

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

G. BENOIT

NO: 500-06-000562-112

Petitioner

-vs.-

AMIRA ENTERPRISES INC., legal
person duly incorporated, having its head
office at 5375 boul. Henri-Bourassa
West, City of Montreal, Province of
Quebec, H4R 1C1

Respondent

**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 she is a member, namely:
 - all residents in Canada who purchased and/or ingested any walnuts produced, packaged, distributed, supplied, imported and/or in any way put onto the marketplace by the Respondent since January 1st 2011, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who purchased and/or ingested any walnuts produced, packaged, distributed, supplied, imported and/or in any way put onto the marketplace by the Respondent since January 1st 2011, or any other group to be determined by the Court;
2. The present action involves a warning and recall issued by Health Canada to the public not to consume certain bulk and pre-packaged raw shelled walnut products because they may be contaminated with *E. coli* O157:H7;
 3. Currently, the following products have been implicated:
 - a) Distributed by Amira – Raw shelled walnuts sold from a bin
 - b) Amira – Prepackaged raw shelled walnuts (Halves/Pieces/Crumbs)
 - c) Tia – Prepackaged raw shelled walnuts (Halves/Pieces/Crumbs)
 - d) Selection – Prepackaged raw shelled walnuts (Halves/Pieces/Crumbs)
 - e) Amira – Mistral Mix containing walnuts
 - f) Tia – Mistral Mix containing walnuts
 - g) Amira – Salad booster containing walnuts
 - h) Tia – Salad booster containing walnuts

B) THE RESPONDENT

4. Respondent Amira Enterprises Inc. (“Amira”) is a federally incorporated Canadian company that does business as an “autre types de commerce de gros de produits alimentaires” and “vente en gros et detail aliments”, the whole as appears more fully from a copy of the *Registre des entreprises* report, produced herein as **Exhibit R-1**;
5. Amira is a major importer and supplier of nuts and dried fruits in the Canadian food market, including walnuts;
6. Amira’s head office is located in Montreal, Quebec, where they conduct business and arrange for distribution of their products throughout Canada, including in the province of Quebec;

C) THE SITUATION

7. The bacterium called *Escherichia coli* (*E. coli*) O157:H7 produces Shiga toxin (Stx) which once ingested by humans can lead to hemorrhagic colitis. Symptoms include severe cramps, watery and/or bloody diarrhea, mild fever, and nausea or vomiting. Symptoms usually appear approximately seven (7) days after infection and will last from two (2) to five (5) days. In some cases it will lead to the development of post-diarrheal hemolytic uremic syndrome, which are severe and life-threatening complication.

8. Stx-producing organisms are very resilient in that they can survive several weeks on surfaces such as counter tops, and up to a year in some materials like compost. They have a very low infectious dose meaning that only a relatively small number of bacteria (< 50) are needed “to set-up housekeeping” in a victim’s intestinal tract and cause infection;
9. On April 3rd 2011, the Canadian Food Inspection Agency (CFIA) and the Respondent issued a public advisory of an outbreak of *E. coli* after several individuals became ill after having reported to consuming raw shelled walnuts, the whole as appears more fully from a copy of said Health Hazard Alert, produced herein as **Exhibit R-2**;
10. On April 4th 2011, the public warning was amended to clarify brand information for the raw shelled walnuts, the whole as appears more fully from a copy of said Amended Health Hazard Alert, produced herein as **Exhibit R-3**;
11. On April 7th 2011, Amira published their own press release confirming all of the above, the whole as appears more fully from a copy of said Press Release, produced herein as **Exhibit R-4**;
12. Nowhere in the Health Hazard Alert (R-2), the Amended Health Hazard Alert (R-3), the Press Release (R-4), Amira’s website, or Health Canada’s website does it inform consumers how or where they may obtain a refund of their walnut products;
13. In fact, the Respondent did not set up any reimbursement program with any retail store outlets (i.e. IGA, Loblaws, Super C, etc...);
14. Therefore, the public has discarded their walnut products and have no meaningful way of being refunded for the sale price that they paid;
15. In addition, certain persons have been infected with the *E. coli* bacteria and have become seriously ill;

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

16. On or about the beginning of March 2011, Petitioner purchased two (2) packages of Amira raw walnuts 454g at the IGA store located at the Cavendish Mall for the price of \$4.99 (plus taxes) each, the whole as appears more fully from a copy of the packaging, produced herein as **Exhibit R-5**;
17. Within the month that followed, Petitioner consumed a portion (approximately half) of each bag of the raw walnuts;

18. On Friday, April 7th 2011, Petitioner learned of the recall of her walnuts on the news;
19. On Saturday, April 8th 2011, Petitioner attempted to reach the Respondent by using the phone numbers listed on the recall notices (514-382-9823 and 1-877-383-9823) and their website at [www. amira.ca](http://www.amira.ca). There was no specific message on the machine nor any information on the company's website as to how she could obtain a refund on her walnuts;
20. Petitioner called the IGA where she purchased the walnuts and was told that there was no program in effect to reimburse her for her walnuts, but that the store had a policy that she could return them if she had a bill. The bags were already opened, half eaten, and she did not keep her receipt – therefore, she was not entitled to any refund;
21. Petitioner was also extremely nervous for her health and is monitoring herself for any possible signs and symptoms of an *E. coli* infection;
22. In consequence of the foregoing, Petitioner is justified in claiming:
- a) economic damages in the amount of the purchase price of the walnuts, namely, \$4.99 plus taxes (x 2); and
 - b) moral damages for the fear and anxiety of becoming ill during the gestation period of the bacteria in the amount of \$500;
23. Petitioner's damages are a direct and proximate result of the Respondent's conduct;

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

24. Every member of the class has either purchased and/or ingested a walnut product which was recalled;
25. The claims of each class member are founded on the same general facts as the Petitioner's;
26. Such persons have suffered some or all of the following damages:
- a) Cost of the purchase of the walnut products
 - b) Moral prejudice for the fear and anxiety of becoming ill during the gestation period of the bacteria

c) Pain and suffering if the person became ill

27. All of the damages to the class members are a direct and proximate result of the Respondent's conduct;

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;

28. The sale of walnut products are widespread in Canada and Quebec;

29. Petitioner is unaware of the specific number of persons who have purchased and/or ingested the walnut products, however, given their tremendous distribution, it is safe to estimate that it is in the tens of thousands;

30. The potential number of group members can be estimated from records kept by the Respondent only;

31. Class members are numerous and are scattered across the entire province and country;

32. The walnut products were sold at a modicum price;

33. 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 Respondent. 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;

34. 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;

35. 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;

36. 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 Respondent and that which the Petitioner wishes to have adjudicated upon by this class action
37. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
38. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondent's misconduct;
39. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a) Did the Respondent place onto the marketplace walnuts that were contaminated with *E. coli* bacteria?
 - b) Did the Respondent take adequate precautions to make sure that their products were free of harmful contamination?
 - c) Did the Respondent institute a proper refund and reimbursement program for those customers that had purchased their walnuts?
 - d) Were Class Members prejudiced by the Respondent's conduct, and, if so, what is the appropriate measure of these damages?
 - e) Is the Respondent liable to pay compensatory, moral, punitive and/or exemplary damages to Class Members, and, if so, in what amount?
40. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

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

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

DECLARE the Defendant liable for the damages suffered by the Plaintiff and each of the members of the class;

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

CONDEMN the Defendant 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 Defendant 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 Defendant 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

43. Petitioner is a member of the class;

44. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that she wishes 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;

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

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

47. Petitioner, with the assistance of her 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;

48. Petitioner is in good faith and has instituted this action for the sole goal of having her 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 Respondent's conduct;

49. Petitioner understands the nature of the action;

50. 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

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

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

53. The head office of the Respondent is located in the judicial district of Montreal;

54. 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 purchased and/or ingested any walnuts produced, packaged, distributed, supplied, imported and/or in any way put onto the marketplace by the Respondent since January 1st 2011, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who purchased and/or ingested any walnuts produced, packaged, distributed, supplied, imported and/or in any way put onto the marketplace by the Respondent since January 1st 2011, 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 Respondent place onto the marketplace walnuts that were contaminated with *E. coli* bacteria?
- b) Did the Respondent take adequate precautions to make sure that their products were free of harmful contamination?
- c) Did the Respondent institute a proper refund and reimbursement program for those customers that had purchased their walnuts?
- d) Were Class Members prejudiced by the Respondent's conduct, and, if so, what is the appropriate measure of these damages?
- e) Is the Respondent liable to pay compensatory, moral, punitive and/or exemplary damages to Class Members, 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 Plaintiff and each of the members of the class;

DECLARE the Defendant liable for the damages suffered by the Plaintiff and each of the members of the class;

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

CONDEMN the Defendant 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 Defendant 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 Defendant 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 Respondent's websites with a link stating "Notice to Amira Walnut Customers";

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 11, 2011

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.
Per: Me Jeff Orenstein
Attorneys for the Petitioner