

CANADA

(Class Action)  
SUPERIOR COURT

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

NO: 500-06-000577-110

██████████

*Petitioner*

-vs.-

**HENKEL CONSUMER GOODS  
CANADA INC.**, legal person duly  
constituted, having its head office at  
1155, North Service Road West, Unit 8,  
City of Oakville, Province of Ontario, L6M  
3E3

and

**THE DIAL CORPORATION**, legal  
person duly constituted, having its head  
office at North Scottsdale Road, City of  
Scottsdale, State of Arizona, 85255, USA

*Respondents*

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**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 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 have purchased DIAL COMPLETE® Antibacterial Hand Wash (“Dial Complete”), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased DIAL COMPLETE® Antibacterial Hand Wash (“Dial Complete”), or any other group to be determined by the Court;
2. Petitioner contends that the Respondents marketed and sold Dial Complete through the use of false or misleading advertisements and representations regarding the hand soaps’ efficacy at eliminating “disease-causing germs” and “illness-causing bacteria”. In addition, Petitioner 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%;
  3. In fact, the available data to date does not support the ability of Triclosan to reduce infectious disease symptoms or bacterial counts on the hands when used at the concentrations commonly found in consumer antiseptic hand soaps. At this time, there is no independent and reliable evidence to suggest Triclosan in antibacterial soaps provides any benefit over washing with regular soap and water. To the contrary, there is the possibility that using Dial Complete over a long period of time may actually cause antibiotic resistance;
  4. By reason of these actions and omissions, the Respondents have been able to charge consumers a premium price for the purchase of Dial Complete over and above regular soap, thereby causing Petitioners and the members of the class to suffer economic damages, which they are entitled to claim;

#### B) The Respondents

5. Respondent Henkel Consumer Goods Canada Inc. (“Henkel”) is a Canadian company that is involved in the business of “Vente et commercialisation de produits de consommation” throughout Canada, including the province of Quebec, the whole as appears more fully from a copy of the *Registre des entreprises* report, produced herein as **Exhibit R-1**;
6. Respondent Henkel operated under the corporate name Dial Canada Inc. until the year 2006. It continues today to use the trade-name Dial Canada;
7. Respondent Henkel is the wholly-owned Canadian subsidiary of the Respondent The Dial Corporation (“Dial Corp.”), an American company;

8. Respondent Dial Corp. is the owner of most (if not all) of the Canadian patents [currently 84 registered on the CIPO database] and trade-marks [currently 479 registered on the CIPO database], including the trade-mark “DIAL COMPLETE”, the whole as appears more fully from a copy of trade-mark registration number TMA582548, produced herein as **Exhibit R-2**;
9. In addition, the labelling of Dial Complete in Canada, including the province of Quebec, states:
 

“The distinctive design and elements of this package are proprietary and owned by The Dial Corporation, A Henkel Company.”
10. Respondents advertise, promote, distribute, and sell a broad range of branded products throughout Canada and Quebec, including body washes, bar soap, liquid hand soap and hand sanitizers, including its Dial Complete line of products, that are the subject of the present class action;
11. Given the close ties between the Respondents and considering the preceding, the Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, both Respondents will be referred to as “Dial” for the purposes hereof;

### C) The Situation

#### *Triclosan*

12. Dial Complete contains Triclosan as its active ingredient, which is a bisphenol antimicrobial agent that was originally developed as a surgical scrub for medical professionals. In recent years, it has been added to many consumer products such as soap and body washes, toothpaste, clothing, kitchenware, furniture and toys;
13. Triclosan is a restricted ingredient in Health Canada’s Cosmetic Ingredient Hotlist. This is explained by Health Canada on their website as follows:
 

“Health Canada considers triclosan to be safe when used in cosmetics at a concentration of up to 0.03% in mouthwashes and 0.3% in other cosmetic products like soaps (see the Cosmetic Ingredient Hotlist for more about triclosan limits). These cosmetic limits are consistent with those of the European Union, which allows triclosan in cosmetic products at 0.3% as a preservative.

the whole as appears more fully from a copy of said website found at <http://www.hc-sc.gc.ca/cps-spc/cosmet-person/cons/safety-innocuite-eng.php#share>, produced herein as **Exhibit R-3**;

14. Dial Complete contains a concentration of Triclosan of 0.46%, which exceeds the safety standards outlined by Health Canada for soaps in its Cosmetic Ingredient Hotlist (“Hotlist”), the whole as appears more fully from a copy of said Hotlist, produced herein as **Exhibit R-4**;

*Marketing*

15. There are currently six (6) different types of Dial Complete sold in Canada, including the province of Quebec, namely:

- Original
- Fresh Pear
- Cool Plum
- Cranberry
- White Tea
- Clean Citrus (for the Kitchen)

16. Since approximately 2003 (if not earlier), Dial has been advertising and selling Dial Complete in Canada, including the province of Quebec, with the explicit representation that it is more effective at killing germs and reducing the transmission of disease than any other hand soap available on the market;

17. More particularly, Dial currently makes the following claims on its Canadian website at [www.dialcomplete.ca](http://www.dialcomplete.ca), namely:

- a) “Dial Complete<sup>®</sup> Antibacterial Foaming Handwash KILLS MORE GERMS than any other liquid hand soap.”
- b) “Make your clean COMPLETE.”
- c) “Dial Complete<sup>®</sup> kills more germs than any other antibacterial liquid hand soap.”
- d) “ANTIBACTERIAL Foaming Hand Wash SUPERIOR GERM KILL”
- e) “Dial Complete is no ordinary hand soap. Its patented formula kills more germs than any other antibacterial liquid hand soaps.”
- f) “But while it’s gentle on hands, it also kills more disease-causing germs found in kitchens than any other liquid soap. This antibacterial and antimicrobial patented formula kills more germs than any other antibacterial liquid hand soaps, and washes away even greasy dirt.”
- g) “The secret is our exclusive, self-foaming Activ-Foam<sup>™</sup> system and a patented formula with a superior germ-killing agent.”

- h) “Dial Complete<sup>®</sup> KILLS 99.9995% of illness-causing bacteria.”
- i) “Dial Complete kills more germs than any other antibacterial liquid hand soaps. It also reduces the transfer of bacteria by 50%. In fact, no soap you can buy is more effective at reducing the transfer of germs.”
- j) “Dial Complete<sup>®</sup> is over 10x more effective at killing disease-causing germs than ordinary liquid soaps.”
- k) “Dial Complete<sup>®</sup> has the power to kill 10 times more disease-causing germs than other antibacterial liquid hand soaps. The Activ-Foam<sup>™</sup> system goes to work on contact, to kill bacteria and certain strains of yeast. It also rinses cleaner than other soaps, washing away 99.9995% of bacteria.”
- l) “The complete facts about Dial Complete<sup>®</sup> clean:
- Dial Complete’s patented formula is over 1,000 times more effective at killing disease-causing germs than other antibacterial liquid hand soaps.
  - As effective at killing germs as hand soaps used by surgeons and nurses in hospitals.
  - EXCEEDS the FDA standards for germ kill effectiveness for healthcare hand wash.
  - It's proven to kill germs such as staph, strep, Salmonella and E-coli.
  - It's antibacterial AND antimicrobial - to kill bacteria and certain strains of yeast.
  - Dial Complete<sup>®</sup> is as effective at killing germs as hand soaps used in hospitals. But it's gentle enough for care for even the youngest hands.”
- m) “Dial Antibacterial Products Do NOT Increase The Risk of Antimicrobial Resistance

...

Can bacteria become resistant? Are people more susceptible to sickness?  
The answer: NO

- The FDA and European Union, after extensive studies over 10 years, have concluded that there is no convincing evidence that the antibacterial ingredient used in Dial liquid soaps pose a risk to humans

or to the environment by inducing or transmitting antibacterial resistance under current conditions of use. (Eu-SCCP, 2002, 2006).

- A large study done by the University of Iowa from 1990 to 2000, which compared the resistance of bacteria against the antibacterial ingredient used in Dial liquid soaps, found no difference in resistance patterns.
  - Peer reviewed scientific research has consistently shown that.
  - The susceptibility of bacteria to antibacterial ingredients has not changed over at least the last ten years.
  - The susceptibility of bacteria from people who use antibacterial products is no different than from those of people who do not.”
- n) “Over 10 times more effective than its competition at killing disease-causing germs including staph, strep, E. coli and salmonella.”

the whole as appears more fully from a paper copy of the complete website at [www.dialcomplete.ca](http://www.dialcomplete.ca), produced herein as **Exhibit R-5**;

18. On Dial’s American website at [www.dialcomplete.com](http://www.dialcomplete.com) (although not reproduced on its Canadian website), Dial indicates that the statements about Dial Complete’s health benefits and the superiority in quality of Dial Complete are backed by a competent, credible, and reliable study published in 2007. However, it fails to disclose that:

- a) the study was performed by Dial itself
- b) only two (2) strains of bacteria were tested, *S. Flexneri* and *E. coli*
- c) there is no mention of the numerous scientific research and studies that had definitively concluded that Triclosan was no more effective than regular soap and water at reducing infectious disease symptoms or bacterial counts on the hands, when used at the concentrations commonly found in consumer antiseptic hand soaps, and
- d) there was no determination as to the development of immunity by the bacteria after repeated use;

the whole as appears more fully from a copy of said study, produced herein as **Exhibit R-6**;

19. Subsequently, Dial issued a press release to tout the new study that they had performed themselves, the whole as appears more fully from a copy of said press release, produced herein as **Exhibit R-7**;

20. It has been these false or misleading advertisements and representations which have allowed Dial to charge consumers premium prices for Dial Complete products and to which consumers agreed to buy in the belief, created by Dial, that Dial Complete was a superior hand soap that is more effective at killing germs, protecting the consumer from germs, and thus preventing illness and promoting good health, than washing with less expensive plain soap and water;
21. Specifically, Dial has no competent, credible, and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific community, when considered in light of the entire body of relevant and a reliable scientific evidence, to substantiate their claims. In reality, the independent, competent, credible, and reliable scientific evidence indicates that Dial's claims constitute unfair or deceptive acts or practices and the making of false or misleading advertisements;

### *Science*

22. Since at least 2000 (if not earlier), the scientific community had questioned both the efficacy and risks of using Triclosan in common household soaps. Firstly, Triclosan's primary activity is only against gram-positive bacteria, with much less efficacy against gram-negative bacteria and fungi. Secondly, at the concentrations used in concentrations commonly found in consumer antiseptic hand soaps (i.e. less than 1%), there was no evidence of any reduced infectious disease symptoms or bacterial counts on the hands as compared to just washing with regular soap and water. Thirdly, there was some data suggesting a growing acquired resistance to these microbial agents and therapeutic antibiotics, as well as, cross-resistance to other microbial agents and therapeutic antibiotics;
23. At the 2000 annual meeting of the American Medical Association ("AMA"), the Council on Scientific Affairs reported in its summaries and recommendation on the *Use of Antimicrobials in Consumer Products* that:

"Result. Despite their recent proliferation in consumer products, the use of antimicrobial agents such as triclosan in consumer products has not been studied extensively. No data exist to support their efficacy when used in such products or any need for them, but increasing data now suggest growing acquired resistance to these commonly used antimicrobial agents. Studies also suggest that acquired resistance to these antimicrobials in bacteria may also predispose these organisms to resistance against therapeutic antibiotics, but further research is needed. In light of these findings, there is little evidence to support the use of antimicrobials in consumer products such as topical hand lotions and soaps. However, there is also little evidence to link the use of these agents in consumer products to the general problem of increased resistance to therapeutic



antibiotics. Considering the available data and the critical nature of the antibiotic resistance problem, it may be prudent to avoid the use of antimicrobial agents in consumer products. Ultimately, antibiotic resistance is a major public health concern that has to be controlled through judicious use of antibiotics by health care practitioners.

Conclusion. The use of common antimicrobials for which acquired resistance has been demonstrated in bacteria as ingredients in consumer products should be discontinued, unless data emerge to conclusively show that such resistance has no impact on public health and that such products are effective at preventing infection. Scientific research on the issue of antimicrobial resistance must continue to elucidate gaps in knowledge, particularly with respect to the use of common antimicrobials as ingredients in consumer products and its impact on the major public health problem of antibiotic resistance.”

the whole as appears more fully from a copy of said report, produced herein as **Exhibit R-8**;

24. In June 2001, the journal *Emerging Infectious Diseases* published an article entitled *Antibacterial Household Products: Cause for Concern* written Dr. Stuart B. Levy, which states:

“Some gram-positive bacteria such as *Enterococcus faecalis* and *Streptococcus pneumoniae*, which do not have *fabI*, have a related enoyl reductase gene, *fabK*. The *fabK* gene in those organisms is naturally resistant to triclosan, so triclosan usage can potentially enhance their growth at the expense of susceptible strains.

...

No current data demonstrate any health benefits from having antibacterial containing cleansers in a healthy household.”

the whole as appears more fully from a copy of said journal article, produced herein as **Exhibit R-9**;

25. In August 2002, the journal *Archives of Dermatology* published an article entitled *Use of Antimicrobial Agents in Consumer Products* by Litjen Tan, PhD, Nancy H. Nielsen, MD, PhD, Donald C. Young, MD, Zoltan Trizna, MD, PhD, which states:

“Scientific data are lacking to indicate that use of these antimicrobial ingredients in consumer products such as hand care products, soaps, and food preparation products has any proven infection-prevention benefit.

...

Resistance to antimicrobial products can occur via 2 mechanisms. Intrinsic resistance is due to a natural property of the organism and therefore is an

innate characteristic of the microbial genome. Acquired resistance, which is the form of significant concern, occurs via mutation or by acquisition of a plasmid or transposable element carrying the gene(s) for resistance. Thus, the natural resistance of gram-negative bacteria to many antimicrobial agents because of the barrier properties of the outer membrane is an example of intrinsic resistance, while the acquisition of multidrug resistance by *Salmonella* is an example of acquired resistance.

...

These resistant strains are also more resistant to triclosan and some antibiotics, although this varies from strain to strain. This finding suggests that resistance developed against one antimicrobial may impart cross-resistance to another antimicrobial or antibiotic.

...

A recent study reports the appearance of methicillin-resistant *Staphylococcus aureus* with increased resistance to triclosan, but more studies are needed to confirm this finding.

...

The absence of data supporting the efficacy of antimicrobial ingredients such as triclosan in household and consumer products suggests that they may be ineffective and therefore unnecessary. Published reports on acquired resistance to these antimicrobial agents, coupled with their increased use in consumer products, suggest that a change may be occurring in the microbial flora of the home, specifically through the selection of resistant organisms. Additionally, the possibility that the selection of organisms resistant to antimicrobials such as triclosan and chlorhexidine also may predispose these organisms to resistance against therapeutic antibiotics is troubling.

...

In light of these findings, there is little evidence to support the use of antimicrobial agents in consumer products such as topical hand lotions and soaps.”

the whole as appears more fully from a copy of said journal article, produced herein as **Exhibit R-10**;

26. In August 2004, the journal *Antimicrobial Agents and Chemotherapy* published an article entitled *Relationship between Triclosan and Susceptibilities of Bacteria Isolated from Hands in the Community* by Allison E. Aiello, Bonnie Marshall, Stuart B. Levy, Phyllis Della-Latta, and Elaine Larson, which states:

“Hygiene has a measurable impact on reducing the burden of infections in the developing world, as well as in specialized populations and settings in the United States. However, there has been little evidence that the use of a 0.2% triclosan soap affords any benefit in the reduction of infectious

symptoms, bacterial counts, or types of bacteria on the hands of individuals within the household setting in the developed world.”

the whole as appears more fully from a copy of said journal article, produced herein as **Exhibit R-11**;

27. In October 2005, the journal *Emerging Infectious Diseases* published an article entitled *Antibacterial Cleaning Products and Drug Resistance* by Allison E. Aiello, Bonnie Marshall, Stuart B. Levy, Phyllis Della-Latta, Susan X. Lin, and Elaine Larson, which states:

“Our earlier research, conducted among the same study population described here, showed that use of antibacterial hand soap containing 0.2% triclosan was no more beneficial than plain soap in reducing infectious illness symptoms or bacterial counts on hands of household members.

...

Currently, no evidence suggests that use of antibacterial soap containing 0.2% triclosan provides a benefit over plain soap in reducing bacterial counts and rate of infectious symptoms in generally healthy persons in the household setting. Our 1-year randomized community intervention study adds to these earlier findings by assessing the potential risks associated with antibacterial product use in the home. The results from our study do not implicate use of antibacterial cleaning and hygiene products as an influential factor in carriage of antimicrobial drug-resistant bacteria on the hands of household members. Although we did not observe a significant impact on antimicrobial drug resistance during the 1-year period, a longer duration and more extensive use of triclosan might provide a suitable environment for emergence of antimicrobial drug-resistant species in the community setting. Further surveillance for the effect of long-term use of antibacterial cleaning and hygiene products on antimicrobial drug resistance in the community is needed.”

the whole as appears more fully from a copy of said journal article, produced herein as **Exhibit R-12**;

28. In October 2005, Health Canada released a *Fact Sheet* on Antibiotic Resistance that stated:

“A major cause of resistance is believed to be overuse or inappropriate use of drugs such as antibiotics, in preventing or treating infections in people, animals and plants. Germs constantly adapt to their environment and have the ability to take on the characteristics of other germs. When antibiotics are used inappropriately, the weak bacteria are killed, while the stronger, more resistant ones survive and multiply. Germs that develop

resistance to one antibiotic have the ability to develop resistance to another antibiotic. This is called cross-resistance.

...

You can help prevent and reduce drug resistance by taking the following steps:

- Avoid the use of antibacterial soap and “bacteria-fighting” cleaning products. These products kill ‘good’ bacteria which fight bad germs. Cleaning with soap and water, or disinfecting surfaces with a solution of water and vinegar or household bleach is adequate.”

the whole as appears more fully from a copy of said Fact Sheet, produced herein as **Exhibit R-13**;

29. In March 2006, the Canadian Paediatric Society (“CPS”) released their Position Statement on *Antimicrobial products in the home: The evolving problem of antibiotic resistance* which gives the recommendations that:

“• The Canadian Paediatric Society does not recommend the use of antimicrobial-impregnated household products. In many situations, the use of antiseptics and antimicrobials is unnecessary.

• The Canadian Paediatric Society promotes hand hygiene using plain soap and water in the vast majority of domestic settings.”

the whole as appears more fully from a copy of said Position Statement, produced herein as **Exhibit R-14**;

30. In 2007, the journal *Clinical Infectious Diseases* published an article entitled *Consumer Antibacterial Soaps: Effective or Just Risky?* By Allison E. Aiello, Elaine L. Larson, and Stuart B. Levy, which states:

“On the basis of our inclusion criteria, we identified a total of 27 studies that examined either the effectiveness of triclosan or the risks of antibiotic resistance associated with exposure to triclosan.

...

The available data do not support the effectiveness of triclosan for reducing infectious disease symptoms or bacterial counts on the hands when used at the concentrations commonly found in consumer antiseptic hand soaps. The effectiveness was similar to that of plain soap in the majority of studies, and a difference in the reduction of bacterial levels on the hands was generally observed only after longer hand washes with soap containing relatively high concentrations of triclosan (i.e.,  $\geq 1.0\%$  wt/vol). Regarding the risks associated with triclosan, we identified several studies that supported a relationship between exposure of bacteria to triclosan in the laboratory and increased MICs to clinically utilized antibiotics.



...

Symptoms such as coughing, sneezing, fever, and diarrhea are commonly observed for many of the significant infectious illnesses observed in the community setting and may be related to infection by viruses or bacteria. Therefore, the available community-based intervention studies suggest that consumer products containing triclosan or triclocarban are not effective against the most common infectious illnesses affecting individuals in the community setting. For these reasons, the public health utility of this antibacterial ingredient for preventing common infectious illnesses, as a measure of added protection beyond that afforded by plain soap use, has not been shown.

...

Collectively, the microbiological efficacy studies strongly suggest that concentrations of triclosan used in consumer liquid hand soaps do not provide a benefit over plain soap for reducing bacterial levels found on the hands. Although some of these studies were limited by study design flaws and variability in testing procedures, the results regarding the lack of efficacy were consistent among studies utilizing a concentration of triclosan found in most consumer liquid hand soaps.

...

The results of our review call into question the marketing of soaps containing triclosan as a product providing efficacy beyond the use of plain soap in the community setting. Soaps containing triclosan at concentrations used in the community setting (0.2% or 0.3% wt/vol) were generally no more efficacious than plain soap at preventing infectious illness symptoms and reducing bacterial levels on the hands. Several studies demonstrated laboratory evidence of triclosan-adapted cross-resistance with antibiotics among multiple species of bacteria. There are still too few studies that have been conducted in the community setting to adequately assess whether the emergence of antibiotic resistance in that setting is associated with the use of consumer soaps containing triclosan. Longitudinal studies are needed to assess changes in levels of antibiotic resistance associated with use of soap containing triclosan over time, and large databases of isolates are required to examine within-species changes in antibiotic-resistance profiles. Still, current findings warrant actions by the FDA for evaluating consumer product advertising claims.”

the whole as appears more fully from a copy of said journal article, produced herein as **Exhibit R-15**;

31. On August 17-19, 2009, the Canadian Medical Association (“CMA”) at their annual meeting adopted a resolution which states:

“The Canadian Medical Association calls upon the federal government to ban the sale of household antibacterial products due to the risk of bacterial



resistance and to recognize that soap and alcohol-based solutions are as effective in preventing household infection.”

the whole as appears more fully from a copy of said minutes of the meeting, produced herein as **Exhibit R-16**;

32. On April 8<sup>th</sup> 2010, the United States Food and Drug Administration (“FDA”) released a *Consumer Update* that stated:

“• At this time, FDA does not have evidence that triclosan added to anti-bacterial soaps and body washes provides extra health benefits over soap and water. Consumers concerned about using hand and body soaps with triclosan should wash with regular soap and water.”

the whole as appears more fully from a copy of said Consumer Update, produced herein as **Exhibit R-17**;

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

33. Petitioner purchased and used Dial Complete on a regular basis since at least the last year from Pharmaprix located on Wellington in Verdun, Quebec, for approximately \$3.99 (plus taxes), the whole as appears more fully from a copy of some product labels, produced herein as **Exhibit R-18**;

34. Petitioner believed, through the Respondents’ marketing and Canadian internet website at [www.dialcomplete.ca](http://www.dialcomplete.ca), that Dial Complete was a superior hand soap that was more effective at killing germs, protecting her from germs, and thus preventing illness and promoting good health, than washing with less expensive plain soap and water;

35. It was for the above reasons, that Petitioner agreed to pay a premium price over and above the price of regular soap;

36. Through her own internet research, Petitioner has learned that Dial’s health claims are not substantiated by and real facts. This was brought to her attention when she came across numerous USA class actions based on the false and misleading advertising of Dial Complete as alleged herein. A copy of numerous American Class Action Complaints are being produced herein as **Exhibit R-19**;

37. Had Petitioner known the true truth, she would not have purchased Dial Complete and she certainly would not have paid the premium price that the Respondents charged for it. The Petitioner has since ceased to purchase and use Dial Complete;



38. Petitioner's damages are a direct and proximate result of the Respondents' conduct and their false or misleading advertising;

39. 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 Dial Complete believing that they were making a superior healthy choice over regular hand soap;

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 or misleading advertising;

40. Had the Respondents disclosed the truth about Dial Complete, reasonable consumers would not have bought them and certainly would not have agreed to pay a premium price for them;

41. In addition, the distribution and sale of Dial Complete was made in violation of Health Canada's Cosmetic Ingredient Hotlist;

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 Dial Complete otherwise the difference in price between the premium sale price of Dial Complete as compared to a regular hand soap;
- 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 or 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 Dial Complete, 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 Dial Complete?



- b. Did the Respondents violate Health Canada's Cosmetic Ingredient Hotlist by selling its Dial Complete with an amount of Triclosan in a concentration exceeding 0.3%?
  - c. 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?
  - d. Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
  - e. Should an injunctive remedy be ordered to remove Dial Complete from the market and prohibit the Respondents from continuing to sell Dial Complete with an amount of Triclosan in a concentration exceeding 0.3%?
  - f. 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 and an injunctive remedy;
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;

ORDER the Defendants to discontinue selling Dial Complete with an amount of Triclosan in a concentration exceeding 0.3%;

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 she 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 her 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 her 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 her 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 her 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 and for injunctive relief;

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

- all residents in Canada who have purchased DIAL COMPLETE<sup>®</sup> Antibacterial Hand Wash ("Dial Complete"), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased DIAL COMPLETE<sup>®</sup> Antibacterial Hand Wash ("Dial Complete"), 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 Dial Complete?
- b. Did the Respondents violate Health Canada's Cosmetic Ingredient Hotlist by selling its Dial Complete with an amount of Triclosan in a concentration exceeding 0.3%?
- c. 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?
- d. Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- e. Should an injunctive remedy be ordered to remove Dial Complete from the market and prohibit the Respondents from continuing to sell Dial Complete with an amount of Triclosan in a concentration exceeding 0.3%?
- f. 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;

ORDER the Defendants to discontinue selling Dial Complete with an amount of Triclosan in a concentration exceeding 0.3%;

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 Dial Complete 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, August 12, 2011

(S) Me Jeff Orenstein

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