

JAN 09 2018

**AMENDED PURSUANT TO RULE 6-1(1)(a) OF THE SUPREME COURT CIVIL RULES**  
**ORIGINAL NOTICE OF CIVIL CLAIM FILED SEPTEMBER 29, 2017**

No. S179104  
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ALMA MATER SOCIETY OF THE UNIVERSITY OF BRITISH COLUMBIA  
VANCOUVER

PLAINTIFF

AND:

QOOLA YOGURT (UBC SUB) LTD.

DEFENDANT

**AMENDED NOTICE OF CIVIL CLAIM**

**This action has been started by the plaintiff(s) for the relief set out in Part 2 below.**

If you intend to respond to this action, you or your lawyer must

- (a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and
- (b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

**JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.**

**Time for response to civil claim**

A response to civil claim must be filed and served on the plaintiff(s),

- (a) if you were served with the notice of civil claim anywhere in Canada, within 21 days after that service,

- (b) if you were served with the notice of civil claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the notice of civil claim anywhere else, within 49 days after that service, or
- (d) if the time for response to civil claim has been set by order of the court, within that time.

### CLAIM OF THE PLAINTIFF(S)

#### Part 1: STATEMENT OF FACTS

1. The Plaintiff, Alma Mater Society of the University of British Columbia Vancouver (the "AMS"), is a society incorporated pursuant to the laws of the Province of British Columbia, and has a registered office at 6133 University Boulevard, Vancouver, British Columbia.
2. The Defendant, Qoola Yogurt (UBC Sub) Ltd. ("Qoola"), is incorporated under the laws of the Province of British Columbia, and has a registered and records office at 6235 - 4000 No. 3 Road, Richmond, British Columbia.
3. The University of British Columbia ("UBC") is the owner of lands situate in the Province of British Columbia, having a legal description of:  
  
P.I.D. 015-891-909  
District Lot 3044  
Group 1 NWD  
Except Firstly: Part on Plan 6147  
Secondly: Part on Plan 9301  
Thirdly: Part on Plan BCP6556; and  
Fourthly: Part on Plan BCP23719  
  
(the "Lands").
4. The AMS and UBC constructed a building on the Lands (the "Building").
5. Pursuant to a lease (the "Head Lease") dated April 30, 2010, UBC leased the Building to the AMS.
6. On or about ~~July 24, 2013~~ August 17, 2015, the AMS entered into an agreement in writing with Qoola for the sub-lease of a 1,039.5 square foot portion of the Building (the "Demised Premises") for a term of five years, from ~~September 1, 2014~~ June 1, 2015 to ~~May 31, 2020~~ August 30, 2019 (the "Sub-lease").
7. While the Sub-lease was not signed by the parties, the terms were set out in writing and accepted by both parties. In particular, Qoola accepted the terms by virtue of its subsequent conduct, including but not limited to paying rent in accordance with the terms of the written Sub-lease.

8. Section 2.2 of the Sub-lease provided for Qoola to pay the AMS a base rent as follows (the "Base Rent"):

Rent

During the Term the Sub-lessee shall pay to the Sub-lessor in lawful money of Canada, without set-off, compensation or deduction, rent as follows:

- (a) For Years One, Two, and Three, Fixed [sic] minimum rent of \$65 per square foot per year, payable in equal consecutive monthly installments [sic] of FIVE THOUSAND SIX HUNDRED AND THIRTY DOLLARS AND SIXTY THREE CENTS (\$5,630.63) each in advance on the first day of each calendar month commencing on the first day of September, 2014. Such minimum rent will be subject to an annual CPI adjustment (based on the percentage increase in the CPI during the previous twelve months), to be advised to the Sub-lessee in March of each year; and For [sic] Years Four and Five, Fixed [sic] minimum rent of \$70 per square foot per year, payable in equal consecutive monthly installments [sic] of SIX THOUSAND AND SIXTY THREE DOLLARS AND SEVENTY FIVE CENTS (\$6,063.75) each in advance on the first day of each calendar month commencing on the first day of September, 2017. Such minimum rent will be subject to an annual CPI adjustment (based on the percentage increase in the CPI during the previous twelve months), to be advised to the Sub-lessee in March each year; and
- (b) For each Lease Year percentage rent equal to the amount, if any, by which eight percent (\_8\_) of the Gross Sales for the Lease Year exceeds the fixed minimum rent payable for the Lease Year under clause (a), payable (on a cumulative basis) in monthly installments [sic] in arrears on or before the thirtieth (30<sup>th</sup>) day after the end of each calendar month thereafter, the amount of each installment [sic] to be equal to:
  - (i) the amount, if any, by which \_EIGHT\_ percent (\_8\_) of the Gross Sales for the period from the beginning of the Lease Year to the end of the previous calendar month exceeds the fixed minimum rent paid or due and payable under Paragraph 2.2(a) for the same period less;
  - (ii) an amount equal to the installments [sic] of percentage rent paid or due and payable under Paragraph 2.2(b) for the same period excepting the previous calendar month.

Notwithstanding anything to the contrary herein contained, the rent payable during Years One, Two, and Three of the Term shall not be less than SIXTY SEVEN THOUSAND FIVE HUNDRED AND SIXTY SEVEN DOLLARS AND FIFTY CENTS (\$67,567.5) [sic] per annum, and during Years Four and Five of the Term shall not be less than SEVENTY TWO THOUSAND SEVEN HUNDRED AND SIXTY FIVE DOLLARS (\$72,765) per annum.

9. Article 4.1 makes it an express obligation of Qoola to pay the rent to the AMS in the manner provided by the Sub-lease.

10. The Sub-lease also provided for payments to be made by Qoola to the AMS, in addition to the Base Rent, as follows (the "Additional Rent"):

(a) 3. Net Lease

3.1 Costs and Charges

The Sub-lessee agrees to pay all costs and charges of every nature and kind whatsoever relating to the Demised Premises and the maintenance thereof whether or not such costs are specifically provided for herein in order that the Sub-lessor will be free of any outlay whatsoever in connection with the Demised Premises for the Term of this Lease; provided that the Sub-lessee shall not be obliged to pay expenses personal to the Sub-lessor including, without limiting the generality of the foregoing, corporate and income tax.

(b) 4.4 Property Taxes

To pay upon demand by the Sub-lessor the Sub-lessee's Proportionate Share [defined in Article 1.1(d) as the area of the Demised Premises divided by the rentable area of the Building] of all taxes, rates and assessments of every nature and kind levied or assessed in respect of the Lands and Building. The Sub-lessor reserves the right to charge for and collect the Sub-lessee's Proportionate Share of taxes, rates and assessments in installments [sic] in advance of the due date thereof.

(c) 4.7 Marketing Levy

In order to support the marketing and promotion of the Building, the Sub-lessee will pay to the Sub-lessor an amount of \$3 PER SQUARE FOOT per annum to be paid on the commencement date of the Term and on each anniversary date thereafter.

11. The charges and maintenance allocated to the Demised Premises was based on the total charges, divided by the total rentable area in the Building, then multiplied by the square footage of the Demised Premises, which generated the following amounts:

	<b>Amount per square foot per month</b>
Building Maintenance	\$2.47
Waste Management	\$1.09
Facility Management	\$1.02
<b>Total</b>	<b>\$4.58</b>

The Demised Premises were 1,039.5 square feet, multiplied by \$4.58, which equals \$396.74 per month.

12. Article 7.7(a) states that Qoola is responsible for any legal fees associated with enforcing the terms of the Sub-lease:

Indemnification of the Sub-lessor

- (a) Except to the extent that the loss of life, personal injury or damage... The Sub-lessee shall also pay all costs, expenses and legal fees incurred by the Sub-lessor in enforcing this Lease

13. Article 8.1 of the Sub-lease provides for re-entry for failure to pay rent:

Proviso for Re-Entry

If the Sub-lessee fails to pay rent or any other charges or amounts payable by the Sub-lessee hereunder, when due, or fails to observe or perform any other of the terms, conditions or covenants of the Lessee to be observed or performed by the Sub-lessee, the Sub-lessor may re-enter and take possession of the Demised Premises as though the Sub-lessee or any other occupant of the Demised Premises were holding over after the expiration of the Term.

14. Article 8.3 allows for termination of the lease or re-letting the premises on re-entry:

Right to Re-Let

If the Sub-lessor re-enters the Demised Premises as herein provided, it may at its option either determine this Lease or it may from time to time without terminating the Sub-lessee's obligations under this Lease, make alterations and repairs considered by the Sub-lessor to be necessary to facilitate a re-letting and re-let the Demised Premises or any part thereof as agent of the Sub-lessee for such term or terms and at such rental or rental and upon such terms and conditions as the Sub-lessor in its discretion considers advisable. No re-entry by the Sub-lessor will be construed as an election on its part to terminate this Lease unless a written notice of that intention is given to the Sub-lessee.

15. Article 8.8 of the Sub-lease provided for the payment of interest by Qoola to the AMS on rental arrears as follows:

Interest on Arrears

All monies payable to the Sub-lessor by the Sub-lessee on any account whatsoever hereunder which are more than thirty (30) days past due shall bear interest at the rate of Twelve [sic] per cent (12%) per annum, calculate monthly until paid.

16. Commencing on or about June, 2015, in breach of Articles 2.2, 3.1, 4.1, 4.4, and 4.7 of the Sub-lease, Qoola began to fall into arrears of Base Rent and Additional Rent.

17. On August 17, 2017, the lawyer for the AMS delivered to Qoola notice of default/ breach of the Sub-lease. At that time, Qoola was in arrears of Base Rent and Additional Rent in the sum of \$87,003.33 plus accrued interest.

18. Qoola made no payment.

19. By notice in writing to Qoola dated August 28, 2017, the AMS terminated the Sub-lease effective on that date and demanded that Qoola deliver up immediate vacant possession of the Demised Premises to the AMS.

20. As of August 28, 2017, Qoola owed the following amount to the AMS, plus the accrued interest:

	<b>Base Rent</b>	<b>Additional Rent (Common Area Maintenance)</b>	<b>Additional Rent (Marketing Levy)</b>	<b>Interest (12% per annum, calculated monthly)</b>
June 2015	\$5,630.63	\$396.74		\$1,857.69 (27 months)
July 2015	\$5,630.63	\$396.74		\$1,220.38 (26 months)
August 2015	\$5,630.63	\$396.74		\$1,702.32 (25 months)
September 2015	\$5,630.63	\$396.74		\$1,625.79 (24 months)
October 2015	\$5,630.63	\$396.74		\$1,550.02 (23 months)
June 2016			\$3,118.50	\$501.98 (15 months)
September 2016	\$5,630.63	\$396.74		\$764.43 (12 months)
November 2016	\$5,630.63	\$396.74		\$624.60 (10 months)
December 2016	\$5,630.63	\$396.74		\$564.68 (9 months)
April 2017	\$5,630.63	\$396.74		\$307.46 (5 months)
May 2017	\$4,764.38	\$396.74		\$209.56 (4 months)
June 2017	\$4,764.38	\$396.74	\$3,118.50	\$156.39 (3 months)
July 2017	\$5,630.63	\$396.74		\$121.15 (2 months)

August 2017	\$5,630.63	\$396.74		\$60.27 (1 month)
Subtotal	\$71,465.69	\$5,157.62	\$6,237.00	
GST	\$3,573.29	\$257.88	\$311.85	
Total	\$75,038.98	\$5,415.50	\$6,548.85	\$11,266.72
<b>Amount Owed as of August 28, 2017</b>			<b>\$87,003.33</b> (rent)	<b>\$11,266.72</b> (interest)

21. As a result of Qoola's aforesaid breaches of the Sub-lease, the AMS has suffered and will suffer damages, losses and expenses, the full particulars of which will be provided at the trial of this action, but which include, without limitation, the following:

- (a) the rent arrears due and owing as at August 28, 2017 under the Sub-lease prior to termination, in the sum of \$87,003.33;
- (b) interest on the rent arrears from and after June 1, 2015 until and including August 27, 2017, in the amount of \$11,266.72, pursuant to Article 8.8 of the Sub-lease at the contractual rate of 12% per annum;
- (c) damages in the nature of the cost of restoring the Demised Premises to a reasonable condition for re-leasing including, without limitation, cleaning and the removal of trade fixtures and other effects from the Demised Premises;
- (d) damages for the cost of advertising and re-leasing the Demised Premises;
- (e) damages for the value of lost rental income over the unexpired term of the Sub-lease;
- (f) 12% interest on the above amounts pursuant to Article 8.8 of the Sub-lease; and
- (g) such other costs, expenses, losses or damages as counsel may advise.

**Part 2: RELIEF SOUGHT**

22. The AMS seeks the following:

- (a) judgment in the sum of \$87,003.33 (the "Principal Arrears") due and owing as at August 28, 2017 under the Sub-lease prior to termination;
- (b) judgment in the sum of \$11,266.72, pursuant to the Sub-lease for the amount of interest which accumulated on the Principal Arrears from and after June 1, 2015

until and including August 27, 2017 (the day before the Sub-lease termination) pursuant to Article 8.8 of the Sub-lease at the contractual rate of 12% per annum;

- (c) general damages for breaches of the Sub-lease in accordance with the common law and the *Law and Equity Act*, R.S.B.C. 1996, c. 253;
- (d) in the alternative, damages for unjust enrichment pursuant to the *Law and Equity Act*, R.S.B.C. 1996, c. 253;
- (e) special damages in the nature of the cost of restoring the Demised Premises to a reasonable condition for re-leasing including, without limitation, cleaning the Demised Premises and removing trade fixtures and other effects from the Demised Premises;
- (f) special damages for the cost of advertising and re-leasing the Demised Premises;
- (g) special damages for the value of lost rental income over the unexpired term of the Lease;
- (h) interest at 12% per annum on the items in paragraphs (c), (d), (e) and (f) above pursuant to Article 8.8 of the Lease;
- (i) in the alternative, interest on the items in paragraphs (c), (d), (e) and (f) above pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 (British Columbia);
- (j) legal costs incurred on a full indemnity basis pursuant to Article 7.7 of the Sub-lease;
- (k) in the alternative, costs on such other basis under the Supreme Court Rules as this Honourable Court deems just and appropriate; and
- (l) such further and other relief as this Honourable Court may deem necessary.

### Part 3: LEGAL BASIS

1. A valid and binding contract was entered into between the AMS and Qoola for the sub-lease of the Demised Premises.
2. Qoola bound itself to the contract and all of its terms in accordance with both contract law and the *Law and Equity Act*, R.S.B.C. 1996, c.79.
3. Qoola breached the terms of the contract, including the failure to pay rent as required under the contract.
4. The AMS has suffered loss and damage as a result of Qoola's breach of the contract, and is entitled to recover such loss and damage from Qoola along with interest at the contractual rate of 12% per annum.
5. In the alternative, if the contract is found to be unenforceable, Qoola has been unjustly enriched by, among other things, retaining the benefit of the Amended Sub-lease by operating its business without paying rent, to which AMS was correspondingly deprived

of its interest in land and of its compensation for Qoola's enrichment without any juristic reason.

Plaintiff's address for service: Roger D. Lee  
DLA Piper (Canada) LLP  
Barristers & Solicitors  
2800 Park Place  
666 Burrard Street  
Vancouver, BC V6C 2Z7

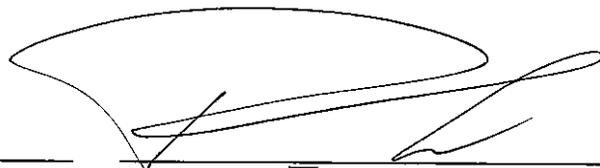
Fax number address for service (if any): 604.687.1612

E-mail address for service (if any): N/A

Place of trial: Vancouver

The address of the registry is: 800 Smithe Street  
Vancouver, BC V6Z 2E1

January 9, 2018  
Dated



Signature of  lawyer for plaintiff  
DLA Piper (Canada) LLP (Roger D. Lee)

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
  - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
  - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

## APPENDIX

### Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

Damages for breach of a lease agreement.

### Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

### Part 3: THIS CLAIM INVOLVES:

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

### Part 4: THIS CLAIM INVOLVES:

Not applicable.