

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

NO: 500-06-000559-118

(Class Action)
 SUPERIOR COURT

J. WILKINSON

Petitioner

-vs.-

COCA-COLA LTD., legal person duly constituted, having its head office at 42 Overlea Blvd., Suite 100, City of Toronto, Province of Ontario, M4H 1B8

and

ENERGY BRANDS INC., legal person duly constituted, having its head office at 1720 Whitestone Expy, City of Whitestone, State of New York, 11357-3000, USA

Respondents

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

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

I. GENERAL PRESENTATION

A) The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:
 - all residents in Canada who have purchased the drink Glacéau VITAMINWATER®, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased the drink Glacéau VITAMINWATER® , or any other group to be determined by the Court;

B) The Respondents

2. Respondent Coca-Cola Ltd. is a Canadian company and a wholly owned subsidiary of the American company The Coca-Cola Company.
3. Respondent Energy Brands Inc. is an American company that does business under the trade-name Glacéau. They developed and began selling the drink Vitaminwater in the United States. In 2007, The Coca-Cola Company purchased Respondent Energy Brand Inc., which is now a wholly owned subsidiary;
4. Respondent Coca-Cola Ltd. is responsible for developing and marketing Glacéau Vitaminwater (“Vitaminwater”) throughout Canada, including the Province of Quebec;

C) The Situation

5. Vitaminwater has created a public appearance of being a healthier alternative to sugary soft drinks and a good source of dietary supplements. This message is deceptive, misleading, false, and unfair. Vitaminwater is a “sugar-sweetened beverage” that is little different from Coke or other soft drinks, except that it is fortified and uncarbonated;
6. Vitaminwater is promoted as a “Nutrient Enhanced Water Beverage” and proclaimed as “vitamins + water = all you need” (taken from the labelling). The truth is, however, that Vitaminwater does not consist of solely vitamins and water, rather it contains 33 grams of sugar, which is almost as much sugar as contained in a can of Coke;
7. In short, Vitaminwater is just fortified sugar water;
8. There are currently nine (9) flavours of Vitaminwater sold in Canada, including Quebec, namely:
 - Defense
 - Energy
 - Essential
 - Focus

- Formula 50
 - Mega C
 - Multi-V
 - Restore
 - XXX
9. Each of these flavours is accompanied by a purported health benefit of drinking that particular beverage. A copy of the labels of each flavour and a print out from the website www.vitaminwatercanada.ca are attached hereto as if recited at full length, produced herein as **Exhibits R-1** and **R-2**, respectively;
10. However, in reality, Vitaminwater is simply a fortified snack food that due to its sugar content contributes to, among other health problems, weight gain, obesity, and diabetes;
11. The Respondents have run a very successful campaign of marketing Vitaminwater as a healthy alternative to sugary soft drinks. In fact, Vitaminwater has estimated sales of more than 500 million dollars annually;
12. This is due, in part, to the premium price tag that health-conscious consumers (the target market of Vitaminwater) are willing to pay for such a product. The average cost of Vitaminwater is about twice the price of the Respondents other sugary beverages, such as Coke and Sprite;
13. More particularly, Vitaminwater's marketing as a healthy beverage is false and misleading:
- a) By using the name "Vitaminwater";
 - b) By prominently promulgating the message on its labelling that Vitaminwater is a "nutrient enhanced water beverage";
 - c) By including on the labelling "vitamins + water = all you need";
 - d) By using in-store advertising with the representations "Drink, Refresh, Recharge" and "Replenish, Nourish, Renew";
 - e) By giving the drinks names that suggest that each flavour has special health benefits;
 - f) By making specific health claims on the labelling and on its website, as evidenced by Exhibits R-1 and R-2, when in fact it's sugar content (similar to soft drinks) contributes to the current epidemic of weight gain, obesity, and diabetes;

- g) By purposely excluding the name Coca-Cola, which consumers would likely associate with snack food, from appearing anywhere on any Vitaminwater packaging, labelling, or its website;
 - h) By promoting Vitaminwater as a healthy alternative to soft drinks, when it has only slightly less sugar than Coke, and when the benefits of these added vitamins are outweighed by its negative health risks as a snack food;
 - i) By failing to disclose on the labelling or elsewhere how many grams of sugar is actually contained in a bottle of Vitaminwater, but instead only stating the confusing text of “calories/591 mL: 120 recommended dose (adults)”;
 - j) By taking a sugary snack food and fortifying it for the sole purpose of claiming that the product provides certain (and often outlandish) nutritional benefits;
14. Since consumers of Vitaminwater are not informed of the quantity of sugar and are misled as to its benefits, they are deprived of the necessary information needed to make a healthy choice and/or are left with the false impression that Vitaminwater is a healthy beverage;
15. Therefore, consumers of Vitaminwater, who are health conscious individuals, would not have agreed to buy a vitamin-fortified junk food and certainly would not have consented to pay a premium price for it;

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

16. Petitioner purchased and consumed Vitaminwater on a regular basis since at least the last year;
17. Petitioner believed, through the Respondents’ marketing and labelling, that Vitaminwater was a healthy alternative to sugary soft drinks;
18. Since learning of the amount of sugar contained in Vitaminwater, the Petitioner has ceased to purchase and consume it;
19. Had he known the true facts, the Petitioner would not have purchased the Vitaminwater, nor paid the premium price that the Respondents charged for it;
20. Petitioner is aware, through his own internet research, that there are at least five (5) class actions that have been instituted in the USA and two (2) in Canada based on the false and misleading advertising of Vitaminwater as alleged herein, the whole as appears more fully from a copy of said Class

Action Complaints and Statements of Claim, produced herein as **Exhibit R-3** and **R-4**, respectively;

21. Petitioner's damages are a direct and proximate result of the Respondents' conduct and their false and misleading advertising;
22. In consequence of the foregoing, Petitioner is justified in claiming damages;

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

28. Every member of the class has purchased a bottle of Vitaminwater believing that they were making a healthy choice and/or as an alternative to sugary soft drinks;
29. The Respondents were fully aware that class members were under this impression and actively promoted it;
30. The class members were, therefore, induced into error by the Respondents' false and misleading advertising;
23. Had the Respondents disclosed the truth about its Vitaminwater, reasonable consumers would not have bought them and certainly would not have agreed to pay a premium price for them;
31. Each member of the class is justified in claiming at least one or more of the following as damages:
 - a. The purchase price of Vitaminwater or otherwise the difference in price between the premium sale price of Vitaminwater as compared to a regular soft drink;
 - b. Punitive damages;
32. Respondent engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from class members;
33. All of these damages to the class members are a direct and proximate result of the Respondents' conduct and their false and misleading advertising;

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

34. Petitioner is unaware of the specific number of persons who purchased Vitaminwater, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
 35. Class members are numerous and are scattered across the entire province and country;
 36. 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 the Respondents would increase delay and expense to all parties and to the court system;
 37. 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;
 38. 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;
 39. 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 Petitioner wishes to have adjudicated upon by this class action
40. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
 41. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
 42. The recourses of the members raise identical, similar or related questions of fact or law, namely:
 - a. Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Vitaminwater?

- b. Are the Respondents liable to the class members for reimbursement of the purchase price or the additional premium in the purchase price as a result of their misconduct?
 - c. Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair and/or deceptive conduct?
 - d. Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?
43. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

44. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages;
45. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

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

ORDER the Defendants to cease from continuing its unfair and/or deceptive conduct;

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

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 Petitioner requests that he be attributed the status of representative of the Class

46. Petitioner is a member of the class;

47. Petitioner is 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 is 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 his attorneys;

48. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;

49. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;

50. Petitioner, with the assistance of his attorneys, is 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;

51. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondents' conduct;

52. Petitioner understands the nature of the action;

53. Petitioner's interests are not antagonistic to those of other members of the class;

B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal

54. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;

55. The Petitioner's attorneys practice their profession in the judicial district of Montreal;

56. 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 damages;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

- all residents in Canada who have purchased the drink Glacéau VITAMINWATER®, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased the drink Glacéau VITAMINWATER®, or any other group to be determined by the Court;

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

- a. Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Vitaminwater?
- b. Are the Respondents liable to the class members for reimbursement of the purchase price or the additional premium in the purchase price as a result of their misconduct?
- c. Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair and/or deceptive conduct?
- d. Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?

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

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

ORDER the Defendants to cease from continuing its unfair and/or deceptive conduct;

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

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 group 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 Respondents' website with a link stating "Notice to Vitaminwater 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, March 14, 2011

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.
Per: Me JEFF ORENSTEIN
Attorneys for the Petitioner