

CANADA

(Class Action)  
SUPERIOR COURT

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO: 500-06-000518-106

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**N. AIGEN**

and

**H. SANTOS**

*Petitioners*

-vs.-

**TRANSITIONS OPTICAL, INC.**  
and  
**ESSILOR INTERNATIONAL SA**  
and  
**ESSILOR CANADA LTD.**  
and  
**ESSILOR NETWORK IN CANADA INC.**

*Respondents*

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**RE-AMENDED MOTION TO AUTHORIZE THE BRINGING OF A CLASS  
ACTION  
&  
TO ASCRIBE THE STATUS OF REPRESENTATIVE  
(Art. 1002 C.C.P. and following)**

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TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,  
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONERS  
STATE AS FOLLOWS:

**I. GENERAL PRESENTATION**

**A) THE ACTION**

1. Petitioners wishes to institute a class action on behalf of the following group, of which they are members, namely:
  - all residents in Canada who purchased Transitions photochromic lenses manufactured and/or distributed, whether directly or indirectly,

by the Respondents since approximately January 1999 through to the present, or any other group to be determined by the Court;

However, a legal person established for a private interest, a partnership or an association is not a member of a group unless, at all times since August 2<sup>nd</sup> 2009, not more than 50 persons bound to it by contract of employment were under its direction or control, and if it is dealing at arm's length with the representative of the group;

Alternately (or as a subclass)

- all residents in Quebec who purchased Transitions photochromic lenses manufactured and/or distributed, whether directly or indirectly, by the Respondents since approximately January 1999 through to the present, or any other group to be determined by the Court;

However, a legal person established for a private interest, a partnership or an association is not a member of a group unless, at all times since August 2<sup>nd</sup> 2009, not more than 50 persons bound to it by contract of employment were under its direction or control, and if it is dealing at arm's length with the representative of the group;

2. Eyeglasses with photochromic lenses are designed to darken when exposed to ultraviolet (“UV”) light and fade to clear when removed from that light;
3. Petitioners contend that the Respondents colluded to monopolize the market for the development, manufacture, and sale of photochromic treatments for corrective ophthalmic lenses;
4. Starting around 1999 and continuing through March 2010, and potentially later, the Respondents engaged in exclusionary conduct, including entering into exclusive dealing arrangements and other restrictive practices at nearly every level of the photochromic lens distribution chain. This conduct substantially foreclosed existing and potential competitors from accessing channels necessary to efficiently and effectively manufacture and market competing photochromic lenses;
5. By reason of this unlawful conduct, Petitioners and the members of the class have (a) paid higher prices for Transitions photochromic lenses than they would have paid in a competitive market; and (b) were deprived of the opportunity to purchase competing photochromic lenses at a lower price - thereby causing damages upon which they wish to claim;

## **B) THE RESPONDENTS**

## TRANSITIONS

6. Respondent Transitions Optical, Inc. (“Transitions”) is an American company. It is a joint venture between PPG Industries, Inc. and Respondent Essilor International SA (“Essilor International”). PPG Industries, Inc. owns 51% of the stock in Transitions and Essilor International owns the remaining 49%;
7. During the relevant period, Respondent Transitions developed, manufactured, distributed, and sold Transitions photochromic treatments for corrective ophthalmic lenses throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, partners, affiliates, and/or subsidiaries;
- 7.1 In fact, at all relevant times, Respondent Transitions held several Canadian trademarks and patents in relation to their photochromic lens products, the whole as appears more fully from a copy of said trademarks and patents, produced herein as *en liasse* **Exhibit A**;

## ESSILOR

8. Respondent Essilor International is a French company. It is the world’s largest manufacturer of ophthalmic lenses;
- 8.1 At all relevant times, Respondent Essilor International held several Canadian trademarks and patents in relation to their ophthalmological lens products, the whole as appears more fully from a copy of said trademarks and patents, produced herein as *en liasse* **Exhibit B**;
9. Respondent Essilor Canada Ltd. (“Essilor Canada”) is in the business of “transformation de lentilles optalmiques” and “distribution de montures et d’équipements optiques”, the whole as appears more fully from a copy of the CIDREQ report, produced herein as **Exhibit R-1**. Essilor Canada is a wholly owned subsidiary of Essilor International;
10. Respondent Essilor Network in Canada Inc. (“Essilor Network”) is in the business of “laboratoire d’optique-fabriquant de lentilles” the whole as appears more fully from a copy of the CIDREQ report, produced herein as **Exhibit R-2**. Essilor Network owns numerous Wholesale Labs, including R & R Optical Laboratory Ltd., Pioneer Optical Ltd., Perspectives Lab Inc., Aries Optical Ltd., K. & W. Optical Limited, Eastern Optical Laboratories Limited, OPSG Limited, Custom Surface Ltd., and Morrison Optical Ltd.;
11. These Respondents being collectively referred to herein as “Essilor”. Given their close ties, they are all solidarily liable for the acts and omissions of each other;

12. During the relevant period, Essilor developed, manufactured, distributed, and sold Transitions photochromic treatments for corrective ophthalmic lenses throughout Canada, including the province of Quebec, either directly or indirectly through its predecessors, partners, affiliates, and/or subsidiaries;

### FURTHER ESSILOR ENTITIES

13. Other corporate entities involved in the alleged actions as described herein are laboratories that sell Transitions photochromic lenses at the wholesale level and are owned or controlled by Essilor International. These include, but are not limited to, the following list taken from Essilor International's 2008 Registration Document, a copy of which is produced herein as **Exhibit R-3**:

Company	Essilor's voting rights %	Essilor's ownership interest %
Aries Optical Ltd.	100	100
BBGR Optique Canada Inc.	100	100
Canoptec Inc.	100	100
Custom Surface Ltd.	100	100
Eastern Optical Laboratories Ltd.	100	100
Essilor Canada Ltd.	100	100
Groupe Vision Optique	100	100
K&W Optical Ltd.	100	100
Metro Optical Ltd.	100	100
Morrison Optical	100	100
OK Lenscraft Laboratories Ltd.	100	100
OPSG Ltd.	100	100
Optical Software Inc.	100	100
Optique de l'Estrie Inc.	100	100
Optique Lison Inc.	100	100
Optique Cristal	70	70
Perspectics	100	100
Pioneer Optical Inc.	100	100
Pro Optic Canada Inc.	100	100
R&R Optical Laboratory Ltd.	100	100
SDL	90	90
Westlab	85	85

### AGENTS

14. Respondents' conduct was authorized, ordered, or done by Respondents' officers, agents, employees, or representatives while actively engaged in the management and operations of the respective Respondents' business;
15. Each Respondent acted as the principal agent, joint venturer of, or for other Respondents with respect to the acts, violations and common course of conduct as alleged herein;



## C) THE SITUATION

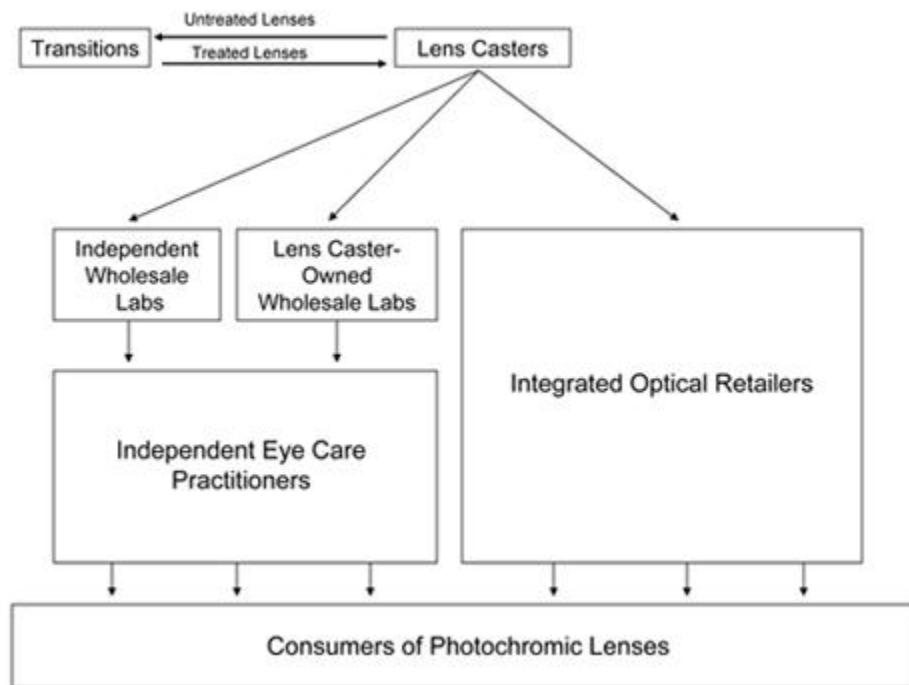
### PHOTOCHROMIC LENS INDUSTRY

16. Corrective ophthalmic lenses are used in eyeglasses to correct vision defects. Consumers can buy those lenses with a photochromic treatment to protect their eyes from harmful UV light;
17. In 2008, photochromic lenses represented approximately 19% of all corrective ophthalmic lenses sold;
18. There are three (3) levels of the supply chain for ophthalmic lenses, including photochromic lenses;
19. At the first level, “Lens Casters” (manufacturers of corrective ophthalmic lenses) convert raw materials supplied by chemical and glassmaking companies into various types of lenses, such as single vision lenses, bifocals, trifocals, and progressive lenses. PPG Industries, Inc., one of the parent companies of Respondent Transitions (and PPG Canada Inc., an affiliate of PPG Industries, Inc.), is a major supplier of these raw materials to Lens Casters, particularly Respondent Essilor Canada, the dominant lens caster in Canada;
20. Respondent Transitions treats ophthalmic lenses with photochromic treatments. Lens Casters provide Transitions with untreated lenses, to which Respondent Transitions applies photochromic materials. Respondent Transitions sells photochromic lenses back to the Lens Casters from whom it received the untreated lenses;
21. Respondent Transitions deals directly only with Lens Casters;
22. At the second level, Lens Casters, including Essilor Canada, sell lenses, including photochromic lenses, through two distribution channels: (1) “Wholesale Optical Labs”, and (2) “Optical Retailers”. Each channel constitutes approximately one half of Lens Casters’ sales;
23. Certain Wholesale Optical Labs are controlled by or otherwise integrated with Lens Casters, as is the case with Essilor Network. Other Wholesale Optical Labs are owned and operated by optical retail chains that generally provide both laboratory and eye-care practitioners services. Yet other Wholesale Optical Labs operate independent of any Lens Caster or Optical Retailer;
24. Wholesale Optical Labs (otherwise referred to as “Prescription Labs”), including Essilor Network, grind lenses according to prescriptions from ophthalmologists, optometrists, and opticians (collectively referred to as “eye-



care practitioners”), polish semi-finished lenses, apply certain surface treatments (such as anti-scratch and anti-reflective coatings), and usually fit lenses into eyeglass frames and deliver finished eyeglasses to eye-care practitioners that are not affiliated with Optical Retailers (otherwise referred to as “Independent Eye-Care Practitioners”). Wholesale Optical Labs typically employ a sales force to promote specific lenses to eye-care practitioners;

25. Optical Retailers provide both laboratory and eye-care practitioner services in a “one stop shop” fashion. Optical Retailers employ their own eye-care practitioners who deal directly with consumers. Optical Retailers also grind and fit lenses into eyeglass frames and deliver the frame with the finished lens to consumers. These retailers range in size from large national chains to smaller regional outfits;
26. At the third level, Optical Retailers and Independent Eye Care Practitioners sell finished, ready-to-wear eyeglasses to consumers;
27. The industry structure for corrective ophthalmic lenses, including photochromic lenses, is shown below:



28. Respondent Transitions possesses significant monopoly power in the relevant market. Transitions’ monopoly power is demonstrated by its consistently high and stable market share, the existence of substantial entry barriers that face any new competitor trying to break into the business, and Transitions ability to exclude competitors and raise prices;

29. Transitions share of the photochromic market has been at least 80% during each of the past five years. In 2008, Transitions' market share exceeded 85%;

### **ANTICOMPETITIVE CONDUCT**

30. Beginning in 1999 and continuing through to at least March 2010, the Respondents all acting together and in concert have unlawfully maintained its monopoly position by exclusionary policies at nearly every level of the market chain. The Respondents all acting together and in concert successfully foreclosed key distribution channels for existing competitors and impeded market entry by potential competitors;

#### **At the Lens Caster Level**

31. At the Lens Caster level, Respondent Transitions' anticompetitive conduct included, but was not limited to: (1) adopting and announcing a general policy that it would not deal with Lens Casters that sold or promoted any competing photochromic lenses; (2) entering into exclusive agreements with certain Lens Casters, including Respondent Essilor Canada; (3) threatening to terminate its dealings with Lens Casters that would not sell Transitions lenses on an exclusive basis; (4) terminating a Lens Caster that purchased a competitor's photochromic lens product; (5) terminating a Lens Caster that develops a competing photochromic treatment and incorporates it into its own lenses;
32. Respondent Transitions enforced its exclusionary policies by, amongst other things, entering into agreements with certain Lens Casters that expressly required exclusivity and by publicizing its exclusive dealing policy in the marketplace. Therefore, even those Lens Casters that had not signed exclusivity agreements with Transitions, effectively precluded them from dealing with its competitors as they were aware of Transitions' policy;
33. Due to Respondent Transitions' dominant market position and its exclusivity policy, Lens Casters were confronted with powerful economic incentives to deal with Respondent Transitions. By the same token, Lens Casters were faced with a no-win proposition if they chose to utilize a competitor's photochromic treatments. Doing so not only would cost a Lens Caster Transitions' business, which accounted for up to 40% of many Lens Casters' revenues, it also would endanger its sales of clear lenses, as many Wholesale Optical Labs and Optical Retailers prefer to buy both clear and photochromic versions of the same lenses. Losing the ability to sell Transitions lenses to Wholesale Optical Labs and Optical Retailers – many of whom have their own exclusivity agreement with Transitions – would deprive any affected Lens Caster of a substantial number of potential customers;



34. Transitions' conduct and policies at the Lens Caster level has been exceptionally effective in helping preserve its market dominance. Lens Casters that are exclusive to Transitions collectively account for over 85% of photochromic lens sales;

#### **At the Wholesale Optical Lab and Optical Retailer Level**

35. At least half of all Wholesale Optical Labs – including those owned by the Essilor Respondents – are owned by Lens Casters that sell only Transitions' photochromic lenses for the reasons as discussed earlier;
36. In order to limit competitors' access to Independent Wholesale Optical Labs as a distribution channel, Transitions entered into agreements requiring that they sell Transitions' lenses as their preferred photochromic lens and minimize their promotion of any competing product;
37. Transitions' exclusionary agreements with Wholesale Optical Labs combined with its agreements with Lens Casters that own over half of the Wholesale Optical Labs, severely curtailed the ability of Transitions' rivals to promote and sell their photochromic lenses to Independent Eye-Care Practitioners (i.e. practitioners unaffiliated with retail chains);
38. Transitions also entered into exclusive agreements with Optical Retailers that substantially impeded competitor entry into the market. Most of these agreements were long-term and could not be easily terminated;
39. In addition, Transitions' agreements with Whole Optical Labs and Optical Retailers typically provided for discounts only to customers who purchased all or almost all of their photochromic lenses from Respondent Transitions;
40. No other photochromic treatment supplier has a treatment that applies to a full line of ophthalmic lenses. Transitions' discount structure thus impaired its competitors' ability to compete for sales to those customers, as the customers economically could neither discontinue nor limit their sales of Transitions' products;
41. Transitions' bundled discount program created a significant entry barrier by limiting the ability of a competitor to enter the marketplace with a new photochromic treatment that applied to less than a full line of ophthalmic lenses;

#### **Conduct of the Essilor Respondents**

42. At all relevant times, Essilor Canada and Essilor Network purchased and sold only Transitions' photochromic lenses. However, unlike other Lens Casters



and Wholesale Optical Labs that were coerced into entering into exclusive agreements with Transitions, Essilor Canada and Essilor Network did so in whole or in substantial part to bolster Transitions' monopoly in the marketplace;

43. Essilor Canada also entered into exclusive agreements with numerous Wholesale Optical Labs and Optical Retailers requiring those purchasers to sell or actively promote only Essilor lenses. Those agreements were intended to bolster Transitions' monopoly in the marketplace;
44. At all relevant times, all of the Essilor corporate entities related to one of the Essilor Respondents purchased and sold Transitions photochromic lenses on a substantially exclusive basis. Yet unlike other (independent) Wholesale Optical Labs that entered into exclusive agreements with Transitions, the Essilor corporate entities did so in whole or in substantial part to bolster Transitions' monopoly in the marketplace;
- 44.1 At all relevant times, Essilor Canada and Essilor Network were acting under the direct orders and consent of their parent, Essilor International;

## **D) THE FOREIGN PROCEDURES**

### **United States Federal Trade Commission ("FTC") Complaint and Consent Order**

45. On or about March 3<sup>rd</sup> 2010, the FTC released a Complaint against Transitions (the "FTC Complaint") and the Decision and Order (the "Order") that resulted from its investigation. The FTC simultaneously accepted for public comment an Agreement Containing Consent Order to Cease and Desist with Transitions. On April 27<sup>th</sup> 2010, the Complaint, Decision and Order were finalized;
46. In a press release issued the same day as the filing of the FTC Complaint, Richard Feinstein, Director of the FTC's Bureau of Competition, stated:
- "Transitions crossed the line between aggressive competition and illegal exclusionary conduct. It used its monopoly power to strong-arm key distributors into exclusive agreements and unfairly box out rivals so they could not use these distributors. Its actions prevented others from competing on the merits, and consumers were forced to pay more for these lenses as a result. Such conduct runs afoul of the antitrust laws and is unacceptable."

47. The FTC issues a complaint when it has “reason to believe” that the law has been violated, and it appears to the FTC that a proceeding is in the public interest;
48. The FTC Complaint charged that Transitions engaged in illegal and exclusionary conduct to maintain its monopoly in the market for the development, manufacture, and sale of photochromic treatments for corrective ophthalmic lenses in the United States;
49. The FTC Complaint alleged, among other things, the following: (1) a relevant market for the development, manufacture, and sale of photochromic treatments for corrective ophthalmic lenses; (2) the lack of close substitutes for photochromic lenses; (3) Transitions’ monopoly power in the photochromic treatment market; (4) the existence of significant entry barriers for the photochromic treatment market; and (5) Transitions used unfair methods of competition to maintain its monopoly power in the photochromic treatment market;
50. The FTC Complaint further alleged that the anticompetitive effects of Transitions’ conduct included: (1) raising prices and reducing the output of photochromic lenses; (2) deterring, delaying, and impeding the ability of Transitions’ actual or potential competitors to enter or to increase their sales in the photochromic treatment market; (3) reducing innovation; and (4) reducing consumer choice among competing photochromic lenses;
51. The Order contemplates numerous forms of significant structural relief that are designed to end Transition’s exclusive dealing practices and restore competition by facilitating new competitor entry. Most of the provisions in the Order will be in effect for 20 years;
52. The Order, among other things: (1) prohibits Transitions from entering into any agreements or adopting any policies that limit its customers’ ability to buy or sell competing photochromic treatments, or that require customers to give Transitions’ products preferential treatment as compared to its competitors’ products; (2) prohibits Transitions from entering into exclusive agreements relating to photochromic lenses or a number of related products and services; (3) prohibits Transitions from offering discounts that are based on the degree to which its customers sell Transitions’ photochromic lenses as compared to its competitors; (4) prohibits Transitions from offering discounts that are applied retroactively after a customer’s sales reach a specific threshold; (5) prohibits Transitions from bundling discounts where customers purchasing more than one line of photochromic lenses obtain additional discounts; (6) prohibits Transitions from limiting the information that customers can give to consumers about competitors’ photochromic lenses; and (7) prohibits Transitions from retaliating against a customer that buys or sells Transitions’ lenses on a non-exclusive basis;



53. The relating documentation emanating from the FTC are being produced as if recited at full length herein, namely:

- a) A copy of the News Release dated March 3<sup>rd</sup> 2010 as **Exhibit R-4**;
- b) A copy of the Analysis to Aid Public Comment dated March 3<sup>rd</sup> 2010 as **Exhibit R-5**;
- c) A copy of the Agreement Containing Consent Order dated March 3<sup>rd</sup> 2010 as **Exhibit R-6**;
- d) A copy of the Complaint dated April 22<sup>nd</sup> 2010 as **Exhibit R-7**;
- e) A copy of the Decision and Order dated April 22<sup>nd</sup> 2010 as **Exhibit R-8**;

#### **USA Class Action Complaints**

54. Several class action actions have been instituted in the United States based on the Respondents' conduct, the whole as appears more fully from a copy of said complaints, produced herein *en liasse* as **Exhibit R-9**;

#### **Result**

54.1 The predominate purpose of the Respondents' conduct was:

- a. To harm the Petitioner and members of the class by requiring them to pay artificially high prices for photochromic lenses; and
- b. To unlawfully increase their profits on the sale of photochromic lenses;

54.2 Petitioners contend that the Respondents failed in their duties, both legal and statutory, notably with respect to sections 45 (from the period of January 1999 to March 11, 2010), 46 (from the period of January 1999 to March 11, 2010), 50 (from the period of January 1999 to March 11, 2009), 61 (from the period of January 1999 to March 11, 2009), and 62 of the Federal Competition Act, thereby rendering them liable to pay damages under section 36 of the Federal Competition Act;

54.3 In addition, Petitioners allege that the Respondents failed in their obligations as provided for in the Civil Code of Quebec, more specifically with respect to the duty to act in good faith at article 7 C.C.Q. and to not cause damage to others at article 1457 C.C.Q.;

#### **II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONERS**



55. During the relevant period, more particularly on or about November 1999, Petitioner Aigen purchased prescription eyeglasses with Transitions photochromic lenses for approximately \$500 from Marer Vision on Cote-des-Neiges, in Montreal, Quebec;

55.1 During the relevant period, more particularly on February 4<sup>th</sup> 2009, Petitioner Santos purchased two (2) Transitions photochromic lenses for a total of \$240 from Albert Hazan, Optician, in Montreal, Quebec, the whole as appears more fully from a copy of said invoice, produced herein as Exhibit R-10;

56. Due to the Respondents' conduct, Petitioners were deprived of the benefit of free market competition, and because of this, they were charged a higher price for the product that they purchased;

57. Petitioners have suffered damages in the amount of the difference between the artificially inflated price that they paid for said product and the price that they should have paid in a free market system;

58. The conduct of the Respondents was not known to the Petitioners at the time that they purchased said product nor could it have been discovered, even through the exercise of reasonable diligence;

59. Petitioner Aigen has since discovered that this situation has been addressed by the United States Federal Trade Commission and that several class actions have been instituted in the United States due to this issue;

59.1 Petitioner Santos discovered the existence of the present class action and wishes to participate herein;

60. Petitioners' damages are a direct and proximate result of the Respondents' conduct;

61. In consequence of the foregoing, Petitioners are justified in claiming damages;

### **III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP**

62. Every member of the class purchased Transitions photochromic lenses;

63. Each member of the class has paid an artificially inflated price for their Transitions photochromic lenses due to the Respondents' unlawful and anticompetitive conduct;

64. Every member of the class has suffered damages equivalent to the difference between the artificially inflated price that they paid for their Transitions photochromic lenses and the price that they he should have paid in a free market system;
65. In addition, every member of the class was effectively deprived of the opportunity to purchase competing photochromic lenses and to purchase those lenses at a lower price;
66. All of the damages to the class members are a direct and proximate result of the Respondents' conduct;
67. In consequence of the foregoing, members of the class are justified in claiming damages;

#### **IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION**

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
68. The sale of Transitions photochromic lenses are widespread in Quebec and Canada;
69. Petitioners are unaware of the specific number of persons who purchased Transitions photochromic lenses, however, given their tremendous popularity, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
70. Class members are numerous and are scattered across the entire province and country;
71. 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 Respondents. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of Respondents would increase delay and expense to all parties and to the court system;
72. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;



73. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
74. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondents and that which the Petitioners wishes to have adjudicated upon by this class action
75. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
76. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
77. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a) Did the Respondents engage in unlawful and anticompetitive conduct to wilfully acquire, maintain, and enhance its monopoly power in the photochromic treatment market?
  - b) Did the Respondents conspire to confer, maintain, or enhance Transitions' monopoly in the photochromic treatment market?
  - c) Did the Respondents conspire to engage in unlawful exclusionary conduct to impair the opportunities of Transitions' competitors in the photochromic treatment market?
  - d) Did the Respondents enter into exclusionary agreements that unreasonably restrained trade and impaired Transitions' competitors in the photochromic treatment market?
  - e) Did the Respondents engage in a contract, combination, or conspiracy among themselves to unreasonably restrain trade and impair Transitions' competitors in the photochromic treatment market?
  - f) Did the Respondents' conduct cause the prices of Transitions photochromic lenses to be sold at artificially inflated and supra-competitive levels?



- g) Were members of the class prejudiced by the Respondents' conduct, and, if so, what is the appropriate measure of these damages?
- h) Are members of the class entitled to, among other remedies, injunctive relief, and, if so, what is the nature and extent of such injunctive relief?
- i) Are the Respondents liable to pay compensatory, moral, punitive and/or exemplary damages to member of the class, and, if so, in what amount?

78. The interests of justice favour that this motion be granted in accordance with its conclusions;

## V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

79. The action that the Petitioners wish to institute on behalf of the members of the class is an action for extracontractual civil liability in damages and for injunctive relief;

80. The conclusions that the Petitioners wish to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the class;

ORDER the Defendants to permanently cease from continuing or maintaining to engage in unlawful and anticompetitive conduct as alleged herein;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;



ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioners requests that they be attributed the status of representative of the Class

81. Petitioners are members of the class;

82. Petitioners are ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and are determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with their attorneys;

83. Petitioners have the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

84. Petitioners have given the mandate to their attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

85. Petitioners, with the assistance of their attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;

86. Petitioners are in good faith and has instituted this action for the sole goal of having their rights, as well as the rights of other class members, recognized and protecting so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;

87. Petitioners understand the nature of the action;

88. Petitioners' interests are not antagonistic to those of other members of the class;

88.1 Petitioner Aigen was instrumental in bringing this class action forward. Petitioner Santos, while not the original Petitioner, wishes to intervene make sure that the present class action is successfully prosecuted;





- B) The Petitioners suggests that this class action be exercised before the Superior Court of justice in the district of Montreal
89. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;
90. The Petitioners' attorneys practice their profession in the judicial district of Montreal;
91. The Respondents Essilor Canada and Essilor Network have their head offices in the judicial district of Montreal;
92. The present motion is well founded in fact and in law.

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present motion;

**AUTHORIZE** the bringing of a class action in the form of a motion to institute proceedings in extracontractual civil liability for damages and for injunctive relief;

**ASCRIBE** the Petitioners the status of representative of the (...) the class herein described as:

- all residents in Canada who purchased Transitions photochromic lenses manufactured and/or distributed, whether directly or indirectly, by the Respondents since approximately January 1999 through to the present, or any other group to be determined by the Court;

However, a legal person established for a private interest, a partnership or an association is not a member of a group unless, at all times since August 2<sup>nd</sup> 2009, not more than 50 persons bound to it by contract of employment were under its direction or control, and if it is dealing at arm's length with the representative of the group;

Alternately (or as a subclass)

- all residents in Quebec who purchased Transitions photochromic lenses manufactured and/or distributed, whether directly or indirectly, by the Respondents since approximately January 1999 through to the present, or any other group to be determined by the Court;

However, a legal person established for a private interest, a partnership or an association is not a member of a group unless, at all times since August 2<sup>nd</sup> 2009, not more than 50 persons bound to it by



contract of employment were under its direction or control, and if it is dealing at arm's length with the representative of the group;

**IDENTIFY** the principle questions of fact and law to be treated collectively as the following:

- a) Did the Respondents engage in unlawful and anticompetitive conduct to wilfully acquire, maintain, and enhance its monopoly power in the photochromic treatment market?
- b) Did the Respondents conspire to confer, maintain, or enhance Transitions' monopoly in the photochromic treatment market?
- c) Did the Respondents conspire to engage in unlawful exclusionary conduct to impair the opportunities of Transitions' competitors in the photochromic treatment market?
- d) Did the Respondents enter into exclusionary agreements that unreasonably restrained trade and impaired Transitions' competitors in the photochromic treatment market?
- e) Did the Respondents engage in a contract, combination, or conspiracy among themselves to unreasonably restrain trade and impair Transitions' competitors in the photochromic treatment market?
- f) Did the Respondents' conduct cause the prices of Transitions photochromic lenses to be sold at artificially inflated and supra-competitive levels?
- g) Were members of the class prejudiced by the Respondents' conduct, and, if so, what is the appropriate measure of these damages?
- h) Are members of the class entitled to, among other remedies, injunctive relief, and, if so, what is the nature and extent of such injunctive relief?
- i) Are the Respondents liable to pay compensatory, moral, punitive and/or exemplary damages to member of the class, and, if so, in what amount?

**IDENTIFY** the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioners and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioners and each of the members of the class;

ORDER the Defendants to permanently cease from continuing or maintaining to engage in unlawful and anticompetitive conduct as alleged herein;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

**DECLARE** that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

**FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

**ORDER** the publication of a notice to the members of the class in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

**ORDER** that said notice be available on the various Respondents' websites with a link stating "Notice to Transitions photochromic lens users";

**RENDER** any other order that this Honourable court shall determine and that is in the interest of the members of the class;

**THE WHOLE** with costs including publications fees.

Montreal, April 13, 2012

(s) Jeff Orenstein

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CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for the Petitioners