

SUPERIOR COURT


(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000577-110

DATE: May 18, 2021

BY THE HONOURABLE SUZANNE COURCHESNE, J.S.C.


Plaintiff/ Class Representative
v.
HENKEL CONSUMER GOODS CANADA INC.
Defendants
and
LE FONDS D'AIDE AUX ACTIONS COLLECTIVES
Mis en cause

JUDGMENT (SETTLEMENT APPROVAL)

[1] **CONSIDERING** that pursuant to a judgment rendered on January 6, 2021, the Plaintiff was authorized by the Court to bring a class action against the Defendants, for settlement purposes only, and was appointed Representative of the class described as follows:

*Toutes les personnes résidant au Canada qui ont acheté Dial
Complete le ou avant la Date d'avis aux membres ;*

All persons resident in Canada who have purchased Dial Complete in Canada on or before the Class Notice Date;

(The Class)

[2] **CONSIDERING** that the Plaintiff alleges, *inter alia*, that the Defendants marketed and sold Dial Complete Antibacterial Hand Wash (**Dial Complete**) through the use of false or misleading advertisements and representations regarding the product's efficacy at eliminating "disease-causing germs" and "illness-causing bacteria"¹;

[3] **CONSIDERING** that in addition, the Plaintiff contends that Dial Complete contains 0.46% Triclosan, which is in excess of Health Canada's established Cosmetic Ingredient Hotlist which dictates a maximum concentration of 0.3%²;

[4] **CONSIDERING** that the Defendants deny these allegations;

[5] **CONSIDERING** that settlement discussions between the parties resulted in a national out-of-court settlement agreement dated October 16, 2020, as amended by addendum dated May 3, 2021 (**the Addendum**) (collectively, **the Settlement Agreement**)³;

[6] **CONSIDERING** Plaintiff's Application for (A) Approval of a Class Action Settlement; (B) Approval of the Notice of Settlement Approval to Class Members; (C) Approval of the Claim Form; (D) Approval of the Notice of Denied Claims, dated April 22, 2021 (**the Application**);

[7] **CONSIDERING** that the Settlement Agreement provides for a payment of \$0.36 for each bottle of Dial Complete purchased by the Eligible Claimants in Canada, up to a maximum of 30 bottles per household; if the total amount claimed by Eligible Claimants exceeds \$172 000, each settlement payment will be reduced on a *pro rata* basis⁴;

[8] **CONSIDERING** that, as provided in the Addendum signed by the parties following the comments of the Fonds d'aide aux actions collectives (**the FAAC**) on the Settlement Agreement, any amounts that are payable to the FAAC will be deducted from each settlement payment, irrespective of where the Eligible Claimant resides⁵;

[9] **CONSIDERING** that the Settlement Agreement also includes injunctive relief whereby the Defendants will not re-introduce Triclosan as an active ingredient in Dial

¹ Motion to Authorize the Bringing of a Class Action & to Ascribe the Status of Representative filed on August 12, 2011.

² *Id.*

³ Exhibit R-1.

⁴ Exhibit R-1, sections 1.48, 1.49, and 12.

⁵ Amendment to the Canadian Class Action Settlement Agreement, dated May 3, 2021, sections 1 and 3.

Complete and will not use an advertising or labelling claim that Dial Complete “Kills 99.99% of Germs” in connection with that product⁶;

[10] **CONSIDERING** that the Settlement Agreement provides for the payment, subject to the Court’s approval, of \$500 to the Plaintiff⁷;

[11] **CONSIDERING** that the payment of such an indemnity to the Plaintiff is contested by the FAAC;

[12] **CONSIDERING** that Class Counsel also seek the approval of their fees of \$265 000 plus applicable taxes as provided in the Settlement Agreement⁸;

[13] **CONSIDERING** the material filed in the Court record, including the solemn declaration of Steven Weisbrot, esq., sworn to on April 22, 2021 regarding the implementation of the Notice Plan,;

[14] **CONSIDERING** that the appropriate notices were published in French and in English, that no opposition was filed and that four (4) potential members opted out;

[15] **CONSIDERING** the submissions of counsel for the Plaintiff, of counsel for the Defendants and of Counsel for the FAAC;

[16] **CONSIDERING** articles 590 and 593 of the *Code of Civil Procedure*;

- **The payment of an indemnity of \$500 to Plaintiff**

[17] **CONSIDERING** that article 14.1 of the Settlement Agreement, as modified by the Addendum, provides for the payment of an indemnity of \$500 to Plaintiff as an indemnity for her disbursements and in full satisfaction of any and all claims asserted by her in her class action proceedings, subject to court approval;

[18] **CONSIDERING** that Article 593 of the Code of Civil Procedure provides that the Court may award the representative plaintiff (a) an indemnity for disbursements and (b) an amount to cover legal costs and the lawyer’s professional fee;

[19] **CONSIDERING** the restrictive interpretation of this provision by the Court of appeal⁹;

[20] **CONSIDERING** that, with regards to disbursements, Plaintiff did not allege any specific expenses in support of her requested indemnity, did not provide details (except

⁶ Exhibit R-1, section 10.

⁷ Amendment to the Canadian Class Action Settlement Agreement, dated May 3, 2021, section 2.

⁸ Exhibit R-1, sections 1.12 and 14.2.

⁹ *Attar v. Fonds d’aide aux actions collectives*, 2020 QCCA 1121; leave to appeal denied *Michael Attar c. Fonds d’aide aux actions collectives, et al.* 2021 CanLII 18042 (SCC).

for general categories of various disbursements without the corresponding amounts)¹⁰ and did not produce any supporting documents, receipts or a sworn declaration to substantiate her claim;

[21] **CONSIDERING** that in such circumstances, the Court cannot exercise its discretion and award Plaintiff an amount for disbursements that would be, at best, arbitrary and unsubstantiated;

[22] **CONSIDERING** that the payment of \$500 is also provided, in the Settlement Agreement, in full satisfaction of any and all claims asserted by Plaintiff in her class action proceedings;

[23] **CONSIDERING** that the Settlement Agreement does not provide details as to the specific amount awarded to Plaintiff for her individual claim under Article 14.1, apart from the disbursements;

[24] **CONSIDERING** that this situation could potentially bestow Plaintiff with an undue advantage in comparison with the other Class Members;

[25] **CONSIDERING** that for these reasons, the Court refuses the \$500 payment to Plaintiff as stipulated in the Settlement Agreement;

- **The Settlement Agreement**

[26] **CONSIDERING** the applicable criteria to determine the reasonableness and fairness of a proposed settlement of a class action¹¹;

[27] **CONSIDERING** the settlement of similar class actions filed in the United States (the U.S. Settlement)¹², and approved by the U.S. District Court¹³;

[28] **CONSIDERING** that the Canadian Settlement was structured to maximize efficiency and compensation to the Class by minimizing costs, while ensuring that Class Members receive the same per person compensation as U.S. class members¹⁴;

[29] **CONSIDERING** that the cap of \$172 000 for all Settlement Payments was established on the basis of the number of expected claimants (approx. 16 000) and the maximum amount per claimant of \$10.80 (30 bottles x \$0.36);

[30] **CONSIDERING** the estimated value of the Settlement as follows:

¹⁰ Application, para. 86.

¹¹ *Pellemans v. Lacroix*, 2011 QCCS 1345, para. 20 and 21; *Markus c. Reebok Canada inc.*, 2012 QCCS 3562, para. 20-23; *Halfon v. Moose International Inc.*, 2017 QCCS 4300, para. 21-23; *Chetrit c. Société en commandite Touram*, 2020 QCCS 51, para. 18.

¹² Exhibit R-2.

¹³ Exhibit R-3.

¹⁴ Application, para. 10-25.

#	Title	Value
1.	Monetary Relief	CAD \$172,000
2.	Notice Program	CAD \$140,890
3.	Claims Administration	CAD \$ 96,726
4.	Injunctive Relief ¹⁵	CAD \$525,000
5.	Class Counsel Fees	CAD \$265,000
6.	Plaintiff Indemnity (refused by the Court)	CAD \$500
	TOTAL	CAD \$1,200,116

[31] **CONSIDERING** that the Settlement is the result of good faith, adversarial, and arm's length negotiations over the course of many months;

[32] **CONSIDERING** that the Defendants have denied and continue to deny the claims and allegations asserted by the Plaintiff in her class action proceedings;

[33] **CONSIDERING** the litigation risks and costs related to a contradictory debate between experts in various fields of specialty and to complicated evidentiary and technical issues, that would arise from continuing the litigation against the Defendants;

[34] **CONSIDERING** the modalities of the Settlement Agreement which provides a simple and efficient claim mechanism, without the necessity to submit proof of purchase;

[35] **CONSIDERING** that no Class Member has submitted any objection to the Settlement Agreement and that only four (4) have opted-out;

[36] **CONSIDERING** the experience of Class Counsel and Counsel for the Defendants in the area of class actions and their recommendation in favor of the terms and conditions of the Settlement Agreement;

[37] **CONSIDERING** that the Court is satisfied, in light of the foregoing, of the allegations of the Application, of the material filed in the Court record and of the representations of the parties' counsel, that the Settlement Agreement is fair, reasonable and in the best interest of the Class Members;

¹⁵ USD\$25 million (value of US injunctive relief as calculated by the US expert, exhibit R-4) x 4.2% (Canadian sales expressed as percentage of US sales from 2006-2019) x 50% (as discounted in the US Court judgment, exhibit R-3) = \$525 000.

- **The Class Counsel Fees**

[38] **CONSIDERING** that Class Counsel seek the Court's approval of their fees of \$265 000 plus applicable taxes;

[39] **CONSIDERING** the submissions of Class Counsel in the Application;

[40] **CONSIDERING** the factors that the Court must take into account to assess the fairness and reasonableness of legal fees¹⁶;

[41] **CONSIDERING** that pursuant to the Mandate Agreement entered into by the Plaintiff, Class Counsel is entitled to request compensation on the basis of a percentage of 30 percent of the amounts recovered, or on the basis of a 3.5 times multiplier, whichever is higher;

[42] **CONSIDERING** that as of the date of the Application, the combined dollar value of Class Counsel's unbilled time in prosecuting this litigation is approximately \$274,175.00;

[43] **CONSIDERING** that the Settlement Agreement provides for less than the Mandate Agreement and reflects a compromise arrived at between the Parties during their negotiations;

[44] **CONSIDERING** that additional time will be incurred for post-settlement work and must be taken into consideration;

[45] **CONSIDERING** the nature of the case which raises serious issues of alleged false or misleading advertising and consumer protection;

[46] **CONSIDERING** the experience and expertise of Class counsel in class action matters, the financial risk they assumed in the present case and the result achieved for the Class;

[47] **CONSIDERING** that for all these reasons, the Court considers that Class Counsel fees and disbursements are fair and reasonable;

PAR CES MOTIFS, LE TRIBUNAL :

FOR THESE REASONS, THIS COURT:

[48] **ACCORDE** la présente demande; **GRANTS** the present application;

[49] **ORDONNE** que, pour les fins du **ORDERS** that for the purposes of this Jugement, les définitions énoncées à Judgment, the definitions contained in the l'Entente de règlement, R-1, s'appliquent et Settlement Agreement, R-1, shall apply

¹⁶ *Option Consommateurs v. Banque Amex du Canada*, 2018 QCCA 305, para. 60-67; *Pellemans v. Lacroix*, 2011 QCCS 1345, para. 50-58.

y sont incorporées par renvoi ;

and are incorporated by reference;

[50] **ORDONNE** qu'en cas de conflit entre le présent Jugement et l'Entente de règlement, ce Jugement prévaudra ;

ORDERS that in the event of a conflict between this Judgment and the Settlement Agreement, this Judgment shall prevail;

[51] **DÉCLARE** que l'Entente de règlement est valide, juste, raisonnable et dans le meilleur intérêt des Membres du Groupe ;

DECLARES that the Settlement Agreement is valid, fair, reasonable and in the best interest of the Settlement Class Members;

[52] **APPROUVE** l'Entente de règlement R-1 conformément à l'article 590 du *Code de Procédure Civile*, à l'exception du paiement de 500 \$ à la Demanderesse ;

APPROVES the Settlement Agreement R-1 pursuant to article 590 of the *Code of Civil Procedure*, except for the payment of \$500 to Plaintiff;

[53] **DÉCLARE** que l'Entente de règlement constitue une transaction au sens des articles 2631 et suivant du *Code Civil du Québec* et que ce Jugement ainsi que l'Entente de règlement lient toutes les Parties et tous les Membres du Groupe qui ne se sont pas exclus en temps utile ;

DECLARES that the Settlement Agreement constitutes a transaction within the meaning of articles 2631 and following of the *Civil Code of Quebec* and that this Judgment and the Settlement Agreement are binding on all parties and all Settlement Class Members who have not excluded themselves in a timely manner;

[54] **NOMME** Angeion Group à titre d'Administrateur du règlement aux fins du Règlement ;

APPOINTS Angeion Group as Settlement Administrator for the Settlement;

[55] **ORDONNE** et **DÉCLARE** qu'à la Date où l'Entente de règlement devient irrévocable, chaque Partie donnant quittance a libéré et sera présumée avoir irréfutablement entièrement libéré de façon définitive et à tout jamais, les Parties quittancées à l'égard des Réclamations quittancées, le tout conformément à l'Entente de règlement ;

ORDERS and **DECLARES** that upon the Irrevocable Agreement Date, each and every Releasor has released and shall be conclusively deemed to have forever and absolutely released the Releasees from the Released Claims in accordance with the Settlement Agreement.

[56] **DÉCLARE** qu'aux fins de l'administration et de l'exécution de l'Entente de règlement et du présent jugement, cette Cour conservera un rôle de surveillance continue et les Défenderesses

DECLARES that for purposes of administration and enforcement of the Settlement Agreement and of this Judgment, this Court will retain an ongoing supervisory role and the Defendants

reconnaissent la compétence de cette Cour uniquement aux fins de la mise en œuvre, de l'administration et de l'application de l'Entente de règlement et ce Jugement, sous réserve des modalités et conditions énoncées dans l'Entente de règlement;

acknowledge the jurisdiction of this Court solely for the purpose of implementing, administering and enforcing the Settlement Agreement and this Judgment, and subject to the terms and conditions set out in the Settlement Agreement;

[57] **APPROUVE** la forme, le contenu et le mode de diffusion de l'Avis d'approbation de la transaction aux Membres du Groupe, (versions française et anglaise) tel que révisé par l'addenda et conformément à l'Entente de règlement ;

APPROVES the form, content and mode of dissemination of the Notice of Settlement Approval to Class Members (both French and English versions) as revised by the Addendum and in accordance with the Settlement Agreement;

[58] **APPROUVE** la forme et le contenu du Formulaire de réclamation tel que prévu à la Pièce B à l'Entente de règlement et suivant la Pièce D de l'Entente de règlement ;

APPROVES the form and content of the Claim Form, as Exhibit B to the Settlement Agreement, and the Notice of Denied Claim, as Exhibit D to the Settlement Agreement;

[59] **RECONNAÎT** que ce Jugement sera déclaré nul et non avenue lors d'une demande subséquente faite sur préavis dans le cas où l'Entente de règlement serait résiliée conformément à ses termes ;

ACKNOWLEDGES that this Judgment shall be declared null and void on subsequent application made on notice in the event that the Settlement Agreement is terminated in accordance with its terms;

[60] **DÉCLARE** que la présente action collective est réglée hors cour sans frais de justice et avec préjudice ;

DECLARES that the present action is hereby settled out of court without legal costs and with prejudice;

[61] **REFUSE** le paiement de 500 \$ par les Défenderesses à la Demanderesse prévu à l'Entente de règlement ;

REFUSES the payment of \$500 by the Defendants to the Plaintiff provided in the Settlement Agreement;

[62] **APPROUVE** le paiement des Honoraires de l'Avocat du Groupe par les Défenderesses aux Procureurs du Groupe conformément à l'Entente de règlement;

APPROVES the payment of the Class Counsel Fee by the Defendants to Class Counsel as provided for in the Settlement Agreement;

[63] **ORDONNE** que les prélèvements du Fonds d'aide aux actions collectives soient effectués sur chaque réclamation individuelle des Membres du Groupe et soient remis conformément à la Loi sur le

ORDERS that the levies by the *Fonds d'aide aux actions collectives* be collected on each claim made by Settlement Class Members and be remitted according to the *Act respecting the Fonds d'aide aux*

fonds d'aide aux actions collectives et le Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives; *actions collectives and the Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives;*

[64] **DÉCLARE** qu'en cas de conflit entre la version française et la version anglaise du présent Jugement, la version anglaise prévaudra; **DECLARES** that in the event of a conflict between the French version and the English version of this Judgment, the English version shall prevail;

[65] **RAPPELLE** qu'un jugement de clôture devra être prononcé après que l'Administrateur du règlement aura produit un rapport final de son administration des réclamations ; **REMINDS** that a judgment closing this Class Action must be delivered after the Settlement Administrator files a final report of the administration of the claims;

[66] **LE TOUT**, sans frais de justice. **THE WHOLE**, without legal costs.



SUZANNE COURCHESNE, J.S.C.

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Me Andrea Grass
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Attorneys for the Plaintiff/ Class Representative

Me Scott Maidment
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Hearing date: May 4, 2021