

CANADA

(Class Action)
SUPERIOR COURT

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

A. CHARLES

NO: 500-06-000609-129

Petitioner

-vs.-

BOIRON CANADA INC., legal person
duly constituted, having its principal
place of business at 1300 René-
Descartes, City of Saint-Bruno de
Montarville, Province of Quebec, J3V
0B7

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 Oscillococcinum and Children Oscillococcinum (together "Oscillo"), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased Oscillococcinum and Children Oscillococcinum (together “Oscillo”), or any other group to be determined by the Court;
2. “Oscillo” is the brand name for a natural health product that is purported to be a homeopathic remedy for the treatment of cold and flu symptoms. Other variants of the name include, but are not limited to, “Oscillococcinum”, “Oscilla[®]”, “Oscillococcinum Children”, and “Oscillo[®] Children”;
 3. Oscillo was falsely marketed to have the ability to cure the flu with its purported active ingredient *Anas Barbarie Hepatis et Codis extractum*, more particularly known as autolysate of the liver and heart of the duck *anas barbariae*;
 4. As set out below, Oscillo is nothing more than a placebo pill that is comprised of sugar (85% sucrose and 15% lactose);
 5. By reason of their actions and omissions, the Respondent induced consumers into purchasing the Oscillo product that does not live up to its promised results, thereby causing Petitioners and the members of the class to suffer economic damages, which they are entitled to claim;

B) The Respondent

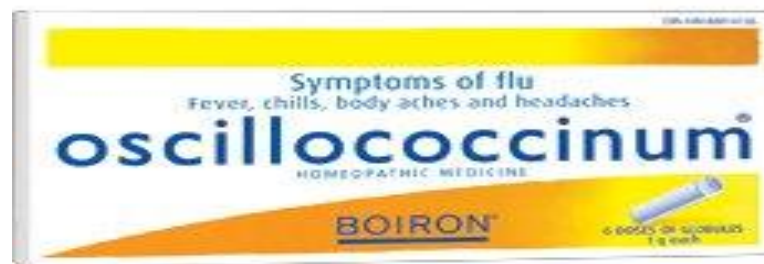
6. Respondent Boiron Canada Inc. (“Boiron”) is a federally incorporated Canadian company whose head office is in Saint-Bruno de Montarville, Quebec, the whole as appears more fully from a copy of the Respondent’s report from the *Registre des entreprises*, produced herein as **Exhibit R-1**;
7. Respondent is responsible for developing and marketing of Oscillo throughout Canada, including the Province of Quebec;
8. Respondent presumably controls their distribution channels, advertising campaigns, and labeling decisions related to Oscillo in Canada from their head office in the province of Quebec;
9. Oscillo’s labeling states the company’s contact information as “Boiron Canada Inc., 816 boul. Guimond, Longueuil, Quebec, J4G 1T5, Canada”;

C) The Situation

10. The Public Health Agency of Canada estimates that as many as 8000 Canadians die of influenza and its complications annually, depending on the severity of the season, the whole as appears more fully from a copy of the

report from the Public Health Agency of Canada, produced herein as **Exhibit R-2**;

11. In April 2009, the virulent pandemic colloquially known as “swine flu” or “H1N1” spread fear across North America. In June 2009, the World Health Organization declared the outbreak to be a pandemic. Since then, flu outbreaks have been relatively less devastating, but the public’s fear of flu infection has fueled the emergence of various alternative medicines, including homeopathic “remedies” such as Oscillo;
12. Respondent Boiron’s parent company, Boiron Inc., a French company, has an operating presence in 59 countries worldwide. It is the largest manufacturer of homeopathic products in the world. It is a \$730 million public company with 4,000 employees in more than 80 countries;
13. The Respondent has taken advantage of the widespread nature of the flu and the public’s fear of it by making various health claims about the purported efficacy characteristics of Oscillo in order to drive enormous sales of the these products. As an example, the front of the product’s packaging places in bold letters the name of the product – Oscillococcinum – directly below the statements “Fever”, “Chills”, “Body Aches”, and “Headaches”, as illustrated below;



14. The Respondent claims that “four clinical studies, including two which have been published in peer-reviewed journals, show that Oscillo reduces the severity and duration of flu-like symptoms such as feeling run down, headache, body aches, chills and fever”, and that Oscillo “nips symptoms in the bud” with “clear improvement” and even “complete resolution within 48 hours”, the whole as appears more fully from a copy of the Respondent’s website www.oscillo.com, produced herein as **Exhibit R-3**;

15. Boiron advertises Oscillo as a treatment and cure for the symptoms of seasonal flu, also known as the common cold, by indicating that “at the first sign of flu symptoms, take OSCILLO®!” and that “OSCILLO® is recommended by Graham Rynbend, head athletic therapist for the Montreal Canadiens”, the whole as appears more fully from a copy of the Respondent’s website www.boiron.ca, produced herein as **Exhibit R-4**;

16. The product labeling of Oscillococcinum states:

“Nature’s #1 Flu medicine

SYMPTOMS OF FLU

Fever, Chills, Body Aches and Pains

INDICATIONS:

For relief of symptoms of flu such as fever, chills, body aches and pains.

DIRECTIONS

At the onset of flu like symptoms, take one dose and repeat for 2 more doses at 6 hour intervals (3 doses total)

Established flu symptoms, take one dose morning and evening for 3 days. One dose consists of the entire contents of one tube to dissolve in the mouth.

Will not cause drowsiness”

The whole as appears more fully from a copy of the product label, produced herein as **Exhibit R-5**. Oscillococcinum Children’s product label is produced herein as **Exhibit R-6**;

17. In fact, Oscillo is composed of nothing more than sugar pellets onto which minute quantities of water have been absorbed. Thus, Oscillo contains no active ingredients, and has no effect on flus, colds or their symptoms;

18. The purported active ingredient - an extract or preparation of the heart and liver of a duck – is not actually present in the sugar that is sold to consumers due to enormous dilutions used in the Oscillo preparations;

“Since 1925, Oscillococcinum has been prepared as follows. Into a one litre bottle, a mixture of pancreatic juice and glucose is poured. Next a Canard de Barbarie is decapitated and 35 grams of its liver and 15 grams of its heart are put into the bottle... After 40 days in the sterile bottle, liver and heart autolyse (disintegrate) into a kind of goo, which is then "potentized" with the Korsakov method.... Oscillococcinum's manufacturer (Boiron) uses

"ultrapure water" from the first step on. Oscillocochinum is designated as "200K"—which means that the original amount is subjected to 200 Korsakov dilutions—and the resulting fluid is used to moisten small 5 milligram balls of milk sugar. Some packages have been labeled "200CK." ("C" is the abbreviation for centesimal, which means 1-to-100 dilution, and "CK" stands for "centesimal Korsakovian.") Other packages have been labeled "200C," which does not specify which dilution method was used".

The whole as appears more fully from a copy of the article entitled "The True Story of Oscillocochinum" dated August 27th 2003, produced herein as **Exhibit R-7**;

19. At the stupendously high dilutions used to prepare the Oscillo product, it can have no effect of any kind in humans because the odds are astronomically high that not even a single molecule derived from the original "extract" could be present in the solution used to soak the tiny balls of lactose mixed with sucrose which constitute the product sold to consumers;
20. Even if this purported active ingredient were present in any significant way, it has no known impact on the human body whatsoever and it is nothing more than Muscovy Duck Liver and Heart, which French cooks use to prepare duck breast;
21. The active ingredient, *Anas Barbariae Hepatis et Cordis Extractum*, is neither active in combatting the flu nor is it actually an ingredient in the final product;
22. The Respondent is fully aware that there is no active ingredient in Oscillo stating "of course its safe. There's nothing in it", the whole as appears more fully from a copy of the article entitled "Flu Symptoms? Try Duck" dated February 9th 1997, produced herein as **Exhibit R-8**;
23. Due to the Respondent's failure to inform consumers of the truth regarding Oscillo and its purported active ingredient, consumers are unknowingly spending millions of dollars every year while receiving no results;
24. Given that a significant factor in a consumer's decision to purchase a flu remedy is the presence of an effective active ingredient, the Respondent's misrepresentations and omissions of material fact induced consumers to purchase the product;
25. Boiron utilized false claims regarding the alleged presence of the active ingredient of Oscillo to persuade consumers to believe that it would significantly reduce, if not completely cure, their flu symptoms;



26. The advertisements and representations made by the Respondent as set forth herein were, and are, 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;
27. The Respondent's false and misleading representations allowed it to reap millions of dollars of profit at the expense of the consumers it has misled into believing that the homeopathic "remedy" Oscillo has the ability to cure the common cold;

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

28. Petitioner purchased Oscillococcinum and Children Oscillococcinum during the past year from Jean Coutu at 3347 Boulevard des Sources, in Dollard-des-Ormeaux, Quebec for approximately \$15.49 plus taxes each;
29. Petitioner believed, after reading the Respondent's labeling, that the products would help herself and her child, who was 5 at the time, to fight the flu and relieve their symptoms which included fever, chills, body aches and pains;
30. Petitioner and her child used the product as directed, but it did not live up to its promised results, having no noticeable effect on their flu symptoms;
31. Petitioner has since discovered that the ingredients in Oscillococcinum and Oscillococcinum Children have no proven health benefit and that these ingredients are so diluted that they are not even present in the final product;
32. Petitioner has since discovered, while researching online, that at least two (2) class actions were filed in the United States for this same product due to the false advertising relating to the presence of an active ingredient as well as the ability to provide any health benefit whatsoever, the whole as appears more fully from a copy of said Class Action Complaints, produced herein *en liasse* as **Exhibit R-9**;
33. In consequence, Petitioner feels that she has been misled by Respondent Boiron and that had she known the true facts, the Petitioner would not have purchased the Oscillo products;
34. Petitioner's damages are a direct and proximate result of the Respondent's conduct and the company's false and misleading advertising;
35. 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

36. Every member of the class has purchased an Oscillo product believing that it contained an active ingredient that would combat their flu symptoms effectively;
37. The class members were, therefore, induced into error by the Respondent's false and misleading advertising;
38. Had the Respondent disclosed the truth about Oscillo, that the active ingredient was neither present nor medically effective, reasonable consumers would not have purchased the product;
39. Each member of the class is justified in claiming at least one or more of the following as damages:
 - a. The purchase price of the product;
 - b. Punitive damages;
40. Respondent engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from class members;
41. 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
42. Petitioner is unaware of the specific number of persons who purchased Oscillo products, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
43. Class members are numerous and are scattered across the entire province and country;
44. 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;

45. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgments on questions of fact and law that are similar or related to all members of the class;
 46. 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;
 47. 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
48. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
 49. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondent's misconduct;
 50. 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 Oscillo products?
 - b) Is the Respondent liable to the class members for reimbursement of the purchase price of the Oscillo products 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?

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

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

52. 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;

53. 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 their 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

54. Petitioner is a member of the class;
55. 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 her attorneys;
56. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;
57. 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;
58. 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;
59. 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;
60. Petitioner understands the nature of the action;
61. 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

62. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;
63. The Petitioner's attorneys practice their profession in the judicial district of Montreal;
64. The Respondent's head office is in the judicial district of Montreal;

65. 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 Oscillococcinum and Children Oscillococcinum (together “Oscillo”), or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who have purchased Oscillococcinum and Children Oscillococcinum (together “Oscillo”), 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 Oscillo products?
- b) Is the Respondent liable to the class members for reimbursement of the purchase price of the Oscillo products 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 their unfair, false, misleading, and/or deceptive conduct;

DECLARE the Defendant solidarily 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 judgment 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 judgment 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 judgment 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 purchasers of Boiron Oscillo products";

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, April 13, 2012

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for the Petitioner

NOTICE OF PRESENTATION

AND: **BOIRON CANADA INC.**
1300 René-Descartes,
Saint-Bruno de Montarville, Quebec
J3V 0B7

TAKE NOTICE that the present motion will be presentable for adjudication before The Superior Court, at the Palais de Justice in Montreal, located at 1 Notre Dame East (Quebec, Canada), in **room 2.16** on the **29th day of June, 2012** at **9h00** in the morning, or as soon as the Court so decides.

Montreal, April 13, 2012

(S) Jeff Orenstein

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

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

(Class Action)
SUPERIOR COURT

NO: 500-06-000609-129

A. CHARLES

Petitioner

-vs.-

BOIRON CANADA INC.

Respondent

NOTICE OF DISCLOSURE OF EXHIBITS

TAKE NOTICE that the Petitioner intends producing the following exhibits at the hearing:

- R-1: Copy of an extract from the *Registre des enterprise* for Respondent Boiron Inc.;
- R-2: Copy of extracts from the Public Health Agency of Canada's website at <http://www.phac-aspc.gc.ca/influenza/>;
- R-3: Copy of extracts from the Respondent's website at www.oscillo.com;
- R-4: Copy of extracts from the Respondent's website at www.boiron.ca;
- R-5: Copy of the Oscillococcinum product label;
- R-6: Copy of the Oscillococcinum Children product label;
- R-7: Copy of the Homeowatch magazine article entitled "The True Story of Oscillococcinum" dated August 27th 2003;
- R-8: Copy of the U.S. News & World Report magazine article entitled "Flu Symptoms? Try Duck" dated February 9th 1997;
- R-9: Copy of the USA Class Action Complaints;



Montreal, April 13, 2012

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for the Petitioner