

Vancouver

26-Feb-10

REGISTRY

Amended pursuant to Rule 24(1), 15(5) and  
the Order of Madam Justice Mackenzie pronounced February 12, 2010  
Original Statement of Claim filed June 5, 2008

No. S078806  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

LANA WAKELAM

PLAINTIFF

AND:

JOHNSON & JOHNSON, JOHNSON & JOHNSON INC.,  
MCNEIL CONSUMER HEALTHCARE CANADA, NOVARTIS CONSUMER HEALTH  
CANADA INC./ NOVARTIS SANTE FAMILIALE CANADA INC.,  
WYETH CONSUMER HEALTHCARE/WYETH SOINS DE SANTE INC  
PFIZER CANADA INC., TRILLIUM HEALTH CARE PRODUCTS INC.,  
VITA HEALTH PRODUCTS INC., and PROCTER & GAMBLE INC.

DEFENDANTS

Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c.50

**AMENDED STATEMENT OF CLAIM**

**DEFINED TERMS**

1. The following terms used throughout this pleading have the following meanings:
  - a. "BPCPA" means the *Business Practice and Consumer Protection Act*, S.B.C. 2004, c. 2, and all regulations thereunder;
  - b. "Class" means all persons resident in British Columbia who purchased Children's Cough Medicine for use by children under the age of six, that was supplied.

offered for sale, advertised or promoted by the Defendants between December 24, 1997, to present;

- c. “Class Period” means December 24, 1997, to present;
- d. “Children’s Cough Medicine” means cough medicine supplied, offered, manufactured, produced, advertised, marketed, sold or promoted by the Defendants for use by children under the age of six years old between December 24, 1997, to present containing one or more of the following groups of drugs:
  - I. Antihistamines such as brompheniramine maleate, chlorpheniramine maleate, dexbrompheniramine maleate, clemastine hydrogen fumarate, diphenhydramine hydrochloride, diphenylpyraline hydrochloride, doxylamine succinate, pheniramine maleate, phenyltoloxamine citrate, promethazine hydrochloride, pyrilamine maleate, and triprolidine hydrochloride;
  - II. Antitussives such as dextromethorphan, dextromethorphan hydrobromide, and diphenhydramine hydrochloride;
  - III. Expectorants such as guaifenesin; and/or
  - IV. Decongestants such as ephedrine hydrochloride/sulfate, phenylephrine hydrochloride/sulphate, and pseudoephedrine hydrochloride/sulphate.
- e. “Defendants” means, collectively, Johnson & Johnson, Johnson & Johnson Inc., McNeil Consumer Healthcare Canada, Novartis Consumer Health Canada Inc./Novartis Sante Familiale Canada Inc., Wyeth Consumer Healthcare/Wyeth Soins De Sante Inc., Pfizer Canada Inc., Trillium Health Care Products Inc., Vita Health Products Inc., and Procter & Gamble Inc. Inc.

### THE PLAINTIFF

- 2. The Plaintiff, Lana Wakelam, is a resident of New Westminister, British Columbia. The Plaintiff is a member of the Class.

**THE DEFENDANTS**

3. Johnson & Johnson is a New Jersey corporation which has its principle place of business in New Brunswick, New Jersey.
4. Johnson & Johnson Inc. is a federal corporation with its headquarters in Montreal, Quebec. Johnson & Johnson Inc. is a member of the Johnson & Johnson Family of Companies.
5. McNeil Consumer Healthcare Canada is a corporation incorporated pursuant to the laws of Canada with its head office located in Guelph, Ontario. McNeil Consumer Healthcare Canada is a division of Johnson and Johnson Inc.
6. McNeil Consumer Healthcare Canada, Johnson and Johnson Inc. and Johnson & Johnson supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present under various brand names including, inter alia, the brand names of Tylenol, Motrin, Benylin and Sudafed.
7. Novartis Consumer Health Canada Inc./Novartis Sante Familiale Canada Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Mississauga, Ontario.
8. Novartis Consumer Health Canada Inc./Novartis Sante Familiale Canada Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present under various brand names including, inter alia, the brand names of Buckley's Jack & Jill and Triaminic.
9. Wyeth Consumer Healthcare/Wyeth Soins De Sante Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Mississauga, Ontario.
10. Wyeth Consumer Healthcare/Wyeth Soins De Sante Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present under various brand names including, inter alia, the brand names of Robitussin, Advil and Dimetapp.

11. Pfizer Canada Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Kirkland, Quebec.
12. Pfizer Canada Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and 2006 under various brand names including, inter alia, the brand names of Benylin and Sudafed.
13. Trillium Health Care Products Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Brockville, Ontario.
14. Trillium Health Care Products Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present for certain large chains who sold the Children's Cough Medicine under their house brand or private label.
15. Vita Health Products Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in Toronto, Ontario.
16. Vita Health Products Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present for certain large chains who sold the Children's Cough Medicine under their house brand or private label.
17. Procter & Gamble Inc. is a corporation incorporated pursuant to the laws of Canada with its head office located in North York, Ontario.
18. Procter & Gamble Inc. supplied, offered, manufactured, produced, advertised, marketed, sold and/or promoted Children's Cough Medicine between December 24, 1997 and the present under various brand names including, inter alia, the brand names of Vicks and Nyquil.

## CAUSES OF ACTION

### Breach of the Business Practices and Consumer Protection Act

19. During the Class Period, the Defendants supplied Children's Cough Medicine to the Class and solicited, offered, advertised, and promoted the sale of Children's Cough Medicine to the Class. As such, the Defendants are suppliers within the meaning of section 1 of the *BPCPA*.
20. Each purchase of the Defendants' Children's Cough Medicine by the members of the Class was for primarily personal, family, or household uses and as such was a "consumer transaction" within the meaning of section 1 of the *BPCPA*.
21. The Defendants engaged in numerous deceptive acts or practices in the supply, solicitation, offer, advertisement and promotion of the Children's Cough Medicine. In particular:
- i. in every consumer transaction in which the Class purchased Children's Cough Medicine, the Defendants represented that Children's Cough Medicine provides effective relief from cough symptoms when in fact the Children's Cough Medicine was not effective in children under the age of six;
  - ii. the Defendants failed to disclose the material fact that Children's Cough Medicine is not effective for children under the age of six; and
  - iii. the Defendants failed to disclose the material fact that Children's Cough Medicine can be dangerous when it is used by children under the age of six.
22. The representations and omissions set out in paragraph 21 above had the capability, tendency or effect of deceiving or misleading the Class and therefore constitute deceptive acts or practices under s.4 of the *BPCPA*.
23. The Defendants gained because of the consumer transactions in which they made the deceptive and misleading representations and omissions set out in paragraph 21 above.

24. The Plaintiff, and the other members of the Class, seek a declaration pursuant to s.172(1)(a) of the *BPCPA* that the Defendants' representations and omissions described in paragraph 21 of this Amended Statement of Claim are deceptive acts or practices.
25. The Plaintiff, and the other members of the Class, seek an interim and a permanent injunction pursuant to section 172(1)(b) of the *BPCPA* restraining the Defendants from engaging or attempting to engage in the deceptive acts or practices described in paragraph 21 of this Amended Statement of Claim.
26. The Plaintiff, and the other members of the Class, seek an order pursuant to s.172(3)(c) of the *BPCPA* requiring the Defendants to advertise to the public the particulars of any judgment, declaration, order or injunction against it in this action on terms and conditions the court considers reasonable and just.
27. The Plaintiff, and the other members of the Class, seek an order pursuant to s.172(3)(a) that the Defendants refund all sums that the Class paid to purchase the Children's Cough Medicine, or that the Defendants disgorge all revenue which it made on account of Children's Cough Medicine purchased by the Class, together with any further relief which may be available under the *BPCPA*.
28. It is unnecessary for the Plaintiff or any member of the Class to prove that the Defendants' deceptive acts or practices caused such persons to purchase the Children's Cough Medicine to make out a claim for relief under sections 172 of the *BPCPA*.
29. In the alternative, the Plaintiff and the other members of the Class suffered damages because of the Defendants' acts or practices and seek damages pursuant to s.171 of the *BPCPA*.

**Breach of the Competition Act**

30. The Defendants made the representations and omissions to the public as particularized in paragraph 21. In so doing, the Defendants breached s. 52 of the *Competition Act*, R.S.C. 1985, c.C-34, and thereby committed an unlawful act because the representations and omissions:

- i. were made for the purpose of promoting the business interests of the Defendants;
- ii. were made to the public; and
- iii. were false and misleading in a material respect.

31. The Class suffered damages as a result of the Defendants' unlawful breach of s.52 of the *Competition Act* and seek those damages, as well as their costs of investigation, pursuant to s. 36 of the *Competition Act*.

**Unlawful Interference with Economic Relations**

32. Further, or alternatively, the acts particularized in paragraph 21 were unlawful acts undertaken by the Defendants with the intent to injure the Class, and the Defendants are liable for the tort of unlawful interference with economic interests.

33. The Class suffered damages as a result of the Defendants' unlawful interference with their economic interests.

**Unjust Enrichment, Waiver of Tort and Constructive Trust**

34. In the alternative, the Plaintiff waives the tort and pleads that she and the other members of the Class are entitled to recover under restitutionary principles.

35. The Defendants have each been unjustly enriched by the receipt of revenue from the sale of the Children's Cough Medicine that was purchased by the Plaintiff and other members of the Class. The Plaintiff and other members of the Class have suffered a corresponding deprivation in the amount of the purchase price that they paid for the Children's Cough Medicine.

36. Since the money that the Defendants received resulted from the Defendants' wrongful or unlawful acts, there is and can be no juridical reason justifying the Defendants' retaining any part of such revenue and in particular, any contracts upon which the Defendants purport to rely to receive the illegal revenue are void and illegal.

37. The Defendants are constituted as constructive trustees in favour of the members of the Class for all of the illegal revenue because, among other reasons:

- (a) the Defendants were unjustly enriched by receipt of the illegal revenue;
- (b) the Class suffered a deprivation because they paid the illegal revenue;
- (c) the Defendants engaged in criminal conduct and committed a wrongful act in making the deceptive and misleading representations and omissions;
- (d) the illegal revenue was acquired in such circumstances that the Defendants may not in good conscience retain it;
- (e) justice and good conscience require the imposition of a constructive trust; and
- (f) there are no factors that would, in respect of the illegal revenue, render the imposition of a constructive trust unjust.

38. The Plaintiff pleads that equity and good conscience requires the Defendants to hold in trust for the Plaintiff and the other members of the Class all of the illegal revenue.

#### **AGGREGATE DAMAGES**

39. The restitution and damages sought by the Plaintiff and other members of the Class in paragraphs 24, 25, 26, 27, 29, 31, 33 and 36 above can be calculated on an aggregate bases for the Class as provided by the BPCPA and ss. 29 and 30 of the Class Proceeding Act.

#### **PUNITIVE DAMAGES**

40. The Plaintiff pleads that the Defendants' conduct in the design, development, testing, manufacturing, licensing, assembly, distribution, marketing, sale, instruction and promotion of the Children's Cough Medicine and the representations and omissions as pleaded above, was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, in intentional disregard of the rights and safety of the Class and their children. Such conduct renders the Defendants liable to pay punitive damages.

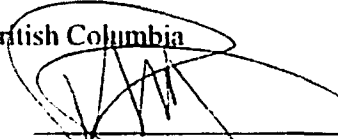


WHEREFORE the Plaintiff claims against the Defendants as follows:

- a) an order certifying the proceeding as a class proceeding;
- b) declaration pursuant to section 172(1)(a) of the *BPCPA*;
- c) a permanent injunction pursuant to section 172(1)(b) of the *BPCPA*;
- d) an order requiring the Defendants to advertise any adverse findings against them pursuant to section 172(3)(c) of the *BPCPA*;
- e) disgorgement and/or restitution by the Defendants pursuant to section 173(3)(a) of the *BPCPA* and/or the doctrine of waiver of tort;
- f) a constructive trust over the Defendant's illegally obtained revenue;
- g) a declaration that the Defendants are in breach of s. 52 of the *Competition Act*;
- h) damages pursuant to section 36 of the *Competition Act* and/or section 171 of the *BPCPA*;
- i) investigation costs pursuant to section 36 of the *Competition Act*;
- j) punitive damages;
- k) the costs of administering and distributing an aggregate damage award;
- l) interest pursuant to the *Court Order Interest Act*, RSBC 1996, c.79; and
- m) such further relief and this Honourable Court deems just.

PLACE OF TRIAL: Vancouver, British Columbia

DATED: February 26, 2010



Reidar Mogerman  
Camp Fiorante Matthews  
Solicitors for the Plaintiff

This Amended Statement of Claim is filed by Reidar M. Mogerman, Camp Fiorante Matthews, Barristers and Solicitors, 400 – 555 West Georgia Street, Vancouver, British Columbia, V6B 1Z6. Tel: (604) 689-7555 / Fax: (604) 689-7554.