CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class Actions)

NO: 500-06-001262-233

ANDREW KRASKA

Plaintiff

v.

JOHNSON & JOHNSON INC.

and

PROCTER & GAMBLE INC.

and

GLAXOSMITHKLINE CONSUMER HEALTH CARE SRL

and

RB HEALTH (CANADA) INC.

Defendants

APPLICATION OF THE DEFENDANT RB HEALTH (CANADA) INC. FOR LEAVE TO ADDUCE RELEVANT EVIDENCE
***(Articles 574, 575 CCP*)**

TO THE HONOURABLE FLORENCE LUCAS, J.S.C., THE DEFENDANT RB HEALTH (CANADA) INC. HEREBY SUBMITS THE FOLLOWING:

I. INTRODUCTION

1. RB Health (Canada) Inc. ("**RB Health**") seeks leave to adduce relevant evidence pursuant to article 574 of the Code of Civil Procedure ("CCP") to contest the Plaintiff Andrew Kraska (the "**Plaintiff**")'s *Application for Authorization to Institute a Class Action and Appoint Applicant as Class Representative* in this matter (the "**Application for Authorization**").

2. More particularly, RB Health seeks leave to file the proposed short affidavit of Manushvi Gupta, in a form substantially similar to the document attached hereto as **Schedule A** (the "**Gupta Affidavit**"), including the following exhibits:

a) excerpts of Health Canada's Drug Product Database for each of RB-Health's products listed in the Application for Authorization (Exhibit RB-1);

b) excerpt of Health Canada's Drug Product Database for "Mucinex Chest Congestion" (Exhibit RB-2);

c) Health Canada's "*Labelling requirements for non-prescription drugs guidance document*" (Exhibit RB-3);

d) package labelling accepted by Health Canada for each of RB-Health's products listed in the Application for Authorization (Exhibit RB-4).

3. As further detailed below, this evidence would provide the Court with "essential and indispensable" information with respect to:

a) the identity and effect of each of the active ingredients contained in RB Health's products listed in the Application for Authorization, allowing the Court to assess whether the commonality and appearance of right criteria of article 575 (1) and (2) CCP are met;

b) background information about Health Canada's regulatory process for non-prescription drugs, including its labelling requirements, allowing the Court to assess whether the appearance of right criterion of article 575 (2) CCP is met, and providing it with useful contextual evidence in a highly regulated environment; and

c) the complete package labelling of both RB-Named Products to complete the fragmentary labelling related evidence filed by the Plaintiff.

II. THE PROPOSED CLASS ACTION

4. As appears from the Application for Authorization, the Plaintiff seeks authorization to institute a class action on behalf of the following proposed class (the "**Proposed Class Members**"):

> *All persons in Quebec who purchased, between January 1, 2007, and date this case is authorized as a class action, any Cough Medicine listed in Schedule A to the Application for Authorization.*

5. The Plaintiff broadly and indistinctly alleges that the defendants have misrepresented to the Proposed Class Members that over-the-counter cold and cough medicine containing phenylephrine ("**PE**") could act as **"a decongestant and alleviate nasal congestion, fever, sneezing, sinus pressure, runny nose and cough**".[1]

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[1] *Application for Authorization*, at para. 1. Such symptoms are collectively referred to by the Plaintiff

6. The Plaintiff alleges that contrary to the defendants' representations, medicines containing PE are not effective via oral administration for the relief of nasal decongestion.[2]

7. Amongst a list of 37 PE-containing products manufactured and/or distributed by the four (4) defendants, each composed of various combinations of active ingredients (the "**Named Products**"), the Plaintiff specifically lists in Schedule A to the Application for Authorization two multi-ingredient products distributed by RB Health:

   a) Mucinex Multi-Action Congestion, Cold & Cough; and

   b) Mucinex Multi-Action Congestion, Cold & Flu (collectively the "**RB-Named Products**").[3]

8. The Plaintiff alleges that RB Health represented to the Proposed Class Members that its *Mucinex Multi-Action Cold & Sinus Caplets*[4] "**helps relieve […] cold and flu symptoms in 1 simple solution"**[5], and that it lists PE hydrochloride in a 5 mg dosage as a nasal decongestant, exclusively relying on an excerpt of *Mucinex*'s website (Exhibit P-28) for this specific product, in which a general description of it is made.

9. Although the Plaintiff's broad statement regarding the defendants' misrepresentations covers "Cold/Cough Symptoms", which include numerous symptoms detailed in paragraph **5** above, his allegations against RB Health are limited to the representation that one of the RB-Named Products "temporarily relieves **symptoms of nasal and chest congestion due to common cold**"[6].

10. The Plaintiff does not allege having ever purchased any of the RB-Named Products, stating that he "was subjected to the **Defendant J&J's** misleading and deceitful marketing practices"[7] only, which he believed, "**would provide decongestion**"[8].

11. Rather, the Plaintiff speculates and extrapolates from his personal experience with the Johnson & Johnson Inc.'s products ("**J&J"** or "**J&J Products**") to make vague allegations against RB Health, "lumping" it with all defendants despite the

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as "**Cold/Cough Symptoms**".

2 *Ibid,* at para. 22.

3 See Schedule A to the Application for Authorization.

4 As appears from the Gupta Affidavit, this product is now branded as Mucinex Multi-Action Congestion, Cold & Flu.

5 *Application for Authorization*, at para. 30.

6 *Ibid*.

7 *Ibid*, at para. 32.

8 *Ibid*, at para. 36.

existence of 37 different Named Products, containing different active ingredients and/or combinations thereof, which provide different effects or combinations of effects and ignoring that many Proposed Class Members may have purchased RB-Named Products for reasons other than their nasal decongestant effects.

III. THE PROPOSED EVIDENCE IS RELEVANT AND NECESSARY

12. The criteria to determine whether the Application for Authorization should be granted are established in article 575 CCP.

13. In its analysis of these criteria, the Court assumes that the facts alleged are true, unless they are clearly inaccurate and contradicted by other evidence. Furthermore, the Court should not consider as true allegations which are based on inferences, conclusions, unverified hypotheses, legal arguments or opinions.

14. RB Health seeks leave to file the Gupta Affidavit and its supporting exhibits, primarily detailing:

a) the complete list of active ingredients in each RB-Named Product and their respective effects, including the signature active ingredient in the RB-Named Products, namely guaifenesin, which is used as an expectorant (phlegm/mucus reducing agent);

b) the regulatory process undertaken by Health Canada prior to authorizing the sale of non-prescription drug products; and

c) the complete package labelling for both RB-Named Products.

A. COMPOSITION OF RB-NAMED PRODUCTS (PARAGRAPHS 4-11 AND EXHIBITS RB-1 AND RB-2)

15. The proposed evidence is relevant as it provides the Court with essential and indispensable information required to assess whether the Application for Authorization meets the commonality and appearance of right criteria of article 575 (1) and (2) CCP.

16. Indeed, the Application for Authorization is premised on the assumption that, because the Plaintiff would have bought the J&J Products based on the so-called representations relating to their decongestant effects, each Proposed Class Member would have necessarily purchased an RB-Named Product for the sole purpose of alleviating their cold and flu symptoms.

17. The Plaintiff's legal syllogism as regards to RB Health is defective and does not take into account that the Defendants each manufactured or sold different products, containing different combinations of different active ingredients, each

with a different effect, making the reason each Proposed Class Member may have purchased them highly individual.

18. RB Health intends to argue at authorization that the RB-Named Products' varied composition of active ingredients, each with a specific effect and, besides PE, not alleged to be ineffective by the Plaintiff, led the Proposed Class Members who bought its products to use them for a multitude of reasons beyond the relief of nasal congestion symptoms which are at the heart of the Plaintiff's proposed legal syllogism against J&J.

19. The proposed evidence demonstrates that, because of the varied composition of each RB-Named Product, none of the elements of the Plaintiff's proposed personal cause of action against J&J, if sufficient, can be extrapolated to the Proposed Class Members who consumed RB Health's products without individual inquiries as to why they bought the products, on what basis and what their satisfaction was with these products such that the requirements of article 575 (1) CCP are also not met.

20. Additionally, given the impossibility of extrapolating the Plaintiff's proposed legal syllogism with respect to J&J to RB Health, the proposed evidence demonstrates the insufficiency of the Plaintiff's allegations and the inexistence of an appearance of right against RB Health pursuant to article 575 (2) CCP.

B. HEALTH CANADA'S REGULATORY PROCESS (PARAGRAPHS 12-20 AND EXHIBIT RB-3)

21. The proposed evidence is essential as it provides the Court with useful context in a highly regulated environmental environment and constitutes essential and indispensable information required to assess whether the Application for Authorization meets the appearance of right criterion of article 575 (2) CCP.

22. RB Health intends to argue at authorization that what the Plaintiff alleges to be a misrepresentation regarding the effect of PE in the RB-Named Products is in fact not a representation at all, but a **labelling requirement imposed by Health Canada**, which requires that the labelling of pharmaceutical products include the "purpose" and "use" of each active ingredient.

C. RB-NAMED PRODUCTS' COMPLETE LABELLING (PARAGRAPH 18 AND EXHIBIT RB-4)

23. As appears from the Application for Authorization, the Plaintiff exclusively relies on an excerpt of *Mucinex*'s website (Exhibit P-28) for one of the two RB-Named Products, namely Mucinex Multi-Action Congestion, Cold & Flu.

24. However, Exhibit P-28 is not the product label of said product and relates to only one of the two RB-Named Products.

25. The evidence that RB Health seeks to adduce therefore, supplements the fragmentary evidence filed in support of the Application for Authorization, introducing the complete labelling of each of the RB-Named Products, which contains the information required by Health Canada, as described above.

IV. CONCLUSION

26. It would be contrary to the interests of justice to refuse evidence directly relevant to understanding the proposed class action and assessing the criteria for authorization.

27. This Court should have the benefit of the evidence described above, providing it with a comprehensive understanding of the RB-Named Products, so that it may be able to make an informed decision at the authorization stage.

28. Without this evidence, the Court may be unable to properly assess whether the criteria for authorization are met and, if they are, how best to define the class and frame the common issues and conclusions sought.

29. The present Application is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

GRANT the present *Application of the Defendant RB Health (Canada) Inc. for Leave to Adduce Relevant Evidence;*

AUTHORIZE RB Health (Canada) Inc. to submit an affidavit from RB Health's representative Manushvi Gupta in a form substantially similar to the document attached hereto as Schedule A, as well as Exhibits RB-1 to RB-4 in support thereof;

THE WHOLE without costs save in the event of contestation.

MONTRÉAL, July 31, 2024

(s) Torys Law Firm LLP

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TAKE NOTICE that the *Application of the Defendant RB Health (Canada) Inc. for Leave to Adduce Relevant Evidence* will be presented before the Honourable Justice Florence Lucas of the Superior Court, sitting in and for the District of Montréal, at a date and time to be determined by the Court, at the Montréal Courthouse, located at 1 Notre-Dame Street East, Montréal, Québec H2Y 1B6.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

MONTRÉAL, July 31, 2024

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