

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL
LOCALITY OF MONTRÉAL

SUPERIOR COURT
(CLASS ACTION)

No: 500-06-000935-185

KENNETH AITCHISON

Applicant

v.

TEVA CANADA LIMITED

and

SANDOZ CANADA INC.

and

PRO DOC LIMITEE

and

SANIS HEALTH INC.

and

SIVEM PHARMACEUTICALS ULC

Defendants

JOINT APPLICATION TO TEMPORARILY STAY THE CLASS ACTION
(Articles 18, 49 and 577 of the *Code of Civil Procedure* ("CCP")
and Article 3137 of the *Civil Code of Québec* ("CCQ"))

TO THE HONOURABLE JUSTICE CHANTAL TREMBLAY, J.S.C., THE PARTIES
JOINTLY AND RESPECTFULLY SUBMIT THE FOLLOWING:

I. INTRODUCTION

1. The parties jointly seek a stay of the *Application for Authorization to Institute a Class action and to Obtain the Status of Representative* which was filed on or

about July 16, 2018, by Applicant Kenneth Aitchison (the “**Québec Action**”) pending a final judgment on the putative class action before the Ontario Superior Court of Justice in *Gloria Palmer v. Teva Canada Limited et al.*, in court docket number CV-18-00601555-00CP (the “**Ontario Action**”), or earlier as may be further requested by the parties and ordered by the Court.

2. This joint application for a stay is predicated upon the existence of a parallel national class action in Ontario including Québec residents filed by the same plaintiff’s counsel which raises the same issues and includes the same members as the Québec Action, and thus seeks to avoid the possibility of contradictory judgments and to ensure a sound and efficient use of judicial resources, all the while protecting the interests of the putative class members who are Québec residents.
3. For the reasons further detailed below, the parties submit that it is in the interests of justice and consistent with the principles of proportionality and judicial economy that the overlapping issues raised in the Québec Action and the Ontario Action be adjudicated by a single court, which the parties propose to be the Superior Court of Justice of Ontario.

II. THE PARALLEL CLASS ACTIONS

A. The Québec Action

4. The Québec Applicant, Kenneth Aitchison, seeks to represent the following class:

“all persons in Québec who purchased or ingested one or more of the valsartan products identified by Health Canada on the Recall List dated July 9, 2018, as described below in paragraph 14.”

5. The Québec Action was filed on July 16, 2018, three days after the Ontario Action. The Québec Action asserts a product liability claim against the Defendants based on the alleged breach of their duty to provide a safe product free of manufacturing defects and on the alleged false and misleading representations and failure to disclose that certain valsartan drugs contained a carcinogenic chemical, nitrosodimethylamine or NDMA, and seeks compensation for personal injury, moral damages and pecuniary damages, as well as punitive damages.
6. These allegations are refuted by Defendants.

B. The Ontario Action

7. The Ontario Action, issued on or about July 13, 2018, before the Superior Court of Justice, proposes the following putative class:

"1. (a)Class' or 'Class Members' means all persons in Canada who purchased or ingested one or more of the valsartan products identified by Health Canada in the Recall List dates July 9, 2018.(...)"

as appears from the Ontario Notice of Action dated July 13, 2018, filed along with the Statement of Claim dated August 10, 2018, amended on January 15, 2019, filed herewith, *en liasse*, as **Exhibit R-1**.

8. As appears from the foregoing, with the exception of the geographic scope of the proposed classes, the proposed classes in the Québec Action and the Ontario Action are essentially identical, relating to the same Defendants and regarding the same valsartan products.
9. Indeed, the proposed class in the Québec Action is included in the proposed national putative class in the Ontario Action which asserts the same allegations of fault and similar causes of action as the Québec Action, and seeks the same types of remedies.
10. The defences to those allegations will also be the same or substantially similar.

C. The Other Parallel Actions

11. Five other related putative class actions have also been filed and are pending in other Canadian provinces:
 - a) A putative class action issued on or about July 23, 2018, before the Supreme Court of British Columbia, in *May Mazarella Ventura v. Teva Canada Limited et al.*, in the case bearing court docket number S-188114 (the "**Mazerella Action**"), as appears from a copy of the Mazerella Action filed herewith as **Exhibit R-2**;
 - b) A putative class action issued on or about August 17, 2018, before the Supreme Court of British Columbia, in *Robert Wayne Gibson v. Pro Doc Ltee et al.*, in the case bearing court docket number 205256 (the "**Gibson Action**"), as appears from a copy of the Gibson Action filed herewith as **Exhibit R-3**;
 - c) A putative class action issued on or about August 31, 2018, before the Supreme Court of British Columbia, in *Ramin Haghighi v. Pro Doc Ltée et al.*, in the case bearing court docket number VLC-S-S-189499 (the "**Haghighi Action**"), as appears from a copy of the Haghighi Action filed herewith as **Exhibit R-4**;
 - d) A putative class action issued on or about August 8, 2018 before the Court of Queen's Bench of Alberta, in *Rosemarie Buskell v. Pro Doc Ltee et al.*, in the case bearing court docket number 1801-11235 (hereinafter the "**Alberta Action**"), as appears from a copy of the Alberta Action filed herewith as **Exhibit R-5**;

- e) A putative class action issued on or about July 13, 2018 before the Court of Queen's Bench for Saskatchewan, in *Carla James v. Pro Doc Limitee*, in the case bearing court docket number 2031/18 (hereinafter the "**Saskatchewan Action**"), as appears from a copy of the Saskatchewan Action filed herewith as **Exhibit R-6**;

hereinafter collectively referred to as the "**Other Parallel Actions**".

- 12. Three of the Other Parallel Actions--in Saskatchewan, Alberta and the Gibson Action in British Columbia--have been issued by Merchant Law Group LLP. The Mazerella Action in British Columbia has been issued by Rice Harbut Elliott LLP, and the Haghghi Action in British Columbia has been issued by Hammerberg Lawyers LLP.

D. Status of the Parallel Class Actions

- i) The Québec Action

- 13. The Québec Action has not progressed since its filing on July 16, 2018 and no procedural steps other than the present Application have been taken.

- ii) The Ontario Action

- 14. The Ontario Action was commenced on July 13, 2018 prior to the Québec Action and the Other Parallel Actions.

- 15. The Honourable Mr. Justice Perrell has now been assigned as the case managing judge for the Ontario Action, and it is anticipated that a case conference will be convened shortly after this Court's ruling on this motion.

- 16. Since the filing of the Ontario Action, Ontario class counsel have been working on preliminary steps to the preparation of a certification record; reaching an agreement on venue with defence counsel; and forming a consortium with Rice Harbut Elliott LLP, counsel in the Mazerella Action in British Columbia..

- iii) Other Parallel Actions

- 17. Although the Other Parallel Actions have not been formally stayed by their respective Courts in favor of the Ontario Action, they have not progressed since their issuance in July and August, 2018.

- 18. As stated, class counsel in the Ontario Action have now formed a consortium with Rice Harbut Elliott LLP, ,counsel in the Mazerella Action, and it is anticipated that the consortium will, if necessary, bring motions in British Columbia, Saskatchewan and Alberta to seek the stay of the Other Parallel Class Actions in favour of the Ontario Action, pursuant to the class proceedings legislation in the those provinces.

III. **LIS PENDENS AND STAY SOUGHT**

19. It is trite law that this Court has inherent jurisdiction to stay any action brought before it if such a stay is consistent with the principles of proportionality and judicial economy, or when there is a risk of contradictory judgments in related matters before different courts.
20. Article 3137 CCQ also specifically provides that this Court may stay its ruling on an action brought before it if there is a situation of "international" *lis pendens*, namely "if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec".

A. **Lis Pendens**

21. The parties herein submit that there is a situation of *lis pendens*, as understood in the context of class actions pursuant to Article 3137 CCQ between the Québec Action and the Ontario Action., as there is an identity of parties, cause and object.
 - i) Same Parties
22. There is juridical identity of the parties by representation. The proposed class membership in the Ontario Action would include the class members in the Québec Action, which proposes a provincial class composed of Québec residents only.
 - ii) Same Cause
23. The Québec Action and the Ontario Action are based on the same key allegations of fact and assert the same causes of action, namely the Plaintiffs assert a product liability claim against the Defendants based on the alleged breach of their duty to provide a safe product free of manufacturing defects and on the alleged false and misleading representations and failure to disclose that certain valsartan drugs contained a carcinogenic chemical, nitrosodimethylamine or NDMA, resulting in personal injury and other alleged moral pecuniary and punitive damages.
24. The Defendants refute these allegations in both jurisdictions.
 - iii) Same Object
25. The object of the Québec Action and the Ontario Action is the same: both seek the recovery of damages, both compensatory and punitive, allegedly suffered as a result of the Defendants' impugned conduct.
26. This object is being denied in both jurisdictions.

B. Stay Sought

27. The parties herein jointly seek a temporary stay of the Québec Action pending a final judgment in the Ontario Action, or earlier as may be subsequently requested by the parties and ordered by the Court.
28. The requested stay is consistent with the principles of proportionality and judicial economy. It serves to avoid a multiplicity of parallel proceedings progressing at once, which would result in significant and avoidable costs for all parties involved, and be unnecessarily demanding on limited judicial resources.
29. It is also consistent with the “spirit of mutual comity” between courts of different provinces recognized by the Supreme Court of Canada in the landmark decision *Canada Post Corp. v. Lépine*, 2009 1 SCR 549, at para. 57.
30. In fact, by using a single proceeding, Québec residents will benefit from judicial economy and their counsel will not expend time and costs simultaneously in more than one jurisdiction.
31. In light of the foregoing, the parties herein respectfully submit that this Court should use its discretion to stay the Québec Action, as it is in the interest of justice and of the putative class members.

IV. THE RIGHTS AND INTERESTS OF QUÉBEC CLASS MEMBERS IN THE CONTEXT OF A TEMPORARY STAY

32. The temporary stay of the Québec Action in favour of the Ontario Action would serve the rights and interests of Québec residents, in accordance with article 577 CCP.
33. Indeed, the causes of action asserted in the Ontario Action include all of the causes of action asserted in the Québec Action, such that the rights of the putative class members in the Québec Action will be asserted in a similar fashion in the Ontario Action.
34. The Court of Ontario will protect the rights and interests of Québec putative class members in the same fashion as a Québec Court would, given the experience of the class action bench in both jurisdictions. Moreover, Québec residents will benefit from judicial economy and will save time and legal costs by having Ontario counsel pursue the certification stage in Ontario.
35. The parties are represented by the same counsel in Ontario and Québec. In the context of the stay requested herein, counsel for the Applicant and for the Defendants, both in Ontario and Québec, have agreed to cooperate to ensure an efficient conduct of the proceedings and the coordination of the Québec Action and the Ontario Action.

36. Moreover, the Applicant agrees that the Québec Action should be temporarily stayed in favour of the Ontario Action and also agrees to be added as a Plaintiff in the Ontario Action.
37. Class counsel in the Ontario Action have also established a bilingual web site and registration system and have lawyers who are bilingual available to respond to any inquiries that putative class members in the Québec Action may have.

V. CONCLUSION

38. For the reasons stated above, the parties jointly seek a temporary stay of the Québec Action pending a final judgment in the Ontario Action.
39. If a stay is granted by this Court, the parties undertake to provide this Court with an update on the status of the Ontario Action on a semi-annual basis, and to advise this Court within 30 days of any significant development in the Ontario Action that may affect the course of the Québec Action.
40. The parties agree that this joint application and the statements herein are not intended to be used and will not be used in any motion to certify or authorize any other class proceeding, including the Ontario Action, as evidence that the authorization or certification criteria are or are not satisfied. Defendants explicitly reserve the right to oppose any motion to authorize the Québec Action, or to certify the Ontario Action and any of the Other Parallel Actions.

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the *Joint Application to Temporarily Stay the Class Action*;

STAY the present action until a final judgment is rendered in the putative class action filed by Gloria Palmer before the Ontario Superior Court of Justice in court docket number CV-18-00601555-00CP, or earlier as may be subsequently requested by the parties and ordered by the Court;

PRAY ACT of the parties' undertaking to provide this Court with an update on the status of the Ontario Action on a semi-annual basis, and to advise this Court within 30 days of any significant development in the Ontario Action that may affect the course of the Québec Action, and **ORDER** the parties to comply with said undertaking;

THE WHOLE with legal costs.

Montréal, this January 21, 2019

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Montréal, this January 21, 2019

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SWORN STATEMENT

I, the undersigned, Noah Boudreau, lawyer, having my professional address at 800 Victoria Square, Suite 3700, P.O. Box 242, in the city and district of Montréal, Province of Québec, H4Z 1E9, do solemnly declare:

1. I am a duly authorized representative of Sandoz Canada Inc., Pro Doc Limitée, Sanis Health Inc. and Sivem Pharmaceuticals ULC in the present case;
2. All the facts alleged in the present application are true.

AND I HAVE SIGNED :



Noah Boudreau

Solemnly affirmed before me,
in Montréal, on January 21, 2019



Commissioner for Oaths for Québec



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LIST OF EXHIBITS

EXHIBIT R-1 : Copy of the Notice of Action No. CV-18-00601555-00CP issued in *Gloria Palmer v. Teva Canada Limited*, Ontario Superior Court of Justice, dated July 13, 2018 and copy of the Statement of Claim dated August 10, 2018 (*en liasse*).

EXHIBIT R-2 : Copy of the Notice of Civil Claim No. S-188114 issued in *May Mazarella Ventura v. Teva Canada Limited et al.*, Supreme Court of British Columbia, dated July 23, 2018.

- EXHIBIT R-3:** Copy of the Notice of Civil Claim No. 205256 issued in *Wayne Gibson v. Pro Doc Ltée et al.*, Supreme Court of British Columbia, dated August 17, 2018.
- EXHIBIT R-4:** Copy of the Notice of Civil Claim No. VLC-S-S-189499 issued in *Ramin Haghighi v. Pro Doc Ltée et al.*, Supreme Court of British Columbia, dated August 31, 2018.
- EXHIBIT R-5:** Copy of the Statement of Claim No. 1801-11235 issued in *Rosemarie Buskell v. Pro Doc Ltée et al.*, Court of Queen's Bench of Alberta, dated August 18, 2018.
- EXHIBIT R-6** Copy of the Statement of Claim No. 2013/18 issued in *Carla James v. Pro Doc Limitée*, Court of Queen's Bench for Saskatchewan, dated July 13, 2018.

Montréal, this January 21, 2019

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DEFENDANTS

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**JOINT APPLICATION TO TEMPORARILY
STAY THE CLASS ACTION
(Articles 18, 49 and 577 CCP
and Article 3137 CCQ), LIST OF EXHIBITS
AND EXHIBITS R-1 TO R-6**

ORIGINAL

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