CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-06-000495-099

(Class Action)
SUPERIOR COURT

S. ST-MARSEILLE

Petitioner

-vs.-

GLAXOSMITHKLINE CONSUMER HEALTHCARE INC., legal person duly constituted, having its principal place of business at 3030, boul. Le Carrefour, bureau 604, City of Laval, Province of Quebec, H7T 2P5

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 persons residing in Canada who have purchased and/or used any type of PoliGrip denture adhesive products, or any other group to be determined by the Court.

    Alternately (or as a subclass)

- all persons residing in Quebec who have purchased and/or used any type of PoliGrip denture adhesive products, or any other group to be determined by the Court.

B) The Respondent

2. Respondent GlaxoSmithKline Consumer Healthcare Inc. is involved in the "vente de produits pharmaceutiques divers", the whole as appears more fully from a copy of the Quebec Inspector General of Financial Institutions report, produced herein as **Exhibit R-1**;

3. Respondent GlaxoSmithKline Consumer Healthcare Inc. is engaged in the business of designing, developing, manufacturing, testing, packaging, promoting, marketing, distributing, labelling, importing, and/or selling various PoliGrip denture adhesive products in Canada, including the province of Quebec;

4. These products include, but are not limited to, PoliGrip Original, PoliGrip Extra Strength, PoliGrip Advanced Care, PoliGrip Ultra Fresh, PoliGrip Ultra Adhesive Powder, Super PoliGrip Comfort Strips, etc. (the product line collectively referred to as "PoliGrip");

C) The Situation

5. Nearly 35 million Americans (approximately 3.5 million Canadians) use denture adhesives to help keep their dentures in place;

6. PoliGrip products are denture adhesives marketed to persons who wear dentures. These products are used daily to bond the dentures to the inner surfaces of the mouth;

7. PoliGrip denture adhesive products contain zinc, which is used as an odour blocker and bonding agent in their various formulations;

8. While there are no ingredients listed on their labels, consumers would be surprised to know that PoliGrip denture adhesive products actually contain concentrations of zinc ranging from about 17,000 to 34,000 micrograms per gram (µg/g);

9. Through the regular use of PoliGrip denture adhesive products, these zinc compounds are foreseeably ingested, swallowed, or absorbed through the mouth and gums of the users;

10. While small amounts of zinc are needed for a balanced and healthy diet, excess zinc can be caused by prolonged use of PoliGrip denture adhesive products and/or using large daily amounts of PoliGrip denture adhesive

products (to keep loose or ill-fitting dentures in place) - both of which are common;

11. When this occurs, the zinc is absorbed in the body's tissues and upsets the mineral homeostasis (the ability to maintain internal equilibrium), resulting in depleted copper levels;

12. This copper depletion in the body (also called hypercupremia), in turn, results in neuropathy (or nerve damage) and other neurological symptoms;

13. According to the Neuropathy Association, peripheral neuropathy is "the result of damage caused to the nerves, which disrupts the body's ability to communicate with its muscles, skin, joints, or internal organs";

14. Some of the symptoms of neuropathy may include (but is not limited to):

- Tingling or numbness in the extremities
- Abnormal sensations
- Foot pain
- Loss of balance
- Heavy feeling in the legs
- Inability to hold objects
- Dizziness
- Nausea
- Vomiting
- Diarrhea
- Lethargy
- Anemia
- Loss of sensation
- Muscle weakness
- Abdominal pain
- Unexplained pain

15. The connection between PoliGrip denture adhesives products and neuropathy is often elusive to health care professionals (although not necessarily to the Respondent);

16. The physical injuries associates with excess zinc and copper depletion are often permanent. While cessation of the PoliGrip denture adhesive products generally results in a return to normal zinc and copper levels, symptoms do not always improve;

17. No warnings of the risks of possible injury or safety instructions to avoid possible injury when using the PoliGrip denture adhesives products appear anywhere on their labels (or anywhere else for that matter);

18. Not only is the relationship between zinc poising / neuropathy and the use of PoliGrip denture adhesives products not disclosed to the users, but the ingredient itself is not even indicated on their labels (or anywhere else for that matter);

19. On or about August 26th 2008, an article was published in the medical journal *Neurology* entitled "Denture Cream: An unusual source of excess zinc, leading to hypocupremia and neurological disease" by Dr. Sharon P. Nations et als., the whole as appears more fully from a copy of said medical journal article, produced herein as **Exhibit R-2**;

20. In this study conducted at the University of Texas Southwestern Medical Center in Dallas, the researchers were presented with four (4) patients who presented various neurological abnormalities in the setting of hypocupremia and hyperzincemia. All of the patients wore dentures.

21. The objective of the study was to "determine zinc concentration in the denture creams used by the patients as a possible source of excess zinc ingestion". Testing revealed zinc concentrations ranging from about 17,000 to 34,000 micrograms per gram (µg/g) in Fixodent and PoliGrip denture adhesive products. It was determined that the patients' symptoms were caused by their exposure to zinc in denture cream. No alternative source of excess zinc ingestion or explanation for hypocupremia was identified;

22. Following this study, several class actions and individual actions were instituted in the United States regarding the use of PoliGrip denture adhesive products and neuropathy. These cases have all been consolidated in the United States District Court, Southern District of Florida in file number 1:09-md-02051, the whole as appears more fully from a copy of various Complaints, produced herein *en liasse* as **Exhibit R-3**;

D) <u>Respondent's Conduct</u>

23. It is generally known and accepted in the scientific community that excess zinc in the body (also called hyperzincemia) could have adverse health effects in humans including the inducement of copper depletion and deficiency (also called hypercupremia);

24. It is generally known and accepted in the scientific community that hypercupremia, particularly of a chronic nature, could cause a host of adverse health effects including neurological damage and injury;

25. Given the state of the scientific knowledge and understanding, it was impossible and implausible that the Respondent was unaware of the likely adverse effects in humans associated with the chronic and/or excess

absorption of zinc attributable to the use and ingestion of PoliGrip denture adhesives products;

26. In view of the foregoing, Respondent has engaged its liability by:

a) failing to disclose that their PoliGrip denture adhesives products contain zinc and/or the quantity of such zinc;

b) failing to provide adequate and proper warnings to fully apprise consumers of the nature and extent of the risks and side effects associated with the use of PoliGrip denture adhesives products;

c) failing to provide proper instructions on the use of PoliGrip denture adhesives products so as to allow a consumer to prevent, protect, and safeguard themselves against possible injury;

d) failing to manufacture and design a safer formulation of PoliGrip denture adhesives products;

e) failing to inform the public and the heath care community in a timely fashion of the dangerous propensities of PoliGrip denture adhesives products;

f) continuing to market and distribute the PoliGrip denture adhesives products without any regard to the above;

27. In the absence of such disclosures, consumers properly assumed that PoliGrip was safe and effective;

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

28. Petitioner started using dentures on the top and bottom of her mouth in the year 2003, when she was 35 years old;

29. Between the years 2003 to 2008, she used various PoliGrip and Fixodent denture cream adhesives;

30. Petitioner purchased these products at the Jean Coutu on Labelle St., in Chomedey, Quebec;

31. During the approximately five (5) years that the Petitioner used the various PoliGrip and Fixodent denture adhesive products, she began suffering from the following ailments:

Numbness in her gums, tingling in her mouth, frozen mouth, nausea, dizziness, laziness (she didn't even want to get out of bed), trouble speaking, loss of sensation in her lips, both hands, and both feet (as if her toes and fingers were frozen), muscle weakness, unable to do physical activities, stomach cramps, burning sensation in her stomach, loss of appetite, headaches, mouth paralysis, and random loss of balance;

32. Since the year 2008, Petitioner discontinued using all PoliGrip and Fixodent denture adhesive products and now uses nothing to keep her dentures in place;

33. Petitioner's symptoms have improved somewhat since she discontinued using these products, but she still suffers from some of these problems and is no longer able to sing, which has seriously affected her income (Petitioner was previously a professional singer);

34. Recently, while researching on the internet in order to find out if there was another way to keep her dentures in place, Petitioner came across some information that these products contain zinc (which she was not aware of) and that other people are suffering from similar problems as she has;

35. Further, Petitioner has discovered that several individual actions and class action have been filed for these problems in the United States;

36. At no time was Petitioner made aware of the true risks associated with taking PoliGrip denture adhesive products;

37. Petitioner would not have taken PoliGrip denture adhesive products if the Respondent had properly disclosed the true risks and benefits of taking these products;

38. Petitioner is at risk of developing even more pronounced health problems in the near future;

39. Petitioner's damages are a direct and proximate result of her use of the PoliGrip denture adhesive products, Respondent's negligence, the lack of adequate warnings, and the lack of proper instructions of use;

40. 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

41. Every member of the class has purchased and/or used PoliGrip denture adhesive products;

42. The class members' damages would not have occurred but for the acts and/or omissions of the Respondent;

43. In consequence of the foregoing, each member of the class is justified in claiming at least one or more of the following as damages:

    a. physical and mental injuries, including pain, suffering, anxiety, fear, loss of quality and enjoyment of life, and increased risk of health problems;

    b. out-of-pocket expenses incurred or to be incurred, including those connected with hospital stays, medical treatment, life care, medications, medical monitoring services, and the diagnosis and treatment of PoliGrip denture adhesive products' side effects;

    c. loss of past income and loss of future income;

    d. refund of the purchase price of PoliGrip denture adhesive products;

    e. disgorgement of all profits earned by the Respondent from the sale of PoliGrip denture adhesive products;

    f. punitive damages;

44. Some of the expenses related to the medical treatment that the class members have undergone or will undergo, will have been borne by the various provincial health insurers, including the *Régie de l'assurance maladie du Québec* and the Ontario Health Insurance Plan. As a result of the Respondent's conduct, these various provincial health insurers have suffered and will continue to suffer damages for which they are entitled to be compensated by virtue of their right of subrogation in respect to all past and future insured services. These subrogated interests are asserted by the Petitioner and the class members;

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

45. Petitioner is unaware of the specific number of persons who took and/or purchased these PoliGrip denture adhesive products, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);

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

47. Petitioner has no way of knowing the names and addresses of potential class members due to the confidential nature of medical and pharmacy records;

48. 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;

49. 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;

50. 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;

51. 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) <u>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</u>

52. Individual questions, if any, pale by comparison to the numerous common questions that predominate;

53. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondent's misconduct;

54. The recourses of the members raise identical, similar or related questions of fact or law, namely:

    a. Can PoliGrip denture adhesive products cause adverse health problems, such as neuropathy and other neurological problems?

    b. Should PoliGrip denture adhesive products have been sold with proper warning alerting users of the relationship between the zinc found in their formulations and the possibility of adverse health problems?

c. Should PoliGrip denture adhesive products have been sold with proper instructions regarding their use considering the presence of zinc, so as to prevent, protect, and safeguard the possibility of adverse health problems?

d. Did the Respondent knowingly, recklessly or negligently breach their duty of safety, duty of care, and/or duty to inform imposed upon them as manufacturers, distributers, and/or sellers of PoliGrip denture adhesive products?

e. In the affirmative to any of the above questions, did the Respondent's conduct engage its liability toward the members of the class?

f. If the responsibility of the Respondent is established, what is the nature and the extent of damages and other remedies to which the members of the class can claim?

g. Are members of the class entitled to bodily, moral, and material damages?

h. Are members of the class entitled to recover the medical costs incurred in the screening, diagnosis and treatment of medical conditions caused by using PoliGrip denture adhesive products?

i. Are the members of the class entitled to recover as damages an amount equal to the purchase price of PoliGrip denture adhesive products or any part of the purchase price?

j. Should the Respondent be ordered to disgorge all or part of its ill-gotten profits received from the sale of PoliGrip denture adhesive products?

k. Are members of the class entitled to aggravated or punitive damages?

l. Should the Respondent be ordered to indicate zinc as an ingredient in their formulations and the amount of such zinc, to place proper warnings as to their health risks, and to place proper instructions as to their safe use on the labels of PoliGrip denture adhesive products?

55. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

56. The action that Petitioner wishes to institute on behalf of the members of the class is an action in damages;

57. The conclusions that Petitioner wishes to introduce by way of a motion to institute proceedings are:

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

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 reimburse to each of the members of the class, the purchase price of the product, 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;

RESERVE the right of each of the members of the class to claim future damages related to the use of PoliGrip denture adhesive products;

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 an amount sufficient to compensate the various provincial health insurers for the medical treatments and expenses that the class members have undergone and will continue to undergo in the future, and ORDER the Defendant to deposit in the office of this court these sums so as to establish a fund to be administered as this Honourable Court deems fit;

ORDER the Defendant to indicate zinc as an ingredient in their formulations and the amount of such zinc, to place proper warnings as to their health risks,

and to place proper instructions as to their safe use on the labels of PoliGrip denture adhesive products;

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) <u>The Petitioner requests that she be attributed the status of representative of the Class</u>

58. Petitioner is a member of the class;

59. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that she wishes to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with her attorneys;

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

61. 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;

62. Petitioner, with the assistance of her attorneys, are ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;

63. 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;

64. Petitioner understands the nature of the action;

65. Petitioner's interests are not antagonistic to those of other members of the class;

B) <u>The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal</u>

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

67. Respondent has its principal place of business in the judicial district of Montreal;

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

69. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

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

- all persons residing in Canada who have purchased and/or used any type of PoliGrip denture adhesive products, or any other group to be determined by the Court.

Alternately (or as a subclass)

- all persons residing in Quebec who have purchased and/or used any type of PoliGrip denture adhesive products, 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. Can PoliGrip denture adhesive products cause adverse health problems, such as neuropathy and other neurological problems?

b. Should PoliGrip denture adhesive products have been sold with proper warning alerting users of the relationship between the zinc found in their formulations and the possibility of adverse health problems?

c. Should PoliGrip denture adhesive products have been sold with proper instructions regarding their use considering the presence of zinc, so as to prevent, protect, and safeguard the possibility of adverse health problems?

d. Did the Respondent knowingly, recklessly or negligently breach their duty of safety, duty of care, and/or duty to inform imposed upon them as manufacturers, distributers, and/or sellers of PoliGrip denture adhesive products?

e. In the affirmative to any of the above questions, did the Respondent's conduct engage its liability toward the members of the class?

f. If the responsibility of the Respondent is established, what is the nature and the extent of damages and other remedies to which the members of the class can claim?

g. Are members of the class entitled to bodily, moral, and material damages?

h. Are members of the class entitled to recover the medical costs incurred in the screening, diagnosis and treatment of medical conditions caused by using PoliGrip denture adhesive products?

i. Are the members of the class entitled to recover as damages an amount equal to the purchase price of PoliGrip denture adhesive products or any part of the purchase price?

j. Should the Respondent be ordered to disgorge all or part of its ill-gotten profits received from the sale of PoliGrip denture adhesive products?

k. Are members of the class entitled to aggravated or punitive damages?

l. Should the Respondent be ordered to indicate zinc as an ingredient in their formulations and the amount of such zinc, to place proper warnings as to their health risks, and to place proper instructions as to their safe use on the labels of PoliGrip denture adhesive products?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

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

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 reimburse to each of the members of the class, the purchase price of the product, 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;

RESERVE the right of each of the members of the class to claim future damages related to the use of PoliGrip denture adhesive products;

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 an amount sufficient to compensate the various provincial health insurers for the medical treatments and expenses that the class members have undergone and will continue to undergo in the future, and ORDER the Defendant to deposit in the office of this court these sums so as to establish a fund to be administered as this Honourable Court deems fit;

ORDER the Defendant to indicate zinc as an ingredient in their formulations and the amount of such zinc, to place proper warnings as to their health risks, and to place proper instructions as to their safe use on the labels of PoliGrip denture adhesive products;

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 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 PoliGrip 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, December 21, 2009

(S) Jeff Orenstein

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