

CANADA
 PROVINCE OF QUEBEC
 DISTRICT OF MONTREAL

(Class Action)
 SUPERIOR COURT

NO: 500-06-000597-126

G. DEL ZOPPO

Petitioner

-vs.-

ALL MARKET INC., legal person duly constituted, having its head office at 39 West 14th Street, # 404, City of New York, State of New York, 10011, U.S.A.

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 he is a member, namely:

- all residents in Canada who have purchased VITA COCO® coconut water, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased VITA COCO® coconut water, or any other group to be determined by the Court;



B) The Respondent

2. Respondent All Market Inc. is a Delaware corporation doing business as Vita Coco with its head office in New York;
3. Respondent has performed all of the commercial activities of manufacturing, labelling, packaging, marketing, distributing, and selling Vita Coco Products in Canada, including the province of Quebec;

C) The Situation

4. Vita Coco Products are sold across the country in supermarkets and health food stores;
5. Respondent markets nationwide Vita Coco Products as “all-natural, super-hydrating, fat-free, cholesterol-free, nutrient-packed, potassium-stacked, mega-electrolyte coconut water!” that should be regularly consumed to help maintain optimal hydration, the whole as appears more fully from a copy of the Respondent’s website www.vitacoco.com, produced herein as **Exhibit R-1**;
6. Respondent has promoted Vita Coco Products as “super-hydrating” beverages. Respondent’s website advertises and unequivocally represents Vita Coco Products as offering superior hydration. The website states:

“While other beverages claim to be the before, during, and after sports hydrator, we don’t. Sure, Vita Coco is stacked with potassium, and is as natural as natural gets (some say it’s like putting a straw in a coconut). Vita Coco is about hydration. And hydration is important no matter what you do. It’s okay if you’re not a marathon runner, a football player or a Tour de France winner. Life is hectic enough, and you should be hydrated while you live it. Go ahead, get hydrated and remember that life is a sport.”

The whole as appears more fully from a copy of the Respondent’s website at www.vitacoco.com, produced herein as **Exhibit R-2**;

7. Respondent claims on its packaging that Vita Coco Products:

- more electrolytes than the leading sports drink with 15 times the potassium
- has more potassium than two bananas (don’t tell the monkeys) – potassium keeps your body properly hydrated and prevents cramping
- the beauty of one ingredient”

The whole as appears from a copy of the label, produced herein as **Exhibit R-3**;

8. Respondent's representations are simply false and materially misleading. Vita Coco Products are no more hydrating than a standard, less expensive sports drink;
9. By using such false and misleading terms as "super-hydrating," "mega-electrolyte," and telling consumers that Vita Coco Products are the superior drink for hydration, Respondent is actively and specifically misrepresenting to consumers the true hydrating benefits associated with Vita Coco Products;
10. According to an independent study (the "Consumer Lab Study") that compared coconut water to both plain water and a rehydration drink (which contains about four times more sodium but far less potassium than coconut water), all three provided adequate hydration, the whole as appears from a copy of the study entitled "Product Review: Coconut Waters Review – Test of O.N.E., Vita Coco, and Zico" dated August 2nd 2011, produced herein as **Exhibit R-4**;
11. The Consumer Lab Study emphasized the critical importance of sodium for hydration. "Rehydration drinks like Gatorade typically contain 110 mg of sodium per an 8 oz cup (240 ml) serving," but "coconut waters made from pure coconut water...contain about 40 mg to 60 mg of sodium in a slightly larger serving (330 ml);"
12. Thus, while Respondent represents to consumers that Vita Coco Products provide more electrolytes than sports drinks, they actually offer far less sodium – which is the critical nutrient lost during sweating. In fact, there is about 10 times more sodium in sweat as potassium;
13. According to Liz Applegate, director of sports nutrition at UC-Davis, coconut water isn't ideal for prolonged bouts of physical activity. That's because of its particular blend of electrolytes. Unlike sports drinks, which generally contain a lot of sodium and a little potassium, coconut water is the opposite: heavy on potassium, light on sodium. "Even though the belief is that when you exercise you need a lot of potassium, sodium is more important," says Applegate. "When you sweat, you lose a lot more sodium than potassium.", the whole as appears more fully from a copy of an article entitled "Is Coconut Water Really Better Than Sports Drinks?" dated August 2nd 2010, produced herein as **Exhibit R-5**;
14. In advertising Vita Coco Products, Respondent also fails to disclose that, because coconut water is very low in protein or branched chain amino acids, Vita Coco Products may not be considered a sports "recovery" drink to rebuild muscle protein;



15. Nor does Respondent disclose that, consumed in large amounts, coconut water may have a mild laxative effect, which would obviously make it less effective at replenishing fluids in the long run;
16. Respondent's misrepresentations are compounded by the information included on the nutrition information labels for Vita Coco Products, which state as follows:

Canada - Serving Size 250 ml		USA - Serving Size 330 ml	
Sodium	30 mg	Sodium	40 mg
Potassium	515 mg	Potassium	680 mg
Magnesium	8% (or 32 mg)	Magnesium	10% (or 340 mg)

The whole as appears from a copy of the label, produced as **Exhibit R-6**;

17. According to the Consumer Lab Study, a sample Vita Coco Product fell woefully short of the electrolyte levels stated on its nutrition label. To assess the accuracy of the nutritional labelling of coconut waters, ConsumerLab.com purchased three popular coconut water products, including a Vita Coco Product, and tested levels of sugars, potassium, sodium, and magnesium. This study found that Vita Coco 100% Pure Coconut Water had 40% less sodium than advertised (only 18 mg out of its listed 30 mg), 35% less magnesium (only 20.80 out of its listed 32 mg), and 16% less potassium (only 432.60 out of its listed 515 mg) . These shortcomings were confirmed by two independent laboratories;
18. Respondent has consistently misrepresented and failed to disclose the true amounts of electrolytes contained in its Vita Coco Products
19. It may be theorized that these serious discrepancies may be due to either a lack of quality controls on the part of the Respondent or as a result of the packaging and/or preservatives used in Vita Coco Products that degrade the nutritional contents, including levels of sodium, magnesium, and potassium from the stated levels on the Respondent's product labels;
20. As a direct result of Respondent's unlawful and deceptive sales practices, Vita Coco has become one of the fastest growing lifestyle beverages in North America and one of the hottest beverage brands in the world, with a cult-like brand loyalty;
21. Respondent has continued to capitalize on its misrepresentations and omissions by charging premium prices for Vita Coco Products above cheaper sports drinks;



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

22. Petitioner purchased (and later consumed) Vita Coco coconut water for \$7.49 plus taxes at Rachelle-Béry on 4810, boul. Saint-Laurent., in Montreal, Quebec;
23. Petitioner believed, after reading the Respondent's labelling, that Vita Coco coconut water was a natural way to hydrate after doing exercise;
24. Petitioner further believed that Vita Coco Products had more electrolytes than a regular sports drink and it is for that reason that he was prepared to pay the premium price tag for it;
25. Petitioner has since discovered that Vita Coco has significantly less sodium than a regular sports drink and, therefore, does not have more electrolytes than a regular sports drink. In addition, Petitioner has learned that Vita Coco has 40% less sodium, 35% less magnesium, and 16% less potassium than indicated on the label. These revelations came to light when the Petitioner discovered the existence of a class action and a settlement entailing consumer refunds related to this very issue in the United States, the whole as appears more fully from a copy of said Class Action Complaint and Settlement Agreement, produced herein as **Exhibit R-7**;
26. In consequence, Petitioner feels that he has been misled by the Respondent and has ceased to purchase Vita Coco Products;
27. Had he known the true facts, the Petitioner would not have purchased Vita Coco Products nor paid the premium price that the Respondent charged for it;
28. Petitioner's damages are a direct and proximate result of the Respondent's conduct and the company's false and misleading advertising;
29. 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

30. Every member of the class has purchased Vita Coco Products believing that it contained more electrolytes and also that it was more hydrating than a regular sports drink, due to the Respondent's marketing, advertising, and labelling;
31. The class members were, therefore, induced into error by the Respondent's false and misleading advertising;

32. Had the Respondent disclosed the truth about Vita Coco Products, reasonable consumers would not have bought them and certainly would not have agreed to pay a premium price for them;
33. Each member of the class is justified in claiming at least one or more of the following as damages:
- a. The purchase price of Vita Coco Products or otherwise the difference in price between the premium sale price of Vita Coco Products as compared to regular sports drinks;
 - b. Punitive damages;
34. Respondent engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from class members;
35. All of these damages to the class members are a direct and proximate result of the Respondent's 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
36. Petitioner is unaware of the specific number of persons who purchased Vita Coco Products, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
37. Class members are numerous and are scattered across the entire province and country;
38. 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 the Respondent would increase delay and expense to all parties and to the court system;
39. 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;

40. 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;
41. 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
42. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
43. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondent's misconduct;
44. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a) Did the Respondent engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Vita Coco Products?
 - b) Is the Respondent liable to the class members for reimbursement of the purchase price of Vita Coco Products or the additional premium in the purchase price as a result of their misconduct?
 - c) Should an injunctive remedy be ordered to prohibit the Respondent from continuing to perpetrate its unfair, false, misleading, and/or deceptive conduct?
 - d) Is the Respondent responsible to pay compensatory and/or punitive damages to class members and in what amount?
45. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

46. 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;
47. 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 Defendant to cease from continuing its unfair, false, misleading, and/or deceptive conduct;

DECLARE the Defendant liable for the damages suffered by the Petitioner 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

48. Petitioner is a member of the class;

49. 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;



50. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;
51. 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;
52. 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;
53. 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 Respondent's conduct;
54. Petitioner understands the nature of the action;
55. 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
56. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;
57. The Petitioner's attorneys practice their profession in the judicial district of Montreal;
58. 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 VITA COCO[®] coconut water, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased VITA COCO® coconut water, 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:

- Did the Respondent engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Vita Coco Products?
- Is the Respondent liable to the class members for reimbursement of the purchase price of Vita Coco Products or the additional premium in the purchase price as a result of their misconduct?
- Should an injunctive remedy be ordered to prohibit the Respondent from continuing to perpetrate its unfair, false, misleading, and/or deceptive conduct?
- Is the Respondent 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 Defendant to cease from continuing its unfair, false, misleading, and/or deceptive conduct;

DECLARE the Defendant liable for the damages suffered by the Petitioner 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 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 Respondent's website with a link stating "Notice to Vita Coco Products 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 all publications fees.

Montreal, February 28, 2012

(S) Jeff Orenstein

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