

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

K. LONG

NO: 500-06-000574-117

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 product NIVEA My Silhouette!™ Slimming & Reshaping Gel-Cream, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased the product NIVEA My Silhouette!™ Slimming & Reshaping Gel-Cream, 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 My Silhouette!TM Slimming & Reshaping Gel-Cream ("My Silhouette") throughout Canada, including the Province of Quebec;
4. Respondent presumably controls their distribution channels, advertising campaigns, and labelling decisions related to My Silhouette from their head office in Montreal, Quebec;

C) The Situation

5. My Silhouette is a skin cream that contains "Bio-slim Complex," a combination of ingredients that includes white tea and anise. Respondent promoted My Silhouette to the public as being able to slim and reshape the body;
6. On the product's labelling appears the following statements:

"SLIMS & RESHAPES THE SILHOUETTE

NIVEA research has developed a 100% natural Bio-Slim Complex that combines high-performance active ingredients for a dual effect of slimming & reshaping.

- **White tea** is known to slim down fat cells and even prevent them from growing back.
- **Anise extract** is proven to activate skin's cell-metabolism which leads to increased collagen production to improve the tone and texture of skin.

Proven results:

- Reduction of up to 3 cm on targeted body parts such as thighs, hips, waist and stomach.
- First measurable slimming results after 4 weeks.
- Skin is noticeably better toned and more elastic.

Your silhouette appears more defined, sculpted and contoured.

NIVEA® My Silhouette Gel contains a highly effective natural Bio-Slim Complex for a slimmer looking and more defined silhouette.

Women confirm:

“My Silhouette is an effective slimming product that makes me feel more beautiful.*”

Recommended usage:

Apply once or twice a day on desired body parts such as thighs, hips, waist and stomach.

Dermatologist tested.

** Test with 171 women; 68% confirm after 4 weeks usage.”*

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

7. On the product’s later labelling appears the following statements:

“NIVEA research has developed the 100% natural Bio-Slim Complex that combines the high-performance ingredients **White Tea** and **Anise Extract** for a dual effect – slimmer looking and more defined silhouette.

Proven results after 4 weeks:

- Body parts such as thigh, hips, waist and belly, appear slimmer.
- Skin is noticeably better toned and more elastic.
- Your silhouette is noticeably more defined, sculpted and contoured.

The NIVEA® innovation

New NIVEA® My Silhouette! Gel-Cream with the highly effective 100% natural Bio-Slim Complex for a slimmer looking and noticeably more defined silhouette.

Women confirm:

“My Silhouette! is an effective slimming product* that makes me feel more beautiful.**”

Recommended usage:

Apply daily once or twice on the concerned body parts such as thighs, hips, waist and belly.

Dermatologist tested.

** Test with 171 women; 68% confirm after 2**, respectively 4* weeks usage.”*

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

8. Up until very recently, these same claims were made on the Respondent's website at <http://www.en.nivea.ca/products/body-care/My-Silhouette>, but to which was shut down following the news that the company had been ordered to by the United States of America Federal Trade Commission ("FTC") to stop advertising that My Silhouette can cause weight-loss and that they would compensate American citizens in an amount of \$900,000 (as reported by the Montreal Gazette on July 14th 2011). The website currently reads where My Silhouette was been promoted:

"WE'RE SORRY

This page is not available

Either the service you are looking for is no longer available or the URL is incorrect."

The whole as appears from a copy of the website page, produced as **Exhibit R-4**;

9. However, the Respondent's British website was still up at <http://www3.nivea.co.uk/products/show/16385>, which was substantially if not exactly the same as the Respondent's Canadian website, where the following statements appear:

"Over the years, our bodies undergo weight and hormonal changes that affect the skin's firmness and the body's contours. Consequently, the body loses its shape.

With **My Silhouette!** NIVEA has developed a formula to help you slim and reshape your body so you to can gain body confidence and a feel-good silhouette.

How does it work?

NIVEA research has developed the natural Bio-Slim Complex that combines two high-performance active ingredients White tea and Anise extract for a dual effect:

- White tea is known for its natural fat reducing properties (in-vitro study)
- Anise extract has been found to lead to increased collagen production (in-vitro study)

Proven results:

The regular use of NIVEA My Silhouette! leads to a reduction of up to 3cm on targeted body parts such as thighs, hips, waist and stomach.

- First measurable results after 4 weeks
- Skin is noticeably more toned and elastic
- Your silhouette is reshaped

In a product in -use test on 187 women:

- 80% agreed their skin appeared noticeably firmer
- 81% agreed their skin felt more toned
- 74% found the product to be effective
- 81% agreed it made them feel more beautiful”

The whole as appears from a copy of the website page, produced as **Exhibit R-5**;

10. The Respondent also ran a television advertisement stating the following:

“[Narrator]: New Nivea My Silhouette! with Bio-Slim Complex helps redefine the appearance of your silhouette and noticeably firm skin in just four weeks. [Depicts woman getting jeans out of rear of closet, and trying them on to discover that they fit.] So you can rediscover your favourite jeans. And how they still get his attention. New Nivea My Silhouette! with Bio-Slim Complex. Touch and be touched.”

11. Respondents also entered into agreements with Google, an Internet search engine, to preferentially identify a webpage marketing My Silhouette in response to consumer searches for information relating to body size. As a result, if a consumer entered the terms “stomach fat,” “nivea slim silhouette,” or “thin waist” into Google, a link to this My Silhouette webpage would appear as a sponsored result at the top of the search results, such as follows:

“[User search term: “stomach fat”]
Want a Toned **Stomach**?
[URL] NIVEA My Silhouette Can Redefine The Appearance of Your Curves!

[User search term: “nivea slim silhouette”]
Want to **Slim** Down?
[URL] NIVEA My Silhouette Redefines the Appearance of the Body’s Contours!

[User search term: “thin waist”]
Thin Waist

[URL] Try NIVEA My Silhouette Body Gel Cream and Redefine Your Curves!"

12. Through the means as described above, the Respondent represented, expressly or by implication, that regular use of My Silhouette results in significant reductions in body size. In truth and in fact, regular use of My Silhouette does not result in significant reductions in body size;
13. 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;
14. As a result, consumers were induced into purchasing My Silhouette under the premise that it would cause them to lose weight, a false and misleading representation, thereby vitiating their consent and entitling them to claim a refund for the purchase price of the product;
15. On July 14th 2011, the Montreal Gazette reported on page A2 a story of My Silhouette, which states as follows:

“Buyer beware: Cream won’t help your jeans fit better

Canadian consumers are still being told that a Nivea skin cream will help shed unwanted pounds, even after the U.S. consumer protection commission recently reached a settlement banning the skin cream maker from making those claims in the United States.

Last month, the settlement with the Federal Trade Commission forced Nivea skin cream maker Beiersdorf Inc. to pay \$900,000 in compensation to consumers, as well as stopping its claim that regular use of its Nivea My Silhouette! skin cream would help consumers slim down.

The product is sold in Canada and the company's Canadian website claims that regular use of the cream will "slim and reshape" the user's body, taking up to three centimetres off thighs, hips, waists and bellies.

“No cream is going to help you fit into your jeans,” FTC chief Jon Leibowitz said. “The tried and true formula for weight loss is diet and exercise.”

Canadian consumers can log complaints about advertising of cosmetic and health products with Advertising Standards Canada.”

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

16. The article in the Montreal Gazette specifically makes reference to the proceedings issued by the FTC and the subsequent settlement, which was release to the public on or about June 29th 2011;
17. In the FTC proceedings, the order:
- bars Beiersdorf from claiming that any product applied to the skin causes substantial weight or fat loss or a substantial reduction in body size.
 - prohibits the company from claiming that any drug, dietary supplement, or cosmetic causes weight or fat loss or a reduction in body size, unless the claim is backed by two randomized, double-blind, placebo-controlled human clinical studies.
 - requires that any claim regarding the health benefits of any drug, dietary supplement, or cosmetic be backed by competent and reliable scientific evidence.
18. The relating documentation emanating from the FTC are being produced as if recited at full length herein, namely:
- a) A copy of the Complaint and Exhibits A, B, C-1, C-2, and C-3 as **Exhibit R-7**;
 - b) A copy of the Analysis of Proposed Consent Order to Aid and Public Comment as **Exhibit R-8**;
 - c) A copy of the Agreement Containing Consent Order as **Exhibit R-9**;
 - d) A copy of the News Release as **Exhibit R-10**;

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

19. Petitioner purchased (and then used) My Silhouette several times over the last year from the Pharmaprix's located on boul. Saint-Charles, as well as, on Pierrefonds blvd. for a price of \$15.99 plus taxes;
20. Petitioner believed, by having seen the Respondent's marketing and having read the Respondent's labelling, that My Silhouette would cause her to lose weight and more specifically in the thighs, hips, waist and stomach area;
21. On July 14th 2011, Petitioner was made aware that My Silhouette does not work as the company had represented to her that it would when she read the article in the Montreal Gazette;

22. Since reading this newspaper article, she researched My Silhouette on the internet and has come across and reviewed the documents made public by the FTC;
23. In consequence, Petitioner feels that she has been misled by the Respondent and has ceased using My Silhouette, vowing to never buy it again. Petitioner has also spoken to friends of hers, who have expressed the same anger at being misled by the Respondent;
24. Had she known the true facts, the Petitioner would not have purchased My Silhouette;
25. Petitioner's damages are a direct and proximate result of the Respondent's conduct and the company's false and misleading advertising;
26. 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 My Silhouette believing that it would cause them to lose weight 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 My Silhouette, 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 My Silhouette;
 - 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 My Silhouette, 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 My Silhouette?
 - b. Is the Respondent liable to the class members for reimbursement of the purchase price of My Silhouette 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 product NIVEA My Silhouette!™ Slimming & Reshaping Gel-Cream, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased the product NIVEA My Silhouette!™ Slimming & Reshaping Gel-Cream, 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 My Silhouette?
- b. Is the Respondent liable to the class members for reimbursement of the purchase price of My Silhouette 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 My Silhouette 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, July 14, 2011

(s) Me Jeff Orenstein

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