concluded BIM was a pyramid scheme, and that the Perpetual Motion Products were not worth nearly the price paid.

[53] In the interview, Kippax estimated there were “over 8,000” BIM distributors and expected to “beat 40,000” members by the end of 2009. He said BIM made “over \$30,000,000” in sales in 2008. When the host insisted BIM distributors could, in fact, lose money, Kippax replied, “How can they lose? How can they lose? They can’t! ... If they buy a product for \$3,200 and it is worth more than \$9,000, how do they lose?” The interview was introduced in evidence and I am satisfied that the individual who made these statements was, in fact, Kippax.

[54] To be clear, in referring to the Marketplace story, I draw no inferences or accept its conclusions; rather I refer to it because of the admissions made by Kippax during the interview.

[55] After the Marketplace story aired, BIM issued a promotional brochure called “We Can Hold Our Heads High” in response. The cover of the brochure shows an array of photographs of Kippax with people who appear to be BIM distributors. The brochure explained that the Marketplace story was an “astounding lack of truth”.

[56] Kippax also posted three videos to YouTube. In those videos, Kippax said “I have been operating this system and working this system for the past 15 years.” He stated that BIM has “testimonials from RCMP officers, current police officers, professional business analysts, pastors – we have many pastors, ex-government agencies...” He countered allegations sales were diminishing

and the BIM scheme was on the verge of collapse by saying “the sales have gone through the roof! This is the most exciting thing ever!” He concluded by relating a story about a woman who “couldn’t even get bus fare, and now she’s making \$13-15,000 a month, part time.”

[57] On March 24, 2010, Kippax convened a telephone conference where he announced to BIM distributors that BIM operations were put “on hold” indefinitely. More specifically, he announced Perpetual Motion Products already paid for would not be delivered, and commissions earned by BIM distributors would not be paid.

### ***Kippax’s Involvement in the BIM Scheme***

[58] The evidence establishes that Kippax played a central role in BIM and that they had an identity of interests. Although only a director for one day, Kippax assumed leadership positions within BIM. BIM materials referred to Kippax as “Global Sales Director,” the “Global Director,” the “master mind,” a member of the “Corporate Team,” “the man larger than life himself”, and the “Baron and Consul General at the Helm of Business in Motion.” The promotional materials accompanying The Pedal to the Metal Tour describe Kippax as “the Honourable Lord, Baron of Tranent and Consul General” and asserts that:

Many privileges and immunities – as granted by the Vienna Conventions of Consular and Diplomatic Relations and entered in force 19 March 1967 by the United Nations, Treaty Series, vol. 596, p. 261 – have been bestowed upon BIM by way of the Honourable Alan Kippax’s achievements.

[59] Kippax also referred to himself as a “Mathematician By Trade” (or MBT) and claimed credit for developing the BIM scheme and the “Time Leverage System” at the core of its business.



[60] Kippax positioned himself at the center of BIM from the outset, using his special appearance at BIM seminars as a selling point. He featured prominently in BIM materials. The “I Can’t Believe It’s True” brochure and the “We Can Hold Our Heads High” brochure are covered by photos of Kippax with BIM distributors. As noted earlier, Kippax was a shareholder in BIM and the sole director for one day in 2007 before those shares were transferred to Fox. Kippax also assumed personal liability for taxes apparently owed by BIM and was the beneficial owner of the shares held in trust by Mohamed.

[61] At BIM seminars, Kippax introduced BIM distributors who had reached director of sales positions and relied on their experiences to encourage new enrolment. In one recording of a BIM seminar, heard in evidence, Kippax asked all people who reached director of sales to come to the front of the room. He asked each of them how many keys they had earned, and then announced to the crowd the dollar value of “up front” money those keys represented. Kippax introduced one BIM distributor – Johnny Abma – to the audience at a BIM seminar and told the audience that Mr. Abma had already earned \$76,000 as a BIM distributor. Mr. Abma’s evidence however, is that he told Kippax that he had never been paid for his work as a BIM distributor.

[62] Kippax was also involved behind the scenes in the technical operation of BIM. Kippax registered the internet domain names used as part of the BIM scheme. Kippax was the registrant and administrative contact for *bimcorporation.com* from July 20, 2007 to January 28, 2008, for *earnfirm.com* from March 14, 2006 to the present, for *icbit.com* from June 25, 2007 to the present, and for *icantbelieveitstrue.com* from March 14, 2006 to the present.

***Availability of Default Judgment***

[63] Rule 210 of the *Federal Court Rules* provides that, if a defendant does not file a statement of defence within the 30 days allowed by the Rules, the plaintiff may bring an *ex-parte* motion for judgment against the defendant. The Court may grant judgment, dismiss the action, or order the action proceed to trial.

[64] On June 7, 2010 the defendants BIM and Kippax were both served in Goderich, Ontario with the Statement of Claim in this proceeding. Proof of service was confirmed by the affidavit of Katherine Henderson, a process server, sworn the following day, June 8, 2010. An earlier attempt to serve the defendants at BIM's registered corporate office at the address used on BIM correspondence was unsuccessful. The affidavit of the process server, Michael Saunders, indicates that the receptionist advised him that BIM had moved and left no forwarding address. Mr. Saunders then attempted a second address, also used on some BIM correspondence. When he attended at that address, 7275 Rapistan Court, Mississauga, Ontario, he was advised that the company was no longer at that address and that the business had closed.

[65] On September 16, 2013 an Order for substituted service on the defendants Kippax and BIM, for service of the plaintiff's motion for default judgment, was made by the Court. The affidavit evidence filed in support of the motion for substituted service included the fact that Kippax was held in detention in Lindsay, Ontario, under the *Immigration and Refugee Protection Act* SC 2001, c 27, and was facing criminal charges in Winnipeg, Manitoba. In consequence, the Order provided that service would be effected by:

- a. Sending the Notice of Motion and supporting affidavit material to the law firm of Rusonik, O'Connor, Robbins, Ross, Gorham & Anglini LLP by courier, with a request that the material be brought to the attention of Kippax;
- b. sending the Notice of Motion and the bodies of the supporting affidavit material to Kippax by email to the address [alankippax@yahoo.com](mailto:alankippax@yahoo.com); and
- c. service of the Notice of Motion and supporting affidavit material on Alan Kippax by process server attending at the Correction Centre, or, if such service is not possible upon the process server attending at the Correction Centre, by leaving the Notice of Motion and supporting affidavit material with an administrator at the Correction Centre with a request that the material be brought to the attention of Kippax.

[66] Affidavits of service were filed on the return of this motion for default judgment confirming that service was effected in accordance with the Order of September 16, 2013.

[67] On November 22, 2013, four days prior to the hearing of this motion, the solicitors for Mr. Kippax in respect of his immigration proceedings wrote to counsel for the Class. Kippax's immigration counsel acknowledged receipt of a copy of the motion materials that had been served on counsel retained by Kippax in his criminal proceedings. Immigration counsel wrote:

However, we have received from Nathan Gorham, his criminal counsel, certain pleadings with respect to the above action and in particular a notice of motion for default judgment returnable November 28, 2013.

[68] Immigration counsel was clear that they had no mandate to represent Kippax and were not retained as his counsel in the proceedings in the Federal Court.

[69] On the eve of the hearing of the motion for default judgment, the Registry received an affidavit from Kippax advising that he was incarcerated in Lindsay, Ontario. In that affidavit Kippax averred that the warden had refused to give him access to materials left with the facility's administration for him. He described his difficulties in obtaining and instructing counsel, and requested that the motion not proceed:

I have vigorously and repeatedly attempted to view the documents which the jail was served with last week addressed to myself, including asking the head guard to get me access to the documents. At the present, I have still seen nothing except a few pages that the server actually handed me, and which do not permit me sufficient knowledge of the allegations being against me to formulate a response. I was told by jail staff, that binder(s) of documents would be held in my personal property locker as we inmates are not allowed to have such in our possession in custody. Despite numerous attempts to see the documents, I was actually told to leave the head guard alone because he was irritated by my asking him every two to four hours.

I have also tried to retain private counsel to appear at the default judgment proceeding. But this is not easy considering I am being detained in a small town in Ontario without access to money. In particular, I had an associate approach Adair Barristers LLP in Toronto but they advised they could not take the case on such short notice.

[70] At the hearing of the motion I asked for submissions from counsel and determined that after weighing the competing interests involved, namely those of the defendant to appear and represent himself, either in person or through counsel, and those of the Class Members to have their claim adjudicated, that the balance weighed decidedly in the favour of the Class Members. In reaching

this conclusion I note in particular that there are multiple inconsistencies in Mr. Kippax's position with respect to whether he had been served with the motion.

[71] For example, as reflected in counsel's letter to the Court, Mr. Kippax had advised immigration counsel that he was aware of and had in his possession, the Statement of Claim, Certification Order, Order for Substituted Service and Notice of Motion for default judgment. In his affidavit however, Kippax said, at paragraph 4:

I have been made aware that the jail was served with some legal papers last week addressed to myself and regarding a class action proceeding in the Federal Court. Prior to this, I have received no notice of this or any other similar claim or action, and was completely unaware of these proceedings.

[72] Secondly, the grounds advanced by Kippax in favour of an adjournment by reason of a failure of service are predicated on unsubstantiated assertions that several people have sworn false affidavits. In this regard, Mr. Kippax denies that he was served with the Statement of Claim on June 7, 2010. For this to be true, Katherine Henderson, the process server, must have sworn a false affidavit. I also note that this statement in his affidavit contradicts what he told his immigration counsel and which was communicated to the Court on November 22, 2013.

[73] Third, he contends, through a letter sent by a business associate, Patrick Power, on November 28, 2013, the day of the hearing of the motion for default judgment, that his criminal counsel were not served with the motion materials. This too is contrary to the sworn affidavit of service filed by Class counsel, and indeed, contrary to the letter to the Registry from his immigration counsel.

[74] Fourth, there were a number of communications between Class counsel and Kippax's immigration counsel. Kippax's affidavit although filed and served by immigration counsel, indicates that Kippax was self-represented. While Kippax was obviously communicating with counsel, counsel never received a mandate to defend or appear.

[75] Fifth, to accede to Kippax's position requires the Court to assume that the warden of the Lindsay Correctional Centre continuously refused, for no apparent reason, to provide counsel with copies of legal papers served on an inmate by Court order.

[76] There are other elements of these proceedings that weigh heavily against Kippax. As a result of the publication order in many national and local newspapers, over 400 individuals identified themselves as class members. It is simply not credible that Kippax was "completely unaware" of these proceedings which 400 other Canadians did become aware of through the notices.

[77] Although Kippax stated in his affidavit that he was "willing to defend [him]self in a full hearing on the merits of this lawsuit and [he has] expressed intention to do so" his conduct suggests otherwise. This became apparent during the hearing of the motion for default judgment itself. After the Court had determined to proceed to hear the merits of the motion, counsel retained by Mr. Kippax appeared. Mr. David L. Varty advised that he had been retained to contest the adequacy of the service. He said that there were inconsistencies between the affidavit of Kippax and those of the process servers, and that cross-examinations were required.

[78] Cross-examinations on the affidavits would serve no interest, whether those of the Class, those of the defendant or those of the administration of justice. Mr. Varty's appearance confirmed that service had been effected, the very point that Kippax sought to dispute. The issue of service was moot. Further, Mr. Varty advised that he had no mandate to file a defence or respond to the merits of the motion. He simply sought an adjournment to challenge the effectiveness of the service. That would be a waste of time, as he was now in possession of the motion materials.

[79] A party seeking to set aside an order deeming service to have been effected in a certain manner must establish, on a balance, that there has been no service, and that the defendant did not, and could not, on reasonable steps, defend. The defendant's explanations fall far short of this. They are, in fact, contradictory and contingent on the belief that persons with no interest in the matter swore false or incorrect affidavits. Although in contact with three different counsel (immigration, criminal and in these proceedings) none were given instructions to defend. Finally, Mr. Kippax's assertion under oath that he was "completely unaware" of these proceedings is simply not credible.

[80] I find, on the basis of the affidavit evidence of Ms. Henderson, that Kippax had been served with the Statement of Claim on June 7, 2010, in Goderich, Ontario. I also find, on the basis of the affidavit evidence before me, that the measures to effect substituted service of the motion for default judgment were perfected, and that Kippax, through his own admission was aware of the motion. No statement of defence has been filed. The plaintiff is therefore entitled, on proof of the required facts, to default judgment in accordance with Rule 211; *Louis Vuitton Malletier SA v Yang*, 2007 FC 1179.

## ANALYSIS

### *Scheme of Pyramid Selling*

[81] The BIM Perpetual Motion scheme and related products meets the definition of pyramid selling in the *Competition Act*.

[82] The *Competition Act* prohibits the establishment, operation, promotion, or advertising of a scheme of pyramid selling. Under the *Competition Act*, “scheme of pyramid selling” is defined as:

55.1 (1) [...] means a multi-level marketing plan whereby;

(a) a participant in the plan gives consideration for the right to receive compensation by reason of the recruitment into the plan of another participant in the plan who gives consideration for the same right;

(b) a participant in the plan gives consideration, as a condition of participating in the plan, for a specified amount of the product, other than a specified amount of the product that is bought at the seller’s cost price for the purpose only of facilitating sales;

(c) a person knowingly supplies the product to a participant in the plan in an amount that is commercially unreasonable; or

(d) a participant in the plan who is supplied with the product

(i) does not have a buy-back

55.1 (1) [...] « système de vente pyramidale » s’entend d’un système de commercialisation à paliers multiples dans lequel, selon le cas :

a) un participant fournit une contrepartie en échange du droit d’être rémunéré pour avoir recruté un autre participant qui, à son tour, donne une contrepartie pour obtenir le même droit;

b) la condition de participation est réalisée par la fourniture d’une contrepartie pour une quantité déterminée d’un produit, sauf quand l’achat est fait au prix coûtant à des fins promotionnelles;

c) une personne fournit, sciemment, le produit en quantité injustifiable sur le plan commercial;

d) le participant à qui on fournit le produit :



guarantee that is exercisable on reasonable commercial terms or a right to return the product in saleable condition on reasonable commercial terms, or

(ii) is not informed of the existence of the guarantee or right and the manner in which it can be exercised.

(i) soit ne bénéficie pas d'une garantie de rachat ou d'un droit de retour du produit en bon état de vente, à des conditions commerciales raisonnables,

(ii) soit n'en a pas été informé ni ne sait comment s'en prévaloir.

[83] “Multi-level marketing plan” is defined as follows in the *Competition Act*:

55. (1) [...] “multi-level marketing plan” means a plan for the supply of a product whereby a participant in the plan receives compensation for the supply of the product to another participant in the plan who, in turn, receives compensation for the supply of the same or another product to other participants in the plan.

55. (1) [...] « commercialisation à paliers multiples » s'entend d'un système de distribution de produits dans lequel un participant reçoit une rémunération pour la fourniture d'un produit à un autre participant qui, à son tour, reçoit une rémunération pour la fourniture de ce même produit ou d'un autre produit à d'autres participants.

[84] I find that BIM represented that BIM distributors would receive compensation for supplying Perpetual Motion Products to other individuals, who in turn could become BIM distributors and receive compensation for supplying Perpetual Motion Products to further BIM distributors. The BIM scheme on its face meets the definition of a multi-level marketing plan.

[85] The BIM scheme is a scheme of pyramid selling because it is a multi-level marketing plan requiring that a participant pay consideration for the right to receive compensation for the recruitment of others who give consideration for the same right, into the plan.

[86] While BIM distributors were told their commissions were based on the sale of a product, I find, on the evidence of the Class Members, that the true incentive was the completion of a BIM Corporate Ladder and the recruitment of new participants. Additional evidence is found in the operation of the Corporate Ladder. Corporate Ladders that were not completed in time were “crushed,” and compensation was denied to those who had sold products. In legitimate multi-level marketing schemes, commissions are paid upon the sale of products, not after the recruitment of others and the completion of a corporate ladder. Similarly, the evidence establishes that participants did not consider the Perpetual Motion Products themselves to be the asset that they were purchasing.

[87] The legality of a plan similar to the BIM scheme in which distributors were required to pay a \$30 “registration fee” to participate was considered in *R v CLP Canmarket Lifestyle Products*, 1989 CarswellMan 272 (MBQB) at paras 12 and 28. In that case, the court held such a requirement to be a violation of the *Combines Investigations Act* (which later became the *Competition Act*):

The fact is that one could not participate in the scheme without being a distributor and could not be a distributor without paying the initial \$30.00 charge, even though the fee might have gone to reimburse Canmarket for some of their expenses. The consideration, then, for the fee was at least in part the right to participate in the scheme and, accordingly, in my view, the fee was "a fee to participate" within the meaning of the relevant provisions of the Act.

[88] BIM required that BIM distributors purchase at least one Perpetual Motion Product from BIM in order to participate in the BIM Corporate Ladder, at a price beyond that paid by BIM. This was in violation of paragraph 55(1)(b) of the *Competition Act*.

[89] BIM distributors were not able to return the Perpetual Motion Products they purchased.

There was no evidence in the record that BIM had a buy-back guarantee of any kind. The requirement of a buy-back guarantee is intended to afford a measure of protection to the public, a protection which was not available to BIM distributors.

### ***Representations Regarding Compensation***

[90] The *Competition Act* states:

55 (2) No person who operates or participates in a multi-level marketing plan shall make any representations relating to compensation under the plan to a prospective participant in the plan unless the representations constitute or include fair, reasonable and timely disclosure of the information within the knowledge of the person making the representations relating to

(a) compensation actually received by typical participants in the plan; or

(b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including

(i) the nature of the product, including its price and availability,

(ii) the nature of the relevant market for the product,

(iii) the nature of the plan and similar plans, and

(iv) whether the person who operates the plan is a corporation, partnership, sole proprietorship or other form of business organization.

55 (2) Il est interdit à l'exploitant d'un système de commercialisation à paliers multiples, ou à quiconque y participe déjà, de faire à d'éventuels participants, quant à la rémunération offerte par le système, des déclarations qui ne constituent ou ne comportent pas des assertions loyales, faites en temps opportun et non exagérées, fondées sur les informations dont il a connaissance concernant la rémunération soit effectivement reçue par les participants ordinaires, soit susceptible de l'être par eux compte tenu de tous facteurs utiles relatifs notamment à la nature du produit, à son prix, à sa disponibilité et à ses débouchés de même qu'aux caractéristiques du système et de systèmes similaires et à la forme juridique de l'exploitation.

[91] BIM and Kippax, jointly and severally, made repeated representations about compensation through the BIM scheme. These representations were neither fair, reasonable, nor timely disclosure of information within the knowledge of BIM or Kippax with respect to compensation actually received or likely to be received by typical participants. The actual or likely compensation earned by all BIM distributors, typical or otherwise, was known to BIM and Kippax, either through their own role or through the database of sales maintained to operate the BIM Corporate Ladder website at *bimcorporation.com*, which tracked BIM distributors with a unique identifier, along with each of their sales.

[92] BIM presentations and BIM scripts described only the best possible results. BIM presentations did not acknowledge it was possible BIM distributors may never be compensated, instead insisting there is “no way to lose.” As reflected in the case of Mr. Abma, described earlier, Kippax made representations about compensation received by BIM distributors, while at the same time being aware those BIM distributors had received nothing. There was indeed a way to lose, and many did.

[93] Finally, BIM or Kippax did not make fair or reasonable representations of the value of the Perpetual Motion Products or the market for those products. BIM and Kippax represented that Ultra Life Club Memberships were worth over \$75,000 and had retailed for over \$15,000. There is no evidence that this was the case. The evidence of Mr. Cuzzetto and others was that BIM and Kippax represented that Ultra Life Club Memberships provided significant discounts on travel when in fact vacations booked through the Ultra Life Club Membership cost as much if not more than similar

vacations available online without an Ultra Life Club Membership. Nor was there a re-sale market for the product.

***Responsibility for Representations by BIM Distributors***

[94] The *Competition Act* requires that the operator of a multi-level marketing plan take steps to ensure representations made to potential participants in the plan by current participants in the plan meet the requirements of the *Competition Act*. Specifically, the *Competition Act* requires:

55 (2.1) A person who operates a multi-level marketing plan shall ensure that any representations relating to compensation under the plan that are made to a prospective participant in the plan by a participant in the plan or by a representative of the person who operates the plan constitute or include fair, reasonable and timely disclosure of the information within the knowledge of the person who operates the plan relating to

55 (2.1) Il incombe à l'exploitant de veiller au respect, par les participants et ses représentants, de la règle énoncée au paragraphe (2), compte tenu des informations dont il a connaissance.

(a) compensation actually received by typical participants in the plan; or

(b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including those specified in paragraph (2)(b).

[95] Subsection 55(2.1) of the *Competition Act* is a statutory due diligence defence. Defendants who demonstrate they took precautions to ensure representations made by participants in the multi-level marketing plan were in compliance with the *Competition Act* will not infringe subsection 55(2.1).

[96] There is no evidence in the record that Kippax or BIM took any steps to ensure representations made by BIM distributors to other potential distributors met the requirements of the *Competition Act*. To the contrary, Kippax or BIM urged BIM distributors to make representations as to compensation to potential recruits by providing BIM presentations and BIM scripts that did not meet those requirements, and by training BIM distributors to give BIM presentations that did not meet those requirements.

***Typical Compensation Under the BIM Scheme***

[97] BIM or Kippax suggested BIM distributors tell recruits they could earn \$13,000 per month, part time, and that one BIM distributor had earned “\$340,000 in less than 6 weeks in the business.”

[98] 394 Class Members filled out a survey distributed by Class counsel. Information provided by the Class Members who responded indicates that of individuals who received compensation, the average amount of compensation was \$2,976.52. The compensation represented by Kippax and BIM was, on average, ten fold greater than the value of the product that was being sold. These findings with respect to subsection 55(2.1) also relate to, and reinforce, the characterization of this as a pyramid scheme. The compensation depended on recruitment.

**DAMAGES**

***Class Members’ Losses***

[99] Class counsel maintained a website where Class Members could obtain information about the lawsuit and provide information about their experience with BIM and losses suffered. The survey asked Class Members to describe their experience with BIM, including how much they spent on Perpetual Motion Products and, if they received any compensation from BIM, the amount of that

compensation. 278 Class Members spent and lost a total of \$2,050,038.30 on BIM products. The smallest loss reported by a Class Member was \$525.00, while the largest loss was \$64,240.00. On average, Class Members lost \$7,374.24 each.

[100] Of the 394 responding Class Members, only 35 indicated they received any compensation from BIM, with the highest amount being \$14,325.00. The average paid to those 35 Class Members who received compensation was \$3,560.22.

### ***Aggregate Award***

[101] The Class seeks an order for aggregate damages in the amount of \$65,600,000, plus interest, against BIM and Kippax. This is predicated on an estimate of 20,000 Class Members, half of the 40,000 BIM distributors Kippax estimated he would have by the end of 2009, and an approximate mid-point between the 32,000 unique identifiers issued and the 8,000 distributors claimed by Kippax. It is also predicated on estimated damages of \$3,280 per Class Member, representing the cost of the Ultra Life Club Memberships and the \$80 distributor fee. The Class contends that this estimate of damages is a fair proxy of measure of damages in the circumstances of this case. I agree that the estimate of \$3,280 per Class Member is reasonable and has a foundation in the evidence. The problem, however, lies in calibrating the nature and scale of the award.

[102] The *Competition Act* allows this Court to award damages for loss or damage suffered as a result of conduct contrary to any provision of Part VI of the *Competition Act*, including violations of sections 55 and 55.1. The *Federal Court Rules* allow a judge to make any order with respect to

damages in class proceedings, including an aggregate assessment of damages, and to order any appropriate special modes of proof for the purposes of that assessment:

334.28 (1) A judge may make any order in respect of the assessment of monetary relief, including aggregate assessments, that is due to the class or subclass.

[...]

(3) For the purposes of this rule, a judge may order any special modes of proof.

334.28 (1) Le juge peut rendre toute ordonnance relativement à l'évaluation d'une réparation pécuniaire, y compris une évaluation globale, qui est due au groupe ou au sous-groupe.

[...]

(3) Pour l'application de la présente règle, le juge peut ordonner le recours à des modes de preuve spéciaux.

[103] Aggregate damage awards are available even if identifying class members who would be entitled to an award would be impractical or would require a case-by-case analysis. As explained by the Ontario Court of Appeal in *Markson v MBNA Canada Bank*, 2007 ONCA 334 (Leave to appeal refused 32134, November 15, 2007), at para 48:

[...] where the court makes an aggregate assessment, but the circumstances render impracticable the determination of those class members entitled to share in the award or the exact share that should be allocated to particular class members, the court should be empowered to order that the members of the class are entitled to share in the award on an average or proportional basis where the failure to do so would deny recovery to a substantial number of class members who have been injured.

[104] In this case, it is probable that BIM and Kippax have records which would allow the Court to determine the damages suffered by each of the Class Members with greater accuracy. However, those records are not before the Court, and there is no indication any records once available still exist. Given that Kippax and BIM have not defended it is questionable whether the Court will ever have access to records necessary to precisely tailor the award. However, the defendants should not



be allowed to shield themselves from an aggregate assessment of damages simply by ignoring the existence of a certified class proceeding.

[105] In the Marketplace story, Kippax estimated there were “over 8,000” BIM distributors and expected to “beat 40,000” members by the end of 2009. He said BIM made “over \$30,000,000” in sales in 2008. BIM “Downline Reports” showing sequential ID numbers for BIM distributors, indicate over 32,000 identifier numbers had been issued by the time BIM collapsed.

[106] Some guidance as to the appropriate amount of an aggregate award can be derived from an analysis of the data provided by Class Members in response to the survey and other evidence put before the Court. While such an analysis is not precise, it is consistent with the objectives of class proceedings in that it avoids a cumbersome individual assessment and will allow Class counsel to act to secure any assets remaining if the award is not paid promptly. In cases such as this an aggregate award of damages is appropriate, although not to the extent claimed by the Class.

[107] The precise calibration of an aggregate award is rendered problematic by the fact that recruits to the BIM scheme were enrolled on the “pre-marketing” website *earnfirm.com*. Registration on *earnfirm.com* generated a unique identification number which recruits would use *if* they chose to become a distributor. The existence, therefore, of 32,000 unique identification numbers does not correlate with class membership. A recruit could receive a unique number, but decide not to purchase a product. They would not be members of the Class.

[108] Similarly, Kippax's assertion of 8,000 distributors and projection of 40,000 distributors by year end in the Marketplace interview is wild speculation. Although Class counsel casts this as an admission, Kippax's touting of 8,000 existing distributors cannot be given great weight. As I have found, Kippax's evidence is simply unreliable and does not constitute a sound basis upon which the average loss per Class Member of \$3,280 can be extrapolated across the 8,000 distributors asserted by Kippax. In reaching this conclusion I note that while 400 individuals responded to the notice, that is considerably fewer than the 8,000 potential class members. There is insufficient evidence therefore to conclude that there were 8,000 distributors.

[109] Notwithstanding the concerns noted, it would be contrary to the objectives of class proceedings, and indeed, defeat the intent of justice, to limit the aggregate award by reason of the defendants' failure to appear. As noted, an un-cooperative defendant should not be able to defeat or limit an otherwise legitimate claim. Aggregate awards, by their very nature, are not exacting, and are based on some reasonable estimation of loss. I therefore heavily discount Kippax's assertion of 8,000 distributors by 75%, and conclude that an aggregate award of \$6,560,000 is appropriate. In reaching this conclusion, I have taken into account several factors. They include, as I have already noted, the fact that Kippax's assertion of 8,000 distributors cannot be relied upon, and the fact that the existence of a unique identifier does not equate to a distributor and Class membership. I have also considered that while the notices of this class action were reasonably effective in reaching Class Members, the list of Class Members identified to date is not exhaustive and there may be others who will come forward.

***Punitive Damages***

[110] The Class also seeks an award of \$1,000,000 in punitive damages against Kippax personally. As the Supreme Court of Canada wrote in *Hill v Church of Scientology*, [1995] 2 SCR 1130 at paras 196 and 199:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant.

[111] Kippax was the self-described “master mind” behind the BIM scheme, a sophisticated operation that preyed on the hopes of thousands of Canadians. He misled potential participants in the BIM scheme. Kippax made representations to the Class as to generous compensation which would be received when he knew, or can reasonably be concluded to have known, were false. According to the evidence of Mr. Abma, since the collapse of BIM, Kippax has attempted to recruit past BIM distributors into new schemes with the promise that they would be “on top.” Kippax maintains control of the domains *earnfirm.com*, *icantbelieveitstrue.com*, and *icbit.com* – the same domains used in the operation of BIM and Treasure Traders International (TTI) (a previous scheme run by Kippax), providing some evidentiary foundation for the need for deterrence.

[112] Courts have considerable discretion in setting the quantum of punitive damages, with proportionality and rationality serving as guiding principles. As the Supreme Court of Canada held in *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 111, in restoring an award of \$1,000,000 in punitive damages:

Retribution, denunciation and deterrence are the recognized justification for punitive damages, and the means must be rationally

proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose.

[113] Notwithstanding the applicability of these factors in this case, punitive damages may not be awarded in consequence of a breach of section 55 of the *Competition Act*. Subsection 36(1) of the *Competition Act* contains an inherent limitation on the availability of the type of damages that may be awarded. This restriction has been previously recognized in this Court and others: *Bédard v Canada (Attorney General)*, 2007 FC 516, para 47; *Wong v Sony of Canada Ltd.*, (2001) 9 CPC (5<sup>th</sup>) 122 (OntSC). The request for punitive damages is denied.

**JUDGMENT**

**THIS COURT ORDERS that:**

1. The motion for default judgment is granted.
2. The common questions (a), (b), (c) and (d), as described at paragraph 3 of these Reasons and as defined in the Certification Order of November 10, 2011, are answered in the affirmative.
3. Common question (e) is answered in the negative.
4. Aggregate damages are assessed in the amount of \$6,560,000.
5. The damages will be paid into an interest-bearing trust account to be held on behalf of the plaintiff and the Class Members pending approval by this Court of a plan for the distribution of funds recovered.

"Donald J. Rennie"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-696-10

**STYLE OF CAUSE:** MARK CUZZETTO v BUSINESS IN MOTION  
INTERNATIONAL CORPORATION, ALAN KIPPAX,  
and ASHIF MOHAMED

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** NOVEMBER 28, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** RENNIE J.

**DATED:** JANUARY 10, 2014

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