

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

I. DRAY

NO: 500-06-000596-128

Petitioner

-vs.-

BEIERSDORF CANADA INC., legal
person duly constituted, having its head
office at 4727, rue Levy, City of
Montreal, Province of Quebec, H4R 2P9

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 have purchased the products NIVEA Good-bye Cellulite™ Gel and Patch (together “Good-bye Cellulite”), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased the products NIVEA Good-bye Cellulite™ Gel and Patch (together “Good-bye Cellulite”), or any other group to be determined by the Court;



B) The Respondent

2. Respondent Beiersdorf Canada Inc. is a federally incorporated Canadian company whose head office is in the judicial district of Montreal, the whole as appears more fully from a copy of the Respondent's report from the *Registre des entreprises*, produced herein as **Exhibit R-1**;
3. Respondent is responsible for developing and marketing NIVEA Good-bye Cellulite™ Gel and Patch (together "Good-bye Cellulite") throughout Canada, including the Province of Quebec;
4. Respondent presumably controls their distribution channels, advertising campaigns, and labelling decisions related to Good-bye Cellulite from their head office in Montreal, Quebec;

C) The Situation

5. Good-bye Cellulite are products that are promoted by the Respondent as capable of toning and smoothing the skin and visibly reduce the signs of cellulite on the skin. The active ingredients in the Good-bye Cellulite Gel are L-Carnitine and lotus extract¹; Good-bye Cellulite Patches contain L-Carnitine;
6. The products' labelling has gone through various changes over the years. The first Good-bye Cellulite Gel labelling made the following statements:

"New NIVEA body Good-bye Cellulite™ Gel visibly reduces the appearance of cellulite.

How does it work?

L-Carnitine is a substance which is naturally present in the skin. It supports the conversion of fat components into energy. A sufficient amount of L-Carnitine in the skin is therefore beneficial.

Regularly used, the new NIVEA body Good-bye Cellulite™ Gel enriched with L-Carnitine leads to a visible reduction of the appearance of cellulite at the respective body parts.

Proven results:

After 2 weeks the skin is noticeably toned and smooth.

After 4 weeks the signs of cellulite are visibly reduced.

¹ In or around 2010, the Respondent added Lotus Extract to the Good-bye Cellulite formula. Prior to that time, the active ingredient was only L-Carnitine.

Dermatologist tested

THE BEST - Seven hundred and fifty women from across Canada, testing unlabelled products over a 10-week period of time, agreed that the NIVEA body Good-bye Cellulite Gel is the best in its category.

7. The Good-bye Cellulite Patch labelling made the following statements:

“New NIVEA body Good-bye Cellulite patch with continuous release of L-Carnitine.

How does it work?

The concentrated fast action of the Nivea body Good-bye Cellulite patch is based on its continuous release of L-Carnitine into the skin. From the first application, the amount of L-Carnitine in the skin is boosted. This leads to a visible reduction of the appearance of cellulite on targeted areas.

Proven concentrated, fast action

After three applications, the skin is noticeably toned and smooth.
After four weeks the signs of cellulite are visibly reduced.

Used in combination with the gel: +60% efficacy!

Dermatologist Tested

Recommended usage:

Apply during day or night, 2-3 times per week max., up to 8 weeks on targeted body parts. Leave on max. 8 hours.

For optimal results, use in combination with NIVEA body Good-bye Cellulite Gel.”

8. The next Good-bye Cellulite Gel labelling made the following statements:

“Good-bye cellulite, good-bye extra massaging!

The latest anti-cellulite innovation from NIVEA:

NIVEA Good-bye Cellulite Gel contains highly effective, natural Lotus extract and L-Carnitine. It visibly reduces the appearance of cellulite – even without massaging.

How does this innovation work?

Natural Lotus extract is known to reduce the formation of new fat cells and increases the breakdown of fat into smaller components into energy*, leaving skin feeling hydrated and smooth

Proven results:

After 2 weeks, 88% of women confirmed that skin is noticeably toned and smooth**.

After 3 weeks, the signs of cellulite on the skin are visibly reduced even without massaging***.

* In-vitro tests

** test with 212 women, *** Test with 45 women

The whole as appears more fully from a copy of the label, produced as **Exhibit R-2**;

9. The Respondent's have since replaced their Good-bye Cellulite line with a product called "Cellulite Gel", the whole as appears more fully from a copy of the label, produced herein as **Exhibit R-3**;
10. In addition to the packaging, the Respondent also advertised Good-bye Cellulite in various fashion magazines and television advertisements. As well as sponsoring the "Nivea Goodbye Cellulite, Hello Bikini Challenge" on The Tyra Banks Show, a U.S. national television program, which promised that Good-bye Cellulite would help "reduce the appearance of cellulite in just four weeks.";
11. L-Carnitine is a naturally occurring amino acid, which plays a role in the metabolism of fat. It aids in the release of stored body fat, triglycerides, into the bloodstream for energy. It is produced by the body in the liver and kidneys and stored in the body's skeletal muscles, heart, brain and sperm. It occurs naturally in red meat, some dairy products and avocado. Most people create all of the L-Carnitine they need, but some are deficient and take supplements;
12. Lotus extract comes from the leaves of *Nelumbo nucifera*. *Nelumbo nucifera* is also known as sacred lotus. Although it has been suggested that *Nelumbo nucifera* may stimulate lipolysis in white adipose tissue, the Respondent's own study published in August 2010 (which did not measure or determine if lotus extract has any effect on cellulite when applied to human skin) admitted that "to our knowledge conclusive studies investigating effects of lotus leaf extract on triglyceride accumulation or lipolysis activity in human cells are lacking so far.", the whole as appears more fully from the journal article entitled *Lotus leaf extract and L-carnitine influence different processes during the adipocyte life cycle*, Siegner et al. Nutrition & Metabolism 2010, 7:66, produced herein as **Exhibit R-4**;



13. Cellulite is the non-pathologic appearance of dimpled skin surface, sometimes likened to "cottage cheese," commonly seen on thighs and buttocks of women, as well as on the abdomen, breasts and arms. The occurrence of cellulite is nearly universal in post-pubertal females. Because it is unsightly, cellulite causes great distress in women and billions of dollars are spent on treatments that are largely ineffective. According to an article in the June 25, 2009 edition of *The New York Times* (the "6/09 *New York Times* article"), the market for cellulite-reduction devices in the United States was more than \$47 million in 2008 and is estimated to increase to as much as \$62 million by 2013, the whole as appears more fully from a copy of said article, produced herein as **Exhibit R-5**;
14. The 6/09 *New York Times* article reports that, unlike the situation in men, the connective tissue bands under women's skin are organized vertically, so that fat may bulge irregularly. The 6/09 *New York Times* article quotes Dr. Michael D. Jensen, a clinical professor of medicine at the Mayo Clinic, as explaining that while "[a]t normal weight your fat cells fall nicely into valleys of connective tissue [,w]hen you get too many fat cells or too big of fat cells now they push upon the roof [*i.e.*, the skin]." This condition is exacerbated with age, as the connective tissue strands between skin and muscle becomes more inflexible;
15. The 6/09 *New York Times* article also quotes Dr. Molly Wanner, a dermatology instructor at Harvard Medical School (and co-author of a 2008 evidence-based review of existing cellulite-reduction treatments), as flatly stating that "[a]t this point, there is no outstanding treatment for cellulite." This view was echoed by Dr. Michael F. McGuire, a clinical associate professor at the University of California, Los Angeles School of Medicine, who was quoted as stating that "realistically there is no cure for cellulite.";
16. An article in the November 3, 2008 edition of the *Los Angeles Times* (the "11/08 *LA Times* article") was similarly skeptical regarding the efficacy of cellulite creams. It quoted Dr. Jenny Kim, an associate professor of medicine and dermatology at UCLA's School of Medicine, as observing that "no studies have convincingly shown that cellulite creams do any good on actual bodies because nobody knows if creams can penetrate the skin deeply enough to reach fat cells, let alone reduce the appearance of cellulite." Dr. Wanner, of Harvard's medical school, was also quoted in the 11/08 *LA Times* article as agreeing that there are no convincing studies to demonstrate that cellulite creams work:

I don't think the evidence is there to recommend spending money on cellulite cream.... Never say never, but at this point there's nothing to suggest that these products [*i.e.*, cellulite creams] can improve cellulite.... That's because there's more to removing [cellulite] than shrinking fat cells.

Unless a product can fundamentally change the structure of skin, ... the bulges will remain.

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

17. Significantly, the 11/08 LA Times article quotes Dr. Kim as noting that studies have found a strong placebo effect for cellulite treatments, so that "users may think they see improvements even if the cream itself is worthless.";
18. There are no reliable studies showing that L-Carnitine or Lotus Extract are readily absorbed through the skin to provide any of the results promised by the Respondent, and the Respondent has reliable scientific evidence to substantiate its claims regarding Good-bye Cellulite;
19. Through the means as described above, the Respondent represented, expressly or by implication, that regular use of Good-bye Cellulite would result in reduced cellulite on the body. In truth and in fact, regular use of Good-bye Cellulite does not result in the reduction of cellulite;
20. Therefore, the advertisements and representations made by the Respondent as set forth above was, and is, false or misleading. The acts and practices of the Respondent as alleged herein constitute unfair or deceptive acts or practices and the making of false advertisements;
21. As a result, consumers were induced into purchasing Good-bye Cellulite under the premise that it would cause them to reduce the cellulite on their body, a false and misleading representation, thereby vitiating their consent and entitling them to claim a refund for the purchase price of the product;

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

22. Petitioner purchased (and then used) Good-bye Cellulite twice over the last couple of years from the Jean Coutu located on boul. Sources for a price of approximately 15.99 plus taxes;
23. Petitioner believed, by having seen the Respondent's marketing and having read the Respondent's labelling, that Good-bye Cellulite would cause a reduction in her cellulite;
24. Petitioner used the product as instructed, but did not experience any of the promised benefits;
25. Recently, the Petitioner has learned of the institution of at least three (3) class actions filed in the United States regarding the facts as alleged in the present

proceedings and a settlement entailing consumer refunds, the whole as appears more fully from a copy of the USA Class Action Complaints and the settlement, produced herein as **Exhibit R-7**;

26. In consequence of her experience and all that she has since read on the subject, Petitioner feels that she has been misled by the Respondent and has ceased using Good-bye Cellulite;
27. Had she known the true facts, the Petitioner would not have purchased Good-bye Cellulite;
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

27. Every member of the class has purchased Good-bye Cellulite believing that it would cause them a reduction in their cellulite due to the Respondent's marketing, advertising, and labelling;
28. The class members were, therefore, induced into error by the Respondent's false and misleading advertising;
29. Had the Respondent disclosed the truth about Good-bye Cellulite, reasonable consumers would not have purchased it;
30. Each member of the class is justified in claiming at least one or more of the following as damages:
 - a. The purchase price of Good-bye Cellulite;
 - b. Punitive damages;
31. Respondent engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from class members;
32. 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
33. Petitioner is unaware of the specific number of persons who purchased Good-bye Cellulite, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
34. Class members are numerous and are scattered across the entire province and country;
35. 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;
36. 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;
37. 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;
38. 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
39. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
40. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondent's misconduct;
41. 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 Good-bye Cellulite?
 - b. Is the Respondent liable to the class members for reimbursement of the purchase price of Good-bye Cellulite as a result of their misconduct?
 - c. Should an injunctive remedy be ordered to prohibit the Respondent from continuing to perpetrate their 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?
42. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

43. 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;
44. 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 she be attributed the status of representative of the Class

45. Petitioner is a member of the class;
46. 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;
47. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;
48. 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;
49. 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;
50. 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 Respondent's conduct;
51. Petitioner understands the nature of the action;



52. 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

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

54. The Respondent's head office is located in the judicial 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 the products NIVEA Good-bye Cellulite™ Gel and Patch (together "Good-bye Cellulite"), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased the products NIVEA Good-bye Cellulite™ Gel and Patch (together "Good-bye Cellulite"), 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 engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Good-bye Cellulite?

- b. Is the Respondent liable to the class members for reimbursement of the purchase price of Good-bye Cellulite as a result of their misconduct?
- c. Should an injunctive remedy be ordered to prohibit the Respondent from continuing to perpetrate their 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?

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 Good-bye Cellulite 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 27, 2012

(s) Me Jeff Orenstein

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for the Petitioner