

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000700-142

DATE: May 28, 2015

IN THE PRESENCE OF: THE HONOURABLE CHANTAL CORRIVEAU, J.S.C.

DEBBIE CORDA
Petitioner

v.

TODD CHRISTOPHER INTERNATIONAL, INC.

and

TODD CHRISTOPHER INTERNATIONAL LLC

and

VOGUE INTERNATIONAL LLC

Respondents

JUDGMENT

Introduction

[1] On July 24, 2014, 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 Respondents on behalf of the following class:

All residents in Canada who have purchased Organix Products or any other group to be determined by the Court;

Alternately (or as a subclass)

All residents in Quebec who have purchased Organix Products or any other group to be determined by the Court;

[2] The Motion to Authorize alleged, *inter alia*, that the Respondents Todd Christopher International Inc, Todd Christopher International LLC, and Vogue International LLC (collectively, "Vogue"), engaged in false and deceptive marketing practices, including, advertising, promotion, and labelling, associated with their Organix Products.

[3] Specifically, the Motion to Authorize alleged that the Respondents made misrepresentations that the Organix Products were organic, including the use of the product name "Organix", which was chosen to look like and to phonetically sound like the word "organics", when the products are composed almost entirely from ingredients that are not organic.

[4] On or about March 3, 2015, following negotiations between counsel for the Parties, the Petitioner and the Respondents reached a settlement agreement (the "Settlement Agreement") to settle all claims asserted against themselves in or related to the present Class Action.

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

The Settlement Class

All persons residing in Canada who purchased Organix Products between October 25, 2008 up to and including the date of the Approval Order.

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 Pre-Approval Order.

Settlement

[6] The Petitioner and the Respondents have agreed to the terms of the Settlement Agreement, subject to the approval of this Court, and without any admission of liability by the Respondents and for the purpose of resolving the dispute between the parties.

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

A. Direct Compensation

- i. Vogue will provide each Class Member who submits a qualifying Claim Form with \$4.00 for each Organix Product purchased during the Class Period, up to maximum of \$28.00;
- ii. Vogue shall provide payment to each Class Member providing such Compensation does not exceed the Settlement Cap of \$325,000. If providing each Class Member with such Compensation exceeds this Settlement Cap, each Class Members' Compensation shall be reduced on a *pro rata* basis;

B. Indirect Compensation

- i. Vogue has also agreed to take reasonable efforts to refrain from the following conduct:
 - a) On and after July 1, 2015, Vogue shall not manufacture or cause to be manufactured any hair care or skin care product using the Organix name unless such product contains at least seventy percent (70%) organically produced ingredients, excluding water and salt; and
 - b) Within thirty (30) days following the Effective Date which is 60 days after the Approval Order has been signed and entered and no appeals have been filed), Vogue shall not use the word "organic" to promote the sale of any hair care or skin care product using the Organix name unless such product contains at least seventy percent (70%) organically produced ingredients, excluding water and salt;

C. The Respondents also have agreed to pay the following amounts:

- (a) all costs relating to notice dissemination;
- (b) all Claims Administration costs;
- (c) fees and disbursements of Class Counsel, in the amount of \$125,000.00 plus applicable taxes; and
- (d) an amount of \$1,500.00 to the Petitioner in consideration for the time and effort that she devoted to the case;

D. The Settlement Agreement provides that, with respect to Quebec residents only, the *Fonds d'aide aux recours collectifs* will be entitled to claim 2% of each Class Member's Compensation paid in money, as is provided for at s. 1(3) of the *Règlement sur le pourcentage prélevé par le Fonds d'aide aux recours collectifs*, R.R.Q., c. R-2.1, r. 2;

- E. The release for the Respondents includes and encompasses any and all claims related to the allegations of the Motion to Authorize, including past and future damages relating to the allegations contained in the Motion to Authorize, excluding bodily injury;
- F. The Claims Administrator is Borden Ladner Gervais LLP ("BLG"), whose function shall be to receive the claims and issue the payments to Class Members;
- G. In order to submit a Claim, eligible class members need to complete and submit through the Settlement Website, by email or by regular mail a Claim Form (Schedule A of the present Agreement), whereby the eligible class members must make a solemn declaration (not a sworn affidavit);
- H. The Claim Period runs until July 20, 2015;
- I. The Opt-Out Deadline expires on June 19, 2015;

Class Notice

[8] In accordance with the Settlement Agreement and this Court's judgment approving the Notice as well as the method of dissemination, notice was effected in the following manner:

- (a) On April 10, 2015, in the form of an approximately 1/3 of a page advertisement in the first section of the newspaper *La Presse*, in the version(s) that are distributed in Montreal and any other edition available in the province of Quebec and elsewhere in Canada;
- (b) On April 17, 2015, in the form of an approximately 1/3 of a page advertisement in the first section of the nationally distributed edition of the newspaper *The Globe & Mail*;
- (c) On April 10, 2015, in a Canadian Newswire (CNW) news release in both English and French;
- (d) On April 2, 2015, in a posting on Class Counsel's website, www.clg.org, and;
- (e) A settlement website was established at www.haircaresettlement.ca (the "Settlement Website") where the Notice was posted and any and all future information will be posted.

[9] Also in accordance with the Settlement Agreement, the present Judgment will be posted promptly after the Approval Order on the Settlement Website.

[10] All of the materials disseminated and made available to Class Members, as well as any and all of the information to be disseminated following the Approval Order, are in French and in English.

Authorization

[11] The Respondents consent 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.

[12] Even where the Respondents consent to the authorization of a class action for settlement purposes only, the criteria set forth at article 1003 C.C.P. must still be reviewed and met¹.

[13] In light of the evidence, the Motion to Authorize dated July 24, 2014, the Exhibits in support and the Affidavit of the Petitioner dated May 19, 2015 justify granting the present Motion in accordance with the criteria set forth at article 1003 C.C.P.

[14] The recourses of the class members raise identical, similar or related questions of law or fact, namely²:

- a) Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of the Organix Products?
- b) Are the Respondents liable to the class members for reimbursement of the purchase price of the Organix Products as a result of their misconduct?
- c) Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- d) Are the Respondents responsible to pay punitive damages to class members and in what amount?

¹ *Vallée c. Hyundai Auto Canada Corp.*, 2014 QCCS 3778; *Schachter c. Toyota Canada inc.*, 2014 QCCS 802; *Markus c. Reebok Canada inc.*, 2012 QCCS 3562; *Richard c. Volkswagen Group Canada inc.*, 2012 QCCS 5534; *Sonego c. Danone inc.*, 2013 QCCS 2616.

² *Cunning c. Fitflop Ltd.*, 2014 QCCS 586.

[15] The facts alleged seem to justify the conclusions sought³.

[16] The composition of the group makes the application of article 59 or 67 C.C.P. difficult or impractical because:

- a) The thousands of potential Group Members are widely dispersed geographically across Canada;
- b) Given the costs and risks inherent in an action before the Courts, many people will hesitate to institute an individual action against the Respondents; and
- c) Individual litigation of the factual and legal issues raised would increase delay and expenses to all parties and to the Court system.

[17] The Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the Class Members since the Petitioner:

- a) Is a Class Member;
- b) Was instrumental in instituting this class action by discovering the existence of the CEH Complaint, the U.S. class action and the settlements related to the same issue as the case at bar, researching further on the internet, and engaging counsel with extensive experience in consumer class actions;
- c) Provided her attorneys with relevant information and instructed them to proceed with the present proceedings;
- d) Made sure that the Class Members would be kept up-to-date through her attorneys' well-designed and easily-navigable website;;
- e) Participated in the settlement negotiations by provided input to her attorneys, ultimately instructing her attorneys to sign the Settlement Agreement;
- f) Has a good understanding of what this class action is about and what the settlement provides to Class Members;
- g) Has performed her responsibilities as the representative of the class and she will continue to do so insofar as the proposed settlement is concerned;

³ Articles 41, 215, 216, 218, 219, 220(a), 221(a), (c), (d) & (g) 228, 239(a), 253, 270, and 272 of the *Consumer Protection Act*, CQLR c P-40.1, articles 1401, 1402, 1407, 1457 of the *Civil Code of Québec*, LRQ, c C-1991 article 7 and 9(1) of the *Consumer Packaging and Labelling Act*, R.S.C. 1985, c C-38., and sections 36 and 52 of the *Competition Act*, R.S.C. 1985, c C-34.

- h) Has acted in the best interests of the Class Members;
- i) Has not indicated any conflict of interest with the Class Members.

Approval

[18] The Court approves the Settlement Agreement as fair, reasonable and in the best interests of the Class Members based on its analysis of the following factors as set out by the relevant case law, namely:

- les probabilités de succès du recours;
- l'importance et la nature de la preuve administrée;
- les termes et les conditions de la transaction;
- la recommandation des procureurs et leur expérience;
- le coût des dépenses futures et la durée probable du litige;
- la recommandation d'une tierce personne neutre, le cas échéant;
- le nombre et la nature des objections à la transaction;
- la bonne foi des parties;
- l'absence de collusion.⁴

[19] In particular, the Court finds that:

- i. No Class Member has objected;
- ii. The negotiations are deemed to have occurred at arm's-length;
- iii. The risk, expense, complexity and duration of further litigation weighs in favour of approval;

⁴ *Vallée c. Hyundai Auto Canada Corp.*, 2014 QCCS 3778; *Option Consommateurs c. Union canadienne (L'), compagnie d'assurances*, 2013 QCCS 5505; *Markus c. Reebok Canada inc.*, 2012 QCCS 3562; *Conseil pour la protection des malades c. CHSLD Manoir Trinité*, 2014 QCCS 2280; *Richard c. Volkswagen Group Canada inc.*, 2012 QCCS 5534; *Bouchard c. Abitibi-Consolidated Inc.*, (C.S.) Chicoutimi, dossier 150-06-000001-966, 15 juin 2004.

- iv. The amount offered in settlement is fair and worthy of approval, especially when weighing the benefits afforded to Class Members against the uncertainties and difficulties associated with obtaining authorization for merits purposes, the expense and length of time necessary to prosecute these proceedings through trial, the uncertainties of the outcome of the proceedings, and the fact that resolution of the class claims, whenever and however determined, would be subject to appellate review and the inherent delays associated therewith;
- v. The promises and commitments of the Parties under the terms of the Settlement Agreement, including the injunctive relief provisions contained therein, thus constitute fair value given in exchange for the releases of the Released Claims against the Released Parties; and
- vi. Class Counsel has extensive expertise in the area of class actions and is recommending the Settlement;

Fees

[20] The Court approves Class Counsel fees and disbursements as fair and reasonable based on its analysis of the following factors as set out in sections 3.08.01 to 3.08.03 of the Code of ethics of advocates⁵, particularly with a view to the objectives of class proceedings (i.e. access to justice, judicial economy, behaviour modification) and the risks assumed by Class Counsel⁶.

[21] Section 3.08.02 of the Code of ethics of advocates states:

3.08.02. The fees are fair and reasonable if they are warranted by the circumstances and correspond to the professional services rendered. In determining his fees, the advocate must in particular take the following factors into account:

- (a) experience;
- (b) the time devoted to the matter;
- (c) the difficulty of the question involved;
- (d) the importance of the matter;
- (e) the responsibility assumed;
- (f) the performance of unusual professional services or professional services requiring exceptional competence or celerity;
- (g) the result obtained;
- (h) the judicial and extrajudicial fees fixed in the tariffs.

⁵ RRQ, c. B-1, r. 1.

⁶ *Lavoie c. Régie de l'assurance maladie du Québec*, 2013 QCCS 866.

[22] In particular, the Court finds that:

- i) The Respondents have agreed to pay Class Counsel's fees in the amount requested, as appears from the Settlement Agreement;
- ii) No Settlement Class Member has objected to Class Counsel's fees. The Notice disseminated to Class Members stated that Class Counsel would be requesting Class Counsel fees;
- iii) The Mandate Agreement with the Petitioner provides that Class Counsel will receive the higher of 30% of the total value of the settlement or a multiplier of 3.5 times the total number of hours worked, plus disbursements and taxes. The fees and disbursements sought are less than those under the Mandate Agreement;
- iv) The action involves complex legal issues and, in the absence of a settlement, would involve lengthy proceedings with an uncertain resolution and possible appeals;
- v) Class Counsel assumed all of the financial risks associated with initiating, financing, and maintaining the litigation;
- vi) Class Counsel fees, at present, represent a 1.08 times multiplier on the actual time incurred, which is appropriate in the circumstances⁷;

[23] This Judgment is based upon the foregoing findings of fact and conclusions of law, which are supported by the substantial evidence presented by the Parties hereto and the Class Members, all of which the Court has considered and is in the record before the Court.

POUR CES MOTIFS, LE TRIBUNAL :

WHEREFORE, THE COURT:

[24] **ACCUEILLE** la présente requête;

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

[25] **ORDONNE** que, pour l'application de ce jugement, les définitions énoncées à la Convention de règlement, R-3, s'appliquent et y sont incorporées par renvoi;

[25] **ORDERS** that for the purposes of this judgment, the definitions contained in the Settlement Agreement, R-3, shall apply and are incorporated by reference;

[26] **AUTORISE** l'exercice de ce recours

[26] **AUTHORIZES** the bringing of a class

⁷ *Guilbert c. Sony BMG Musique (Canada) inc.*, 2007 QCCS 432; *Sony BMG Musique (Canada) inc. c. Guilbert*, 2009 QCCA 231; *Sonego c. Danone inc.*, 2013 QCCS 2616.

collectif contre les Intimées pour les fins d'un règlement hors cour seulement;

action against the Respondents for the purposes of settlement only;

[27] **ATTRIBUE** au requérant le statut de représentant du groupe ci-après décrit:

[27] **ASCribES** to the Petitioner the status of representative of the group herein described as:

«Toutes les personnes résidant au Canada qui ont acheté des produits de soins des cheveux et de la peau de marque Organix entre le 25 octobre 2008 et le 28 mai 2015 ».

"All persons residing in Canada who purchased Organix Products between October 25, 2008 and May 28, 2015".

[28] **DÉCLARE** que la Convention de règlement, R-3 (incluant son préambule et ses Annexes) (ci-après « la Convention de Règlement ») 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 se sont pas exclus en temps opportun;

[28] **DECLARES** that the Settlement Agreement, R-3 (including its Preamble and its Schedules) (hereinafter "the Settlement Agreement") 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 have not excluded themselves in a timely manner;

[29] **ORDONNE ET DÉCLARE** que, sauf disposition contraire dans le présent jugement, ou tels qu'ils peuvent être modifiés par celui-ci, les termes qui commencent par une majuscule dans ce document ont le sens qui leur est attribué dans la Convention de règlement, R-3;

[29] **ORDERS AND DECLARES** that, except as otherwise specified in, or as modified, by this Judgment, capitalized terms used herein shall have the meaning ascribed in the Settlement Agreement, R-3;

[30] **DÉCLARE** que la Convention de règlement, R-3, est valide, équitable et raisonnable, et qu'elle est dans le meilleur intérêt des Membres du Groupe, du Requéran et des Intimées;

[30] **DECLARES** that the Settlement Agreement, R-3, is valid, fair, reasonable and in the best interest of the Class Members, the Petitioner and the Respondents;

[31] **APPROUVE** la Convention de règlement, R-3;

[31] **APPROVES** the Settlement Agreement, R-3;

[32] **DÉCLARE** que la Convention de règlement, R-3, fait partie intégrale du présent jugement;

[32] **DECLARES** that the Settlement Agreement, R-3, is an integral part of this judgment;

[33] **ORDONNE** aux parties et aux Membres du Groupe, sauf ceux exclus conformément à la Convention de règlement et au présent jugement, de se conformer aux termes et conditions de la Convention de règlement, R-3;

[33] **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 abide by the terms and conditions of the Settlement Agreement, R-3;

[34] **APPROUVE** la forme et le contenu du

[34] **APPROVES** the form and content of the

Formulaire de réclamation et du Formulaire de demande d'exercice du droit d'exclusion, respectivement comme étant les Annexes A et C de la Convention de règlement, R-3;

Claim Form and Opt Out Form, respectively as Schedules A and C of the Settlement Agreement, R-3;

[35] **ORDONNE** que chaque membre du groupe qui désire s'exclure de la Convention de règlement, R-3, et, par conséquent, ne pas être lié par la Convention de règlement, soit tenu d'agir conformément à la Convention de règlement et au Formulaire de demande d'exercice du droit d'exclusion (Annexe C de la Convention de règlement, R-3);

[35] **ORDERS** that each Class Member who wishes to opt-out of the Settlement Agreement, R-3, and thus not be bound by the Settlement Agreement, must do so in conformity with the Settlement Agreement and the Opt Out Form (Schedule C of the Settlement Agreement, R-3);

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

[36] **APPROVES** the schedule regarding the administration of the Settlement Agreement, namely:

- a) L'échéance pour exercice du droit d'exclusion : le 19 juin 2015;
- b) L'échéance pour transmettre une réclamation conforme à la Convention de règlement : le 20 juillet 2015;

- (a) The deadline for opting out of the Settlement Agreement: June 19, 2015;
- (b) The deadline to file a claim under the Settlement Agreement: July 20, 2015;

[37] **DÉCLARE** que pour être valides, les Formulaires de réclamation doivent être remplis et soumis de la manière prévue à la Convention de règlement, R-3;

[37] **DECLARES** that to be eligible, Claims Forms must be completed and submitted in the manner stipulated by the Settlement Agreement, R-3;

[38] **ORDONNE** que les prélèvements par le Fonds d'aide aux recours collectifs soient effectués tel que prévue à la Convention de règlement, R-3, et soient remis conformément à la *Loi sur le recours collectifs*, et le *Règlement sur le pourcentage prélevé par le Fonds d'aide aux Recours collectifs*;

[38] **ORDERS** that the levies by the *Fonds d'aide aux recours collectifs* be collected as provided for in the Settlement Agreement, R-3, and remitted according to the *Loi sur le recours collectifs*, and the *Règlement sur le pourcentage prélevé par le Fonds d'aide aux recours collectifs*;

[39] **ORDONNE** que Borden Ladner Gervais LLP soit, par les présentes, nommé Administrateur des Réclamations aux fins du règlement;

[39] **ORDERS** that Borden Ladner Gervais LLP is hereby appointed as Claims Administrator for the settlement;

[40] **ORDONNE** que la Requérante se voit verser des honoraires de 1,500 \$ en reconnaissance de ses efforts déployés pour intenter l'Action en vue d'obtenir ce règlement;

[40] **ORDERS** that the Petitioner shall be paid an honorarium of \$1,500 in recognition of her efforts in prosecuting the Action through settlement;

[41] **APPROUVE** le versement aux Procureurs

[41] **APPROVES** the payment to Class

du Requérant des honoraires extrajudiciaires et frais tel que prévu à la Convention de règlement, R-3; Counsel of its extrajudicial fees and costs in the amount provided for in the Settlement Agreement, R-3;

[42] **ORDONNE** qu'un exemplaire du présent jugement soit affiché sur le site web de l'Administrateur des Réclamations à www.haircaresettlement.ca; [42] **ORDERS** that a copy of this Judgment shall be posted on Claims Administrator's website at www.haircaresettlement.ca;

[43] **DÉCLARE** que dans le cas de divergence entre les conclusions françaises et anglaises de ce jugement, la version française prévaudra; [43] **DECLARES** that in the case of any discrepancy between the French and English conclusions of this judgment, the French version will prevail;

[44] **RÉSERVE** le droit des parties de s'adresser au tribunal pour solutionner quelque litige que ce soit découlant de la Convention de règlement, R-3; [44] **RESERVE** the right of parties to ask the Court to settle any dispute arising from the Settlement Agreement, R-3;

LE TOUT, sans frais.

THE WHOLE, without costs.


CHANTAL CORRIVEAU, j.c.s.

Me Jeff Orenstein and Me Andrea Grass
CONSUMER LAW GROUP INC.
Attorneys for the Petitioners

Me Robert Charbonneau
BORDEN, LADNER, GERVAIS
Attorneys for the Respondents

Date of hearing: May 25, 2015