CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No:500-06-000430-088

CLASS ACTION
SUPERIOR COURT

SOPHIE LAVOIE, [redacted]

Petitioner

vs

ADVANCED MEDICAL OPTICS, INC., a moral person, with a head office at 1700 East St. Andrew Place, Santa Ana, California, 92705.

and

AMO CANADA COMPANY, a moral person, with a registered head office at 1100-1959 Upper Water Street, Halifax, Nova Scotia, B3J-3E5

Respondents

MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND TO OBTAIN THE STATUS OF REPRESENTATIVE (A. 1002 C.C.P.)

IN SUPPORT OF HER MOTION FOR PERMISSION TO INSTITUTE A CLASS ACTION AND OBTAIN THE STATUS OF A REPRESENTATIVE, PETITIONER RESPECTFULLY SUBMITS AS FOLLOWS:

1. **Petitioner wishes to institute a class action on behalf of all the persons forming part of the Group hereinafter described and of which the Petitioner is a Member, namely**

All persons in the province of Québec who purchased, acquired, or used the product Complete® MoisturePlus™ contact lens solution manufactured, distributed or ultimately offered for sale to the public by the Respondents, and which was subject to the product recall announced by the Respondents on May 25, 2007, and any updates to that product recall.

2. **Petitioner's personal claim against the Respondents is based on the following facts:**

OVERVIEW, PETITIONER AND RESPONDENTS

2.1 This Motion for Authorization to Institute a Class Action and to Obtain the Status of Representative concerns a consumer product known as Complete® MoisturePlus™, (hereinafter "the Solution"), a contact lens cleaning, storing and moisturizing solution which is distributed, offered for sale and sold by the Respondents in Québec.

2.2 The Petitioner, Sophie Lavoie, is a resident of Laval, Québec. She is a member of the proposed Group and is a purchaser and user of the Respondents' product Complete® MoisturePlus™ .

2.3 The Respondent, ADVANCED MEDICAL OPTICS, INC., is a corporation incorporated pursuant to the laws of Delaware, United States of America, with a head office situated in Santa Ana, California, United States of America..

2.4 The Respondent, AMO CANADA COMPANY, is a Canadian subsidiary of ADVANCED MEDICAL OPTICS, INC. and carries on business in the Province of Québec, with registered offices located in Halifax, Nova Scotia.

2.5 The Petitioner, individually and as a representative of a Group of similarly situated persons, claims as against the Respondents for offering for sale and selling to the Petitioner and Group members the Solution. The Solution was not fit to be sold to Group members because use of the Solution could result in eye infections and other physical problems, including, but not limited to, the condition known as Acanthamoeba Keratitis (herinafter "AK").

2.6 The Solution is a consumer product that was manufactured by the Respondents, distributed by the Respondents and ultimately offered for sale and sold to the Petitioner and Group members. The Solution was intended to be placed in the stream of commerce and distributed and offered for sale.

RESPONDENTS' BUSINESS AND THE RECALL

2.7 The Respondents' business includes manufacturing, producing, distributing, and/or selling contact lens care products, which in turn includes disinfecting solutions, enzymatic cleaners, and lens rewetting drops with brand names such as Complete® MoisturePlus™, COMPLETE®, Blink-N-Clear®, Consept® F, Consept® 1 Step, Oxysept® 1 Step, Ultra Care®, Ultrazyme®, Total Care™ and blink™ branded products.

2.8 The Respondents' business also includes producing, distributing, and/or selling vision correction products with brands such as, *inter alia*, Star S4 IR™, Wave Scan Wavefront®, CustomVue™, IntraLase FS™, IntraLase Method™, and IntraLasik™.

2.9 On May 25, 2007, the Respondent Advanced Medical Optics announced a recall of the Solution. This recall was based on information received by the Respondents on that date from the United States Center for Disease Control and Prevention (hereinafter "CDC"), The recall announcement advised consumers to discontinue using any Solution in their possession. This recall announcement is filed as Exhibit P-1 to this Motion.

2.10 On May 28, 2007, the Respondent AMO Canada Company issued a recall announcement of the Solution in Canada. This announcement essentially reproduced the announcement issued in the United States on May 25, 2007. This recall announcement is filed as Exhibit P-2 to this Motion

2.11 According to the recall announcements issued by the Respondents, the CDC had gathered data that, among other conclusions, showed that consumers who used the Solution to clean, store and moisturize contact lens had a seven fold increased risk of developing a sight-threatening condition known as Acanthamoeba Keratitis ("AK")as compared with consumers who used other contact lens solution.

2.12 The recall announcements describe AK as an infection caused by an organism commonly found in water, soil, sewage systems, cooling towers, and ventilation systems. Symptoms of AK include eye pain, eye redness, blurred vision, sensitivity to light, and excessive tearing. AK can ultimately lead to blindness.

THE PETITIONER'S FACTS

2.13 The Petitioner used the Solution from 1997 until soon after the recall of the Solution on May 28, 2007.

2.14. The Petitioner purchased the Solution at various places at various times. Typically, she would purchase the Solution at Jean Coutu pharmacies in Pierrefonds or Rosemère, Québec. She is currently in possession of bottles of the Solution as described below:

a) Lot #AB01121, with an expiry date of March 2008;
b) bottles with expiry dates of November 2006, and January, 2006.

2.15 On June 27, 2007, the Petitioner was examined by Dr. Mélanie Prud'homme, an opthamalogical doctor. She was diagnosed with an eye infection. After approximately two weeks, there was no improvement. The Petitioner was referred to Dr. Pierre Laflamme. Dr Laflamme examined her on or about July 12, 2007.

2.16 After a further two weeks, there was still no improvement in the Petitioner's eye infection. She was referred to Dr. M. Dagher, at Notre-Dame Hospital in Montréal, Québec. Dr. Dagher examined the Petitioner on July 31, 2007. Dr. Dagher diagnosed Acanthamoeba Keratitis and immediately started treatments. The Petitioner has since been examined by Dr. Dagher on August 14, 2007, August 28, 2007, September 25, 2007, October 23, 2007, November 27, 2007, and approximately once per month thereafter. In a note dated October 2, 2007, Dr. Dagher describes the Petitioner's diagnosis as follows:

> *Ulcère cornée oeil gauche probablement a l'acanthamoebe. Mme Sophie Lavoie était porteuse de verre de contact souple et a utilisé la solution Multiplus*

This diagnosis is filed as Exhibit P-3 to this Motion.

2.17 The Petitioner has suffered and continues to suffer physical discomfort as a result

of contracting AK. She has been unable to wear contact lenses on a regular basis since July, 2007. She has experienced pain and irritation in her eyes.

2.18 The Petitioner has incurred and continues to incur financial expenses because she contracted AK. She has been obliged to spend substantial amounts on eye examinations, medical treatments, and medication since June, 2007. A non-inclusive list of expenses incurred by the Petitioner is listed below and filed as exhibits to this Motion:

Exhibit P-4:Medical examination: Dr. Prud'homme, July 27, 2007: $35.00;
Exhibit P-5: Medication prescribed by Dr. Prud'homme, June 27, 2007: $19.53;

Exhibit P-6:Medication prescribed by Dr. Laflamme: 6 invoices dated July 12, July 23, and July 26, 2007: total amount $127.15

Exhibit P-7: Medication prescribed by Dr. Dagher: 16 invoices dated between July 31, 2007, and November 16, 2007: total amount $2672.37

CONSUMER PROTECTION ACT AND LATENT DEFECT

2.19 At the times of purchases of the Solution, the Petitioner was a consumer as defined in Article 1e) of the *Consumer Protection Act*, R.S.Q., c. p.40.1.("*CPA*")

2.20 The Solution was purchased for use as a cleaning and storage solution for the Petitioner's contact lenses. By being dangerous to the health of the Petitioner, the Solution was clearly not fit for the purpose for which it was intended, contrary to Article 37 of the *CPA*.

2.21 Furthermore, by being unsafe for cleaning and storage of contact lenses, the

Solution had a latent defect that the Petitioner had no ability to discern. Per Article 1726 Québec Civil Code ("Civil Code"), the Solution has a latent defect because the risk of eye infection or contracting AK renders the Solution unfit for the use for which it was intended.

RECOURSE VERSUS RESPONDENT

2.22 Per Articles 53 and 54 CPA, and Article 1730 Civil Code, the Petitioner may legally pursue the Respondents, as manufacturers and/or distributors of the Solution, for the damages resulting from the facts that the Solution was not fit for purpose per Article 37 CPA and that the Solution had a latent defect per Article 1726 Civil Code.

SAFETY DEFECT

2.23 The Petitioner, in purchasing the Solution to use to clean and store her contact lenses, was entitled to expect a level of safety that the Solution would not be actually or potentially harmful or dangerous to her. By being actually or potentially

harmful or dangerous, the Solution had a safety defect, per Article 1469 Civil Code. Per Article 1469 Civil Code, the Respondents, as manufacturers, are liable to reparation for injury suffered by the Petitioner as a result of the safety defect.

NEGLIGENCE OF RESPONDENTS

2.24 The Petitioner relied on the Respondents to ensure that safe Solution was being put into the stream of commerce. The Respondents knew or ought to have known that the Petitioner was relying on the Respondents to manufacture and/or distribute Solution that was safe and fit for the intended purpose. The Respondents was

negligent in not taking the appropriate steps to ensure the safety and fitness for purpose of the Solution manufactured and/or distributed by the Respondents. *Inter alia*, the Respondents were negligent in its testing of its Solution prior to distribution for retail sale.

UNJUST ENRICHMENT

2.25. Further, the Petitioner state that the Respondents were unjustly enriched as a result of the revenues generated from the sale of the Solution. Specifically, the Petitioner states that, pursuant to Articles 1493 -1496 of the Québec Civil Code:

a) The Respondents have obtained an enrichment through revenues and profit from the sale of the Solution;
b) The Petitioner and other Group Members have suffered a corresponding deprivation including injury to their eyes, the price paid for the Solution, medical costs and other associated costs, and
c) The benefit obtained by the Respondents and corresponding detriment experienced by the Petitioner and Group Members has occurred without juridical reason.

DAMAGES SUFFERED BY PETITIONER

2.25 The Respondents are civilly responsible for damages suffered by the Petitioner as a result of the deficiencies in the Solution manufactured and put into the stream of commerce by the Respondents. These damages include, *inter alia*, the following:

a) cost of purchase of the Solution;
b) cost of replacement of Solution with other brands of contact lens solutions;
c) cost of return of Solution as part of Respondents' recall;

d) costs of medical care and medication incurred;

e) moral prejudice for pain and suffering experienced by Group Members;

f) moral prejudice for anxiety and worry because of increased possibility of contracting AK or other eye ailments.

3. **The facts giving rise to personal claims by each of the Group Members against the Respondent are:**

3.1 The claims of each Group Member are founded on the same general facts as the Petitioner's claims as pertains to the acts and omissions of the Respondents regarding the safety of the Solution, whether the Solution was fit for the purpose for which it was produced and sold, whether the Solution had a latent defect, whether the Solution has a safety defect, and whether the Respondents were negligent in any aspect of bringing the Solution into the stream of commerce.

3.2 Each Group Member has facts particular to his or her claim concerning the issues of the modalities of acquisition of the Solution, and the effects suffered by Group Members as a result of acquisition and/or use of the Solution.

4. **The composition of the Group makes the application of articles 59 or 67 difficult or impractical because:**

4.1 The members of the Group are so numerous that joinder of all members is impracticable. While the exact number of Group members is unknown to the Petitioner at the present time, there are thousands of potential Group Members who have purchased the Solution up until May 25, 2007, date of the recall.

4.2 The potential number of Group members can be estimated from records kept by the Respondents and from sales statistics provided by retailers. The potential Group

members are widely dispersed geographically in the province of Québec.

5. **The identical, similar, or related questions of law or fact between each Group Member and the Respondents which the Petitioner wishes to have decided by the class action are:**

5.1 Are Group Members "consumers" per Article 1e) of the Québec *Consumer Protection Act*?

5.2 Was the Solution fit for the purpose for which it was intended, per Article 37 of the *Consumer Protection Act*?

5.3 Did the Solution have a latent defect, per Article 1726 of the Québec Civil Code?

5.4 Did the Solution have a safety defect, as defined by Article 1469 of the Québec Civil Code?

5.5 Were the Respondents negligent in any aspect of the testing, manufacture, or distribution of the Solution?

5.6 Did using the Solution result in prejudice, losses, injuries, or other damages to the Petitioner and Group Members?

5.7 Are the Respondents civilly responsible for physical damage suffered by Group Members because of use of the Solution ?

5.8 What are the categories of damages suffered by Group Members?

5.9 Are the Respondents liable to pay exemplary damages as a result of its acts or

omissions?

6. **The question of law or fact which is specific to each Group Member is:**

The category of damages suffered by each Group Member and the amount of damages owed to each Group Member.

7. **It is expedient that the bringing of a class action for the benefit of Group Members be authorized as:**

7.1 The majority of the issues to be dealt with are issues common to every Group Member.

7.2 The relatively small claim of individual Group Members might discourage them from pursing this matter in any other forum.

7.3 The high number of potential litigants could lead to a multitude of individual legal actions in different jurisdictions, possibly leading to contradictory judgements on questions of law and fact.

8. **The nature of recourse which the Petitioner wishes to exercise on behalf of the Group Members is:**

An action in civil responsibility against the Respondents based on deficiencies in the quality and safety of Complete® MoisturePlus™ contact lens solution manufactured and/or distributed by the Respondents and acts and/or omissions of the Respondents during planning, testing, manufacture, or distribution of Complete® MoisturePlus™ contact lens solution.

9. **The conclusions sought by your Petitioner are:**

GRANT the Petitioner's action against the Respondents;

GRANT the relief requested against the Respondents and authorize the Petitioner to commence a class action;

CONDEMN the Respondents to compensate each of the Group Members for any material injury suffered or expense incurred by the Group Members as a result of the deficiencies in the Solution and any faults committed by the Respondents connected with these deficiencies, with interest payable at the legal rate as prescribed by law;

CONDEMN the Respondents to pay each of the Group Members a monetary amount for the moral injury suffered as a result of physical illness suffered by Group Members, with interest payable at the legal rate as prescribed by law;;

CONDEMN the Respondents to pay each of the Group Members a monetary amount for anxiety and distress caused by the increased possibility of suffering eye illness or disease as a result of using the Solution.

CONDEMN the Respondents to pay exemplary damages;

CONDEMN the Respondents to any further relief as the Court finds appropriate;

THE WHOLE with costs, including the costs of all exhibits, expert reports and testimony, and publication of notices.

10. **Petitioner requests that she be ascribed the status of Representative for the following reasons:**

She is a Group Member. She is well informed of the facts initiating this action. She has the required time, determination, and energy to bring this matter to a conclusion. She collaborates fully with her lawyers, responds diligently and intelligently to requests her attorneys make and comprehends the nature of the class action proceeding. She is not in a conflict of interest with other Group Members.

11. **Petitioners proposes that the class action be brought before the Superior Court of the district of Montréal for the following reasons:**

11.1 The Respondents conduct business and sold the Solution in numerous business establishments in the Judicial District of Montréal, Québec.

11.2 The Petitioner resides near the Judicial District of Montréal.

11.3 The Petitioner suffered damage in the Judicial District of Montréal.

WHEREFORE Petitioners PRAYS

THAT the present motion be granted;

THAT the bringing of a class action be authorized as follows:

An action in civil responsibility against the Respondents based on deficiencies in the quality and safety of Complete® MoisturePlus™ contact lens solution manufactured and/or distributed by the Respondents and acts and/or omissions of the Respondents during planning, testing, manufacture, or distribution of Complete® MoisturePlus™ contact lens solution.

THAT the status of Representative be granted to the Petitioner for bringing the said class action for the benefit of the following Group of persons, namely:

All persons in the province of Québec who purchased, acquired, or used the product Complete® MoisturePlus™ contact lens solution manufactured, distributed or ultimately offered for sale to the public by the Respondents, and which was subject to the product recall announced by the Respondents on May 25, 2007, and any updates to that product recall.

THAT the principal questions of law and fact to be dealt with collectively be identified as follows:

1. Are Group Members "consumers" per Article 1e) of the Québec *Consumer Protection Act*?
2. Was the Solution fit for the purpose for which it was intended, per Article 37 of the *Consumer Protection Act*?
3. Did the Solution have a latent defect, per Article 1726 of the Québec Civil Code?
4. Did the Solution have a safety defect, as defined by Article 1469 of the Québec Civil Code?
5. Were the Respondents negligent in any aspect of the testing, manufacture, or distribution of the Solution?
6. Did using the Solution result in prejudice, losses, injuries, or other damages to the Petitioner and Group Members?
7. Are the Respondents civilly responsible for physical damage suffered by Group Members because of use of the Solution ?
8. What are the categories of damages suffered by Group Members?
9. Are the Respondents liable to pay exemplary damages as a result of its acts or omissions?

THAT the conclusions sought with relation to such questions be identified as follows:

GRANT the Petitioner's action against the Respondents;

GRANT the relief requested against the Respondents and authorize the Petitioner to commence a class action;

CONDEMN the Respondents to compensate each of the Group Members for any material injury suffered or expense incurred by the Group Members as a result of the deficiencies in the Solution and any faults of the Respondents connected with these deficiencies, with interest payable at the legal rate as prescribed by law;

CONDEMN the Respondents to pay each of the Group Members a monetary amount for the moral injury suffered as a result of physical illness suffered by Group Members, with interest payable at the legal rate as prescribed by law;

CONDEMN the Respondents to pay each of the Group Members a monetary amount for anxiety and distress caused by the increased possibility of suffering eye illness or disease as a result of using the Solution.

CONDEMN the Respondents to pay exemplary damages;

CONDEMN the Respondents to any further relief as the Court finds appropriate;

THE WHOLE with costs, including the costs of all exhibits, expert reports and testimony, and publication of notices.

THAT it be declared that any Group Member who has not requested his exclusion from the Group be bound by any judgment to be rendered on the class action, in accordance with law;

THAT the delay for exclusion be fixed at ninety (90) days from notice to Members and

that at the expiry of such delay, the Members of the Group who have not requested exclusion be bound by any such judgment;

THAT it be ordered that a Notice to Members be published in the following manner:

Publication once in each of the following daily newspapers:
La Presse, Le Journal de Montréal, The Montreal Gazette;
Publication of the Notice to the Members on Respondents' websites.
Publication on the website of Petitioner's legal counsel.

THAT the record be referred to the Chief Justice so that he may fix the district in which the class action is to be brought and the judge before whom it will be heard. That the Clerk of this Court be ordered, upon receiving the decision of the Chief Justice, in the event that the class action be brought in another district, to transmit the present record to the clerk of the designated district.

Date of Issuance: April 8 , 2008

Merchant Law Group LLP

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Attorneys for Petitioners

No. 500-06-000430-088

SUPERIOR COURT
(CLASS ACTION))

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SOPHIE LAVOIE

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ADVANCED MEDICAL OPTICS, INC. and AMO CANADA COMPANY

MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION AND TO OBTAIN THE STATUS OF REPRESENTATIVE

BC3841

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