

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000597-126

DATE: January 30, 2013

BY: THE HONOURABLE CHANTAL CORRIVEAU, J.S.C.

GIANNI DEL ZOPPO

Petitioner

v.

ALL MARKET INC.

Respondent

JUDGMENT

THE CONTEXT

[1] On February 28, 2012, the Petitioner filed a Motion to Authorize the Bringing of a Class Action & to Ascribe the Status of Representative (the "Motion to Authorize") against the Respondent on behalf of the following class:

"All residents in Canada who have purchased VITA COCO[®] coconut water".

[2] The Petitioner was seeking to bring an action in damages, an injunction, and an action in exemplary damages against the Respondent pursuant to the *Civil Code of Quebec*, R.S.Q. 1991, c. 64, and to the *Consumer Protection Act* (Quebec), R.S.Q., c. P-40.1.

[3] On June 21, 2012, following negotiations between counsel for the Parties, the Petitioner and the Respondent reached a settlement agreement (the "Settlement Agreement") to settle all claims asserted in or related to the present Class Action, without any admission of liability by the Respondent and for the purpose of resolving the dispute between them.

[4] The Settlement Agreement applies to persons who are members of the following class:

"All Persons residing in Canada who have purchased in Canada between February 28, 2009 and September 1, 2012, Vita Coco[®] coconut water"

(the "Settlement Class")

Excluded from the Class are all Persons who timely and validly request exclusion from the Class pursuant to the Pre-Approval Notice disseminated and published in accordance with the Approval Order.

[5] The following is a summary of the key terms of the Settlement Agreement:

- A. According to the figures provided by the Respondent, if all eligible Class Members claim the compensation to which they are entitled, the total amount of compensation will be \$1,000,000. Each qualifying Class Member will receive monetary compensation in an amount between \$6.00 and \$25.00;
- B. The Respondent agrees to modify the labels, advertising and communications relating to Vita Coco[®] coconut water sold in Canada, beginning at the latest on September 1, 2012;
- C. In addition, the Respondent has agreed to pay the following amounts:
 - (i) Fees and disbursements of Class Counsel, in the amount of \$115,000 plus applicable taxes;
 - (ii) The costs of publication of the notice of settlement and the costs of maintaining a website;
 - (iii) The shipping, by regular mail, of the monetary compensation to the eligible Settlement Class Members;
 - (iv) An amount of \$500 for the Petitioner for the time and effort devoted to the case;
- D. The benefits to be provided to eligible Settlement Class Members shall be as follows:
 - (i) Where the claimant submits a claim with an adequate proof of purchase – they will receive a cash refund in the amount of the purchase(s) up to a maximum of \$25.00;

- (ii) Where the claimant submits a claim with a solemn affirmation, but without physical proof – they will receive a cash payment of \$6.00;
- E. The Respondent shall be the Claims Administrator;
- F. In addition, the Settlement Agreement includes a process to submit to this Court any dispute arising out of the claims process, as described in paragraph 25 thereof;
- G. The Settlement Agreement also provides that the Respondent retain a percentage of the amounts payable to members of the group residing in Quebec for the benefit of the *Fonds d'aide aux recours collectifs* (the "Fonds d'aide") in conformity with Article 1(3)(a) of the *Regulation respecting the percentage withheld by the Fonds d'aide aux recours collectifs* (R.R.Q., c R-2.1, r. 2);
- H. In order to submit a claim, eligible members need only complete and submit the claim form attached as Schedule A of the Settlement Agreement, make a solemn declaration and, if applicable, attach a proof of purchase;
- I. The claim form will be made available to Members of the Group on the website for this purpose at <https://classaction.vitacoco.com>. In addition, a copy will be available on Petitioner's attorneys website at www.clg.org and can also be mailed upon request;
- J. In addition, in accordance with paragraph 34 of the Settlement Agreement, and this Court's approval of the publication of the Pre-Approval Notice (Schedule B), notice was effected on December 15, 2012 in the newspapers *La Presse* and *The Globe & Mail*, as well as, through an online campaign on the Respondent's Facebook page and company website, by using Google Adwords, and also on the Petitioner's attorneys' website.

AUTHORIZATION OF THE CLASS ACTION FOR SETTLEMENT PURPOSES

[6] The Respondent consents to the authorization of the present Motion as a class proceeding for settlement purposes only, which consent shall be withdrawn should the Settlement Agreement not be approved by the Court.

[7] The Motion to Authorize dated February 28, 2012, the Exhibits in support thereof, and the Affidavit of the Petitioner dated January 9, 2013 provides sufficient grounds to satisfy each of the criteria as set forth at article 1003 C.C.P. on a *pro forma* basis and, therefore, the Court considers the reasons adequate and grants the Motion to Authorize.

- **Art. 1003 (a) C.C.P. – The recourses of the members raise identical, similar or related questions of law or fact**

[8] The original questions of fact and law put forward in the Motion for Authorization (see paragraph 44) are :

- a) Did the Respondent engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Vita Coco Products?
- b) Is the Respondent liable to the Class Members for reimbursement of the purchase price of Vita Coco Products or the additional premium in the purchase price as a result of their misconduct?
- c) Should an injunctive remedy be ordered to prohibit the Respondent from continuing to perpetrate its 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?

[9] These questions are common to all Class Members as they would have been exposed to the Respondent's advertising whether it be by website, point-of-sale, or product labelling.

[10] Specific examples of these representations are found in the Motion for Authorization at paragraphs 5, 6, 7, and 16 as well as, at Exhibits R-1, R-2, R-3, and R-6.

[11] The principal issue to be determined, that will advance all Class Members' claims, would be to decide if these advertisements and/or statements were false or misleading.

- **Art. 1003 (b) C.C.P. – The facts alleged seem to justify the conclusions sought**

[12] Assuming that these advertisements and/or statements were false or misleading, the legal argument that would be put forward would be that they were made in violation of articles 40, 219, 228, 239, 253, and 272 of the *Consumer Protection Act*, articles 1401, 1402, and 1407 of the *Civil Code of Quebec*, and sections 36 and 52 of the *Competition Act*.

[13] If the Court would have come to the conclusion that a legal violation had occurred, the damages claimed at paragraph 33 (i.e. purchase price and punitive damages) of the Motion for Authorization could be awarded in whole or in part.

- **Art. 1003 (c) C.C.P. –The composition of the group makes the application of article 59 or 67 difficult or impracticable**

[14] The allegations to this effect are found at paragraphs 36 to 41 of the Motion for Authorization.

[15] It seems self-evident from the facts of the present action that purchasers of Vita Coco coconut water are numerous and dispersed across the entire country.

- **Art. 1003 (d) C.C.P. – The member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately**

[16] The allegations to this effect are found at paragraphs 48 to 55 of the Motion for Authorization.

[17] The specifics of these allegations in the present case are clearly illustrated in the Affidavit of Gianni Del Zoppo dated January 9, 2012;

[18] Without repeating each and every one of the paragraphs of the affidavit, it is put forward that:

- a) Petitioner was instrumental in instituting this class action by discovering the existence of a class action and subsequently a settlement entailing consumer refunds related to the same issue in the United States, conducting further internet research, speaking to people in his inner circle to satisfy himself that others felt misled, and engaging counsel with experience in consumer class actions;
- b) Petitioner provided his attorneys with relevant information and instructed them to proceed with the institution of the present cases;
- c) Petitioner made sure that the Class Members would be kept up-to-date through his attorneys' website;
- d) Petitioner participated in the settlement negotiations and provided input to his attorneys;
- e) Petitioner has a good understanding of what his class action is about and what the settlement provides to Class Members ;
- f) Petitioner has performed his responsibilities as class representative and will continue to do so;

- g) Petitioner has always acted in the best interests of the proposed Class Members;
- h) Petitioner has not shown any signs of a possible conflict of interest between himself and the proposed Class Members.

APPROVAL OF THE SETTLEMENT AGREEMENT

[19] The Court is of the opinion that the Settlement Agreement is fair, reasonable and in the best interests of the Class Members for the following reasons.

[20] In reaching this conclusion Court has analyzed the guiding principles given by the jurisprudence¹ for determining whether to approve a settlement, namely:

1. les probabilités de succès du recours collectif;
2. l'importance et la nature de la preuve administrée;
3. les termes et conditions de la transaction (c'est-à-dire, les avantages et les inconvénients pour les membres);
4. la recommandation des avocats et leur expérience;
5. le coût des dépenses futures et la durée probable du litige;
6. la recommandation d'une tierce personne neutre, le cas échéant;
7. le nombre et la nature des objections à la transaction;
8. la bonne foi des parties;
9. l'absence de collusion.

- **The Probability of Success**

[21] While the Petitioner maintains that his action is well-founded, the Respondent vigorously denies his claims and allegations.

[22] It is clear that the Parties would have entered into a contradictory debate between experts as to the purported benefits of Vita Coco coconut water, as well as to the accuracy of the product labelling.

¹ *Union des consommateurs c. Banque Nationale du Canada*, 2012 QCCS 6388; *Sigouin c. Merck & Co. Inc.*, 2012 QCCS 2014.

- **The Amount and Nature of Discovery**

[23] The Petitioner's attorneys were given access to and reviewed the Respondent's sales figures in Canada, the U.S. legal proceedings and subsequent settlement agreement, the new labelling for Vita Coco coconut water, and other relevant elements.

- **The Terms and Conditions of the Settlement Agreement**

[24] The Settlement includes the following benefits:

- a) There is no maximum amount payable to Class Members as a whole. This means that all persons that want to receive compensation under the settlement agreement will be able to do so and will not see their claims reduced (i.e. such as a maximum with a prorata reduction);
- b) Cash refunds (as opposed to vouchers). The amounts are close to the original sale price of the product;
- c) There is no need for invoices to claim compensation in the amount of \$6.00. A claimant can claim up to a maximum of \$25 with proof of purchase;
- d) The mechanism to make a claim is fast and easy, as the claim form can be submitted online from a specific website created by the Respondent;
- e) The benefits to Class Members is substantially similar to those provided for in the U.S. settlement agreement²;
- f) The claims administrator's website is bilingual;
- g) The claims administrator's phone number will serve Class Members with questions in both official languages.

- **The Recommendation of Experienced Counsel**

[25] Consumer Law Group Inc., which has significant expertise in the area of consumer class actions, has recommended the settlement.

- **The Future Expenses and the Probable Length of the Litigation**

[26] If the case were to proceed in an adversarial fashion, there would be extensive expert costs.

² *Stacey B. Fishbein, et al. v. All Market Inc. d/b/a Vita Coco*, Case No. 11-CIV-5580 (JPO), in the United States District Court, Southern District of New York.

[27] In addition, it is safe to say that the present action would take several years to be decided on the merits and an appeal would certainly not be unusual, causing extra delays.

[28] The Class Members are better off receiving compensation today.

- **The Number and Nature of any Objectors**

[29] No objections were made.

- **The Good Faith of the Parties and the Absence of Collusion**

[30] The settlement was the product of adversarial, arm's length negotiations over the course of many months.

APPROVAL OF CLASS COUNSEL FEES

[31] The Respondent has agreed to pay class counsel fees (see paragraphs 40 and 41), as well as an incentive award to the Petitioner (see paragraph 17) pursuant to the Settlement Agreement. These amounts not only include the work that has been accomplished to date, but also the additional time that will be needed to complete the implementation of the settlement. For example, Petitioner's counsel will continue to work with Respondent's counsel to oversee claims submissions and processing, pay claimants, and communicate with Class Members about the settlement.

[32] It should be noted that these amounts of class counsel fees and the incentive award are being paid by the Respondent over and above any compensation that Class Members will receive. It will not have any effect on or reduce Class Members' recovery in any way.

[33] The Court is of the opinion that the class counsel fees are justified in the circumstances for the reasons to follow.

[34] Given that no cap has been set on the payout to Class Members and given the sales of the product is approximately \$1 million, the potential for claims is significant.

[35] The mandate agreement with the Petitioner provides for a calculation of class counsel fees in excess of the agreed upon amount in the settlement agreement (i.e. the higher of 30% or a multiplier of 3.5). Therefore, the negotiated amount was a concession made to facilitate a settlement, in the interest of Class Members.

[36] The mandate agreement benefits from a presumption of validity. Where it is fair and reasonable to the members of the class and not contrary to the *Civil Code*, it should be respected.

[37] In addition the mandate agreement provides that neither the Petitioner nor the Class Members are responsible for any costs, legal fees, or disbursements should the proceeding not be successful. This means that the law firm has taken on a risk with no guarantee of compensation.

[38] Class counsel fees are also related to access to justice. There is a need to compensate lawyers properly who take on consumer files that would not ordinarily be undertaken by individual plaintiffs in order to ensure that there are attorneys willing to perform this type of work, which the Courts have said serves a social purpose.

[39] The law firm is specialized in class actions and has dedicated 122.50 hours to this file thus far, not including any work that will be performed to put the settlement into effect.

[40] The issue was important as it relates to holding companies liable for their advertising to consumers, whose individual claims are often for small sums of money. The work required a particular expertise which only a handful of law firms in Quebec possess.

[41] The result is a good one in that the settlement is beneficial to Class Members and was achieved relatively quickly.

POUR CES MOTIFS, LE TRIBUNAL :

[4] **ACCUEILLE** la requête;

[5] **AUTORISE** un recours collectif contre l'Intimée pour les fins d'un règlement hors cour;

[6] **ATTRIBUE** au Requérant le statut de représentant du groupe décrit comme suit :

«toute personne qui réside au Canada et qui a acheté au Canada entre le 28 février 2009 et le 1^{er} septembre 2012 de l'eau de noix de coco Vita Coco®. »

WHEREFORE, THE COURT:

[4] **GRANTS** the present motion;

[5] **AUTHORIZES** the bringing of a class action against the Respondent for the purposes of settlement;

[6] **ASCRIBES** to the Petitioner the status of representative of the group herein described as:

"all persons residing in Canada who have purchased in Canada between February 28, 2009 and September 1, 2012, Vita Coco® coconut water."

- [7] **DÉCLARE** que la Convention de règlement R-1 (incluant son préambule et ses Annexes) constitue une transaction au sens des articles 2631 et suivant du *Code civil du Québec*, obligeant toutes les parties et tous les Membres du recours collectif qui ne sont pas exclus;
- [7] **DECLARES** that the Settlement Agreement R-1 (including its Preamble and its Schedules) constitutes a transaction within the meaning of articles 2631 and following of the *Civil Code of Quebec*, binding all parties and all Class Members who are not excluded;
- [8] **DÉCLARE** que la Convention de règlement R-1 est valide, équitable et raisonnable, et qu'elle correspond au meilleur intérêt des Membres du Groupe, du Requérent et de L'Intimée;
- [8] **DECLARES** that the Settlement Agreement R-1, is valid, fair, reasonable and in the best interest of the Class Members, the Petitioner, and the Respondent;
- [9] **APPROUVE** la Convention de règlement R-1;
- [9] **APPROVES** the Settlement Agreement R-1;
- [10] **DÉCLARE** que l'ensemble de la Convention de règlement R-1 (incluant son Préambule et ses Annexes) fait partie intégrante du présent jugement;
- [10] **DECLARES** that the Settlement Agreement R-1 in its entirety (including its Preamble and its Schedules) is an integral part of this judgment;
- [11] **ORDONNE** aux parties et aux Membres du Groupe, sauf ceux exclus conformément à la Convention de règlement et au présent jugement, de se conformer à la Convention de règlement R-1;
- [11] **ORDERS** the parties and the Class Members, with the exception of those who are excluded in accordance with the terms and conditions of the Settlement Agreement and with this judgment, to conform to the Settlement Agreement R-1;
- [12] **APPROUVE** la forme et le contenu du Formulaire de réclamation et du Formulaire de demande d'exercice du droit d'exclusion, respectivement les Annexes A et D de la Convention de règlement R-1;
- [12] **APPROVES** the form and content of the Claim Form and Opt-Out Form, respectively as Schedules A and D of the Settlement Agreement R-1;
- [13] **ORDONNE** que chaque Membre du Groupe qui désire s'exclure de la Convention de règlement R-1 et ainsi ne pas être obligé par la Convention de règlement, soit tenu d'agir conformément avec la Convention de règlement et le Formulaire de demande d'exercice du droit d'exclusion (Annexe D de la Convention de règlement);
- [13] **ORDERS** that each Class Member who wishes to opt out of the Settlement Agreement R-1, and thus not be bound by the Settlement Agreement, has to do so in conformity with the Settlement Agreement and the Opt-Out Form (Schedule D of the Settlement Agreement);

[14] **DÉTERMINE** le calendrier relatif à l'administration de la Convention de règlement, à savoir :

- a) Échéance pour exercice du droit d'exclusion : le 15 mars, 2013;
- b) Échéance pour transmettre une réclamation conforme à la Convention de règlement : 60 jours calculés à partir de la date de l'approbation du règlement par la Cour supérieure du Québec.

[14] **DETERMINES** the schedule regarding the administration of the Settlement Agreement, namely:

- (a) The deadline for opting out of the Settlement Agreement: March 15, 2013;
- (b) The deadline to file a claim under the Settlement Agreement: 60 days from the date the Superior Court of Quebec has approved the Settlement Agreement.

[15] **DÉCLARE** que pour être valides, les Formulaires de réclamation doivent être remplis et transmis tel que stipulé à la Convention de règlement R-1;

[15] **DECLARES** that to be eligible, Claims Forms must be completed and submitted in the manner stipulated by the Settlement Agreement R-1;

[16] **ORDONNE** que les prélèvements du Fonds d'aide aux recours collectifs soient prélevés seulement sur chaque réclamation individuelle des membres résidents au Québec, telle que prévue à la Convention de règlement R-1, et être remis conformément à la *Loi sur le recours collectifs*, et *Le règlement sur le pourcentage prélevé par le Fonds d'aide aux recours collectifs*;

[16] **ORDERS** that the levies by the *Fonds d'aide aux recours collectifs* be collected only on each claim made by Quebec residents, as provided for in the Settlement Agreement R-1, and be remitted according to the *Loi sur le recours collectifs*, and the *Règlement sur le pourcentage prélevé par le Fonds d'aide aux recours collectifs*;

[17] **APPROUVE** le paiement forfaitaire de 500\$ au Requérent conformément à la Convention de règlement R-1;

[17] **APPROVES** the lump sum payment of \$500 to the Petitioner in accordance with the Settlement Agreement R-1;

[18] **APPROUVE** le versement par l'Intimée aux Procureurs-Requérent des honoraires extrajudiciaires et frais prévue à la Convention de règlement R-1;

[18] **APPROVES** the payment by the Respondent to Class Counsel of its extrajudicial fees and costs as provided for in the Settlement Agreement R-1;

[19] **RÉSERVE** le droit des parties de s'adresser au tribunal pour solutionner quelque litige découlant de la Convention de règlement R-1;

[19] **RESERVES** the right of parties to ask the Court to settle any dispute arising from the Settlement Agreement R-1;

[20] **LE TOUT**, sans frais.

[20] **THE WHOLE**, without costs.


CHANTAL CORRIVEAU, J.S.C.

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Date of hearing: January 15, 2013