

AMENDED THIS FEB. 19/09 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
 RULE/LA RÈGLE 26.02 (A)

THE ORDER OF _____
L'ORDONNANCE DU _____
DATED / FAIT LE _____

Court File No. CV-08-00-3595310000

REGISTRAR _____
SUPERIOR COURT OF JUSTICE

GREFFIER _____
COUR SUPÉRIEURE DE JUSTICE

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

Brian Singer

Plaintiff,

-and-

Schering-Plough Canada Inc.

Defendant.

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: July ²⁵~~24~~, 2008

Issued by: "S. CHANDRADAT"
Local Registrar

Address of court office:

393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: **SCHERING-PLOUGH CANADA INC.**
300 Consilium Place
Suite 1000
Scarborough, ON, Canada
M1H 3G2

1. The plaintiffs claim:
 - a. an order certifying this proceeding as a Class Proceeding and appointing the Plaintiff named herein as the representative plaintiff for the Class;
 - b. an order, pursuant to s. 24 of the *Class Proceedings Act, 1992*, directing an aggregate assessment of damages;
 - c. \$20 Million in general damages for the Class, or such other sum as this Honourable Court deems just;
 - d. an interlocutory and a final mandatory order directing that Defendant comply with the *Competition Act*, R.S.C. 1985, c. C-34 (“*the Competition Act*”);
 - e. an interlocutory and a final mandatory order directing that Defendant comply with the *Food and Drugs Act* (R.S., 1985, c. F-27)(“*the Food and Drugs Act*”);
 - f. an interlocutory and a final mandatory order directing that Defendant comply with the *Consumer Protection Act* (S.O., 2002, c. 30)(“*the Consumer Protection Act*”);
 - g. an order pursuant to s. 23 of the *Class Proceedings Act, 1992*, admitting into evidence statistical information, including statistical information regarding the packaging and labeling of sun-protection products;
 - h. a declaration that the Defendants deceptively packaged and labeled their sun-protection products;

- i. pre-judgment and post-judgment interest on the amounts payable pursuant to subparagraphs (c) and, (f) pursuant to the *Courts of Justice Act*;
- j. punitive, aggravated and exemplary damages in the amount of \$ 5 Million or such other amount as this Honourable Court deems just;
- k. costs of this action on a substantial indemnity basis plus Goods and Services Tax;
- l. the costs of administering the plan of distribution of the recovery in this action in the sum of \$1 Million or such other sum as this Honourable Court deems appropriate;
- m. damages and costs of the investigation of this claim in accordance with Section 36(1) of the *Competition Act*;
- n. in the alternative to (b) and (c) above, a declaration that Schering-Plough has been unjustly enriched, to the deprivation of members of the Class, by the value of their increased profits derived from the sale of sun-protection products in violation of the *Consumer Protection Act*, the *Competition Act*, the *Food and Drugs Act*, and other Common Law duties and an order requiring Schering-Plough to disgorge to the Class members an amount equal to the increased profits earned by Defendant as a result of said violations, or in the alternative a declaration that Defendant has been unjustly enriched to the deprivation of the Class Members in the amount of all profits arising from the sale of the sun-protection products in violation of the *Consumer Protection Act*, the *Competition Act*, the *Food and Drugs Act*, and other Common Law duties;
- o. restitution of all business profits rationally related to Defendants' misconduct; and

p. such further and other relief as may be required by the *Class Proceedings Act, 1992*, or as this Honourable Court may deem just.

Summary of the Action

Defendant Made Misleading Representations to the Public for the Purpose of Promoting the Sale of its Sun-Protection Products.

2. Defendant engages in marketing and advertising campaigns that promote the use of its sun-protection products for the protection of one's skin from the sun's Ultraviolet ("UV") rays.
3. For example, labeling of Defendant's sun-protection products represent to consumers, *inter alia*, that Defendant's products offer "protection from the sun's harmful UVA and UVB rays". Defendant has also advertised, marketed and represented that many of its sun-protection products provide "waterproof" and/or "sweat-proof" protection against all of the sun's harmful UV rays (that is to say both UVA and UVB rays).
4. Plaintiffs plead that Defendant has made misleading representations to the public, and that Defendant's sun-protection products have misleading labeling, in that Defendant's sun-protection products do not offer the same protection from the sun's damaging UVA rays in the same manner or level of protection as the protection offered from UVB rays, as advertised, or as implied, and that Defendant's sun-protection products are not in fact "waterproof" or "sweat-proof" as advertised, or represented.

5. Further, Plaintiffs plead that Defendant's sun-protection products do not protect from all of the sun's harmful UV rays for periods of time nor under conditions as claimed on labeling of Defendant's sun-protection products.
6. Plaintiffs plead that Defendant's misleading advertising and labeling of its sun-protection products is a violation of various statutes across Canada and the common law including but not limited to the *Consumer Protection Act* and other similar provincial legislation, *the Food and Drug Act* and *the Competition Act*, respectively.
7. Plaintiff pleads that Defendant has been unjustly enriched at the expense of the Plaintiffs as a result of their misleading advertising and labeling practices.

Background

8. Sunlight reaches the Earth in waves called infrared, or in invisible rays, called Ultraviolet ("UV") rays. Over-exposure to UV rays is believed to cause premature wrinkling, skin cancer, and photokeratitis, or snowblindness.
9. Research has shown that UV rays damage the DNA in skin cells, putting people at higher risk for skin cancer, and permanent eye damage. UV radiation can also have a damaging effect on the immune system and premature aging of the skin, giving it a wrinkled, leathery appearance.
10. UV rays consist of wavelengths that are shorter than visible light and are divided into UVA rays (320-400 nanometers), UVB rays (290-320 micrometers) and UVC rays (less than 290 micrometers).

11. Exposure to UVB rays has been shown to cause sun burning, premature aging of the skin and is considered to be a factor in the development of skin cancer.
12. UVA rays penetrate deeper into the skin's layers than UVB rays and are also harmful to the skin. UVA rays have been shown to damage the DNA in skin cells, contribute to premature aging of the skin and are a factor in the development of more serious forms of skin cancer.
13. Consumer sun-protection products, which are commonly referred to as sunscreens, purport to stop UVB and UVA rays from reaching the skin.

The SPF Refers Only to UVB and not UVA

14. Defendant markets, advertises and sells its sun-protection products through statements that the products provide protection from both UVA and UVB radiation. Plaintiffs allege herein that this uniform marketing and sales pitch is false and misleading because Defendant's sun-protection products do not offer the same level or degree of protection against UVA rays and their detrimental effect on the skin, as they do against the burning effect of UVB rays as Defendant's advertising seems to imply.
15. The SUN-PROTECTION FACTOR ("SPF") is a scale that indicates how much protection a sun-protection product offers the skin against sun burning caused by UVB. Sunscreens with higher SPFs filter out more UVB rays that cause burning than those with lower SPFs. For example, SPF 15 Sunscreen offers the skin approximately 15 times its natural protection against sun burning.

16. SPF does not measure the degree of protection the skin has against longer UVA rays while wearing sun-protection products. As alleged, UVA rays can cause damage to the DNA in skin cells, are known to cause photo-aging and are linked to the more aggressive types of skin cancer, such as melanoma.
17. Plaintiffs plead that Defendant's advertising and representing that Defendant's sun-protection products provide protection from the sun's UVA and UVB rays next to the SPF factor implies that SPF applies to both UVA and UVB rays, and that the same is misleading, false and/or deceptive.
18. In 2003, the US Federal Trade Commission also recognized that "[a]lthough sunscreens with identical SPF numbers give you equivalent sunburn protection from UVB rays, no sunscreen product screens out all UVA rays. Some may advertise UVA protection, but there is no system to rate UVA protection yet." FTC Facts for Consumers, <http://www.ftc.gov/bcp/edu/pubs/consumer/health/hea14.shtm> (last accessed on July 17, 2008).
19. Recently the European Union mandated that a separate UVA seal defining the level of protection all sun-protection products offer against UVA rays must be found on the labeling of each product.

Defendant's Misrepresentations and False Labeling May Also be Dangerous

20. Consumers who purchase Defendant's sun-protection products may even increase their exposure to the sun believing that they are receiving protection from all the sun's harmful rays, when in fact they are not receiving the complete protection that they bargained for, or

that they thought they were getting and accordingly, unnecessarily expose themselves to harmful UVA rays without the benefit of their skin's natural warning system, a sunburn.

21. Scientists believe that the number of skin cancer cases has been rising dramatically over the years, due to increasing exposure to UV radiation from the sun. An estimated 77,600 people will be diagnosed with skin cancer in 2008 in Canada and an estimated 1,150 will die of the illness.
22. Studies found that because sunscreens in fact do not block all of the sun's harmful rays as their labeling and advertising suggests, consumers are being given a false sense of security about the benefits of using sunscreens, and are staying out in the sun longer based on that false assumption.
23. Scientists have found that melanoma, the most deadly and incurable form of skin cancer, is directly attributable to exposure to UVA radiation. UVB radiation, on the other hand, causes sunburn and has been linked to the milder forms of skin cancer that are curable and rarely fatal, such as squamous cell and basal cell skin cancer.
24. In 2000, the United Nations, through its International Agency for Research on Cancer, found that "[s]everal relevant epidemiological studies have shown significantly higher risks for melanoma in users of sunscreens than in non-users" and that the "protective effects of sunscreens can be outweighed by overexposure based on the false assumption that sunscreens completely abolish the adverse effects of UV-light."

FDA Regulations

25. In 1999, the FDA specifically found that:

- a. The term “sunblock” should not be used in the label of sunscreens. *See Sunscreen Drug Products For Over-The-Counter Human Use; Final Monograph*, 64 Fed. Reg. 27666 at 27680 (May 21, 1999) (“*Final Monograph*”).
- b. The unqualified use of terms such as “shields from” “protects from” “filters” or “screens out” the “sun's rays” “sun's harsh rays” or “sun's harmful rays” to “help prevent skin damage” provide the wrong message and a false sense of security to some consumers. *Final Monograph*, 64 Fed. Reg. 27666 at 27677;
- c. The term “waterproof” is not permitted in product labeling as it may be confusing or misleading to consumers. *See Final Monograph*, 64 Fed. Reg. 27666 at 27675-
- d. The term “[X] times your natural protection from sunburn” is not permitted in product labeling as it could provide the wrong message and a false sense of security to some consumers. *Final Monograph*, 64 Fed. Reg. 27666 at 27677.
- e. Sunscreen labels that represent protection against “skin aging” “wrinkling” “premature skin aging” or “photoaging” are currently “unsupported.” *Final Monograph*, 64 Fed.:Reg. 27666 at 27677.

26. The FDA requested that manufacturers comply with its findings and conclusions “voluntarily as soon as possible.” *Final Monograph*, 64 Fed. Reg. 27666 at 27667. Although Defendant

knew about these findings and conclusions, it did not make any effort to comply with the FDA's directive.

The Parties

The Plaintiffs

27. Brian Singer resides in Thornhill, Ontario.

The Defendant

28. SCHERING-PLOUGH CANADA INC. (“Defendant”) is a corporation organized under the laws of Canada with its principal place of business at 3535 Transcanadienne Hwy, Pointe Claire, Quebec, H9R 1B4. Defendant engages in the invention, development, manufacturing and marketing and sale of pharmaceutical products worldwide, including Ontario. Defendant also maintains an office in Scarborough, Ontario. Defendant also invents, develops, manufactures distributes, advertises and/or markets over-the-counter sun-protection products.

The Class

29. Plaintiffs bring this action on behalf of all persons resident in Canada that:
- a. Purchased sun-protection products manufactured, distributed, sold, advertised and/or marketed by Defendant;
 - b. Between July 2002 and the date of judgment. (the “Class Period”);

Plaintiff's Details

30. Plaintiff Brian Singer purchased, *inter alia*, "Coppertone SPF 50 Sunscreen Lotion" a sun-protection product manufactured and sold by the Defendants, and suffered damages, economic and other damages, as a result of purchasing Defendants' product.

Plaintiff's Allegations

31. Defendant has consistently maintained a leading market position in North America with respect to the sale of sun-protection products. In view of growing concerns about premature aging of skin and skin cancer, Defendant has developed and marketed specialty products to purportedly suit consumers' lifestyles and sun-protection needs.
32. Defendant has spent millions of dollars in labeling and advertising its sun-protection products. It has cultivated an image that its products protect the skin against harmful UVA and UVB rays. Plaintiffs plead that Defendant has concealed the fact that its sun-protection products provide less protection from the sun's UVA rays than from the sun's UVB rays.
33. Plaintiffs plead that through the use of materially misleading labeling and advertising, Defendant represented, directly and by implication, that its "Coppertone SPF 50 Sunscreen Lotion" provides "Broad Spectrum UVA/UVB Protection" that is "Waterproof".
34. Plaintiffs plead that in fact, "Coppertone SPF 50 Sunscreen Lotion" used by the Plaintiffs only protected the skin against UVA rays at a level or degree and period that was significantly less than the level or degree and period of protection provided against the burning effect of UVB rays.

35. Through the use of materially misleading statements contained in advertisements and on the web, that Defendant has represented on its web site www.coppertone.ca, Plaintiffs plead that Defendants have represented directly and by implication that its products protect the skin against all UVA rays equally. For example, Defendant has advertised that its “Coppertone Kids Sunscreen Lotion SPF 50” “...provides 50 times your natural protection against UVA and UVB rays” and it “Contains avobenzone and other sunscreen ingredients that absorb the entire UVA and UVB Spectrum.”
36. Defendant misled the Plaintiffs by representing that its product contained the necessary active ingredients to protect the skin against harmful UVA rays. However, Defendant’s sun-protection products used by Plaintiffs at best only protected the skin against UVA rays at a level or degree and for a period that was significantly less than the level or degree of protection provided against the burning effect of UVB rays.
37. Defendant knew or should have known about the scientific studies referenced above, which have been conducted and published over the course of the last decade in leading medical journals by noted scientists at institutions such as the United Nations International Cancer Research Agency, the Brookhaven National Laboratory, and the Memorial Sloan-Kettering Cancer Center.
38. Defendant chose to ignore the scientific studies and instead lobbied applicable government agencies to prevent regulatory action specifically forcing them to change their labeling practices, as described above.

39. Defendant has continued to make labeling claims such as “Broad spectrum protection” and “SPF [X] UVA/UVB” protection.

Defendant’s Sun-Protection Products May Degrade in the Sun

40. Many of Defendant’s sun-protection products contain as an active ingredient Avobenzone which is used for protecting the skin against UVA rays. Avobenzone, however, has been found to quickly degrade after being exposed to sunlight. One study has found that within fifteen minutes of exposure to sunlight, 36% of the exposed Avobenzone disintegrates. Thus, the protective effects of Avobenzone against UVA rays may immediately diminish upon the exposure of human skin to sunlight.

41. Consumers have purchased Defendant’s sun-protection products with the expectations that the representations that the sun-protection products will protect the skin from both harmful UVA and UVB rays, are “waterproof” and/or “sweat-proof”, are “sunblocks” and other material misrepresentations made by the products’ advertising and labels at the time of sale are true.

42. Defendant increased its profits as a result of Plaintiffs purchasing its products.

Defendants' Advertising Campaign and Public Representations

43. Defendant misled Plaintiffs by representing that their products protect against harmful UVA rays to the same level and degree as they protect against UVB rays by strategically placing the acronym “UVA” next to or alongside “SPF [x]”.

44. Plaintiffs plead that Defendant's products at best only protected the skin against the shorter UVA rays at a level or degree and for a period that was significantly less than the level or degree of protection provided against the burning effect of UVB rays, causing consumers to believe that as long as their skin did not burn, as a consequence of using the Defendant's sun-protection products, their skin was also being protected from all the harmful rays of the sun, including UVA rays.

45. Although aware that their sun-protection products contain misleading labels, Defendant embarked on a widespread publicity campaign that falsely and misleadingly led Plaintiffs to believe that they were receiving the same level or degree of protection from both UVA and UVB rays by using their respective sun-protection products when in fact they were not. These efforts were and are directed at prospective purchasers through various mediums, such as television, national and, regional newspapers, and magazines.

46. Defendant has made the following general advertising claims about their sun-protection products on the Internet, which is accessible to persons all over the world, including the Plaintiffs:

- "Contains avobenzone and other sunscreen ingredients that absorb the entire UVA and UVB spectrum"
- "Waterproof"
- "...provides 50 times their natural protection against UVA and UVB rays"
- "Sweatproof formula won't run into eyes and cause stinging".

Negligence

47. Defendant at all material times owed a duty of care to Plaintiffs to provide Plaintiffs with accurate information on the packaging and labeling of Defendant's sun-protection products and not to make deceptive, false or misleading claims on the packaging and labeling of all sun-protection products, or on the web.
48. Plaintiffs plead that Defendant breached its duty of care to Plaintiffs in that, *inter alia*, Defendant placed false, misleading and/or deceptive information on its sun-protection products for the purpose of generating sales of such products.
49. It was foreseeable that Plaintiffs would suffer damages as a result of the negligence of Defendant.
50. As a result of Defendants' breach of the duty, and its placing the false, misleading and/or deceptive advertising on the product labels, the Plaintiffs have suffered damages.

Breach of Express Warranty

51. Plaintiffs hereby incorporate by reference paragraphs numbered 1 through 50 as though fully set forth herein.
52. The advertisements, product labels, and other similar uniform representations disseminated by Defendant regarding the foregoing products were, and are, affirmations of fact and/or promises that these products will, *inter alia*,
- (1) protect consumers from UVA rays to the same level or degree they protect them against UVB rays,

- (2) provide “waterproof” protection,
- (3) provide “sweat-proof” protection;
- (4) provide “all day” protection or “[X] hours of protection” and
- (5) provide “[X] times your natural sun-protection.”

53. Defendant advertised its sun-protection products in order to bring such products and the quality of those products to the attention of Plaintiffs.

54. Defendant sought to create consumer demand through the use of such advertisements by attesting to the quality of such products and in particular by attesting to their ability to protect consumers from UVA rays to the same level or degree they protect them against UVB rays and their ability to provide, *inter alia*, “sunblock;” “waterproof,” “sweat-proof,” “all day” protection, “[X] hours” of protection and “[X] times your natural sun-protection.”

55. Defendant’s advertisements, labels and other similar representations were affirmations of fact constituting express warranties that the sun-protection products would conform thereto.

56. As alleged above, Defendant’s sun-protection products failed to conform to the express warranties made to Plaintiffs.

57. Defendant breached its express warranties because their products did not protect users from all UVA rays, did not provide the same level or degree of protection against UVA rays as they did against the burning effect of UVB rays, did not provide “waterproof” or “sweat-

proof” protection, and did not provide “all day” protection, “[X] hours” of protection or “[X] times your natural sun-protection.”

58. Plaintiffs are entitled to damages thereby for breach of express warranty arising out of Defendant’s false and misleading advertising and representations.

Violations of the Consumer Protection Act

59. Plaintiffs incorporate by reference paragraphs 1 – 58 as though completely reproduced herein.

60. Plaintiffs bring this action under their statutory right as provided by Section 98(3) in accordance with Section 100 of the Act for a refund of all monies received by the Defendants in the course of their sale of the mislabeled sunscreen. .

61. The Plaintiffs plead that the purchase and sale of the products constitute a “consumer transaction” under the Consumer Protection Act s.1. which means “any act or instance of conducting business or other dealings with a consumer, including a consumer agreement.”

62. Where the purchase and sale of the products is found to be a consumer transaction, by virtue of making false representations to the public as to the quality, character, and effectiveness of the products, the Defendants engaged in unfair practices in breach of section 17(1) of the Consumer Protection Act, S.O. 2002, c. 30, Sched. A. s.17(1), in that the representations were false, misleading or deceptive as under section 14(1) and (2) of the Consumer Protection Act in that they state:

- a. The goods have performance characteristics, uses, benefits and qualities they do not have;
- b. The goods were of a particular standard, quality, grade, style or model, which they were not;
- c. The goods have been supplied in accordance with a previous representation, which they were not; and
- d. Exaggerations, innuendo or ambiguities as to a material fact and failed to state a material fact that deceives or tends to deceive.

63. Alternatively, should the court find that the purchase and sale of the foregoing products is extends beyond that of a “consumer transaction” within the meaning of s.1, Plaintiffs plead additionally that the purchase and sale constitutes a “consumer agreement” under the same section which means “an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment” under the *Consumer Protection Act* s.1.

64. As such, Defendants actions breached section 9 of the *Act* as follows:

- a. Defendant breached section 9(2) of the Consumer Protection Act, S.O. 2002, c. 30, Sched. A. s.9(2) by failing to disclose the known defect in the products and intentionally misleading the consumer which violates the implied conditions and warranties of fitness and quality applicable by virtue of the *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 15.

65. The plaintiff pleads in addition, that the false and misleading representations and the purchase and sale transaction similarly constitutes a breach of section 17(1) as an unfair

practice by virtue of an unconscionable representation under section 15 of the *Consumer Protection Act*, 2002, c. 30, Sched. A, s. 15(1) in that the Defendant ought to know:

- a. That the price grossly exceeds the price at which similar goods or services are readily available to like consumers;
 - b. That the consumer transaction is excessively one-sided in favor of someone other than the consumer;
 - c. That the terms of the consumer transaction are so adverse to the consumer as to be inequitable; and
 - d. That a statement of opinion is misleading and the consumer is likely to rely on it to his or her detriment.
66. Additionally, Plaintiffs plead the purchase and sale of the products constitute “remote agreements” as contemplated by Section 20(1) of the *Consumer Protection Act*, 2002, c. 30, s. 20(1). Plaintiff seeks to cancel the said agreements pursuant to Section 47(1) on the basis that no copies of the agreements were sent to Plaintiffs and Defendants made false and misleading representations on their packaging and advertising, thereby failing to disclose a material aspect of the product in contravention of s. 45 of the *Act*.
67. Under the remedy of cancellation, the *Consumer Protection Act* cancels the remote consumer agreement complained of under paragraph 37, supra, as if it never existed, requiring Defendants to refund any payment made under the agreement or any related agreements to Plaintiffs in accordance with Sections 95 and 96 of the *Act*.
68. Further, plaintiff pleads that this Statement of Claim shall constitute notice to Defendants as required by section 92 for seeking a remedy of cancellation.

69. Plaintiffs plead that Class Members are entitled to damages pursuant to S. 18(2) of the Act, which provides in relevant part that:

18. (1) Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages. 2002, c. 30, Sched. A, s. 18 (1).

Remedy if rescission not possible

(2) A consumer is entitled to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement under subsection (1) is not possible.

70. In light of Defendant's conduct alleged above, Plaintiffs plead that it is in the interest of justice for this Court to dispense with section 18(3), and related sections of the Consumer Protection Act requiring that the Plaintiff notify the Defendant of its intent to seek the remedies requested herein, and accordingly, respectfully requests that the Court disregard such notice requirement as provided for in s. 18(5) of the same act.

Violations of the Food and Drugs Act

71. Plaintiffs incorporate by reference paragraphs 1 – 61 as though completely reproduced herein.

72. Plaintiffs plead that Defendant's conduct described herein is a violation of s. 9 (1) of the Food and Drugs Act which provides in relevant part:

No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

73. Plaintiffs plead that Defendant's conduct regarding misrepresentations made about its sun-protection products herein described above was a breach of s. 9 (1) of the *Food and Drugs Act* in that the representations are false, misleading and/or deceptive regarding the value and safety of the product.

Claims Under the Competition Act

74. Plaintiffs incorporate by reference paragraphs 1 – 64 as though completely reproduced herein.

75. Plaintiffs plead that Defendants conduct described herein is a violation of s. 52 (1) of the *Act* which provides in relevant part:

No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

76. Plaintiffs plead that Defendants conduct regarding misrepresentations made about its sun-protection products herein described above was a breach of S.52(1) of the *Competition Act* in that the representations:

a. Were made to the public,

- b. Were made for the purposes of promoting supply or use of Defendant's products and/or the business interests of the Defendant; and
- c. Were false and misleading in a material respect.

77. Plaintiffs plead that the misleading statements made by Defendant on the advertising, labeling and packaging of its sun-protection products as listed above constitute material and misleading representations for the purposes of section 52 of the *Competition Act*.

78. Plaintiffs rely on section 52(1.1) of the *Competition Act* and plead that reliance on a misleading statement is not necessary for the purpose of establishing a breach of section 52 of the *Competition Act*.

79. Plaintiffs were damaged due to the breach of section 52 of the *Competition Act* and are entitled to recover such damages under s. 36 therein to settle within the costs of these proceedings and obtain any other legal or equitable relief the Court deems appropriate.

Unjust Enrichment

80. Plaintiffs incorporate by reference the allegations in paragraphs 1 to 70 as though completely reproduced herein.

81. Defendant has been unjustly enriched by increased profits derived from sales of its sun-protection products as a result of its misleading advertising and labeling of such products, in breach, *inter alia*, of statutes including *Consumer Protection Act*, *the Food and Drug Act* and *the Competition Act* and other common law duties.

82. Plaintiffs have suffered corresponding deprivation in that they purchased the Defendants products under false pretenses.
83. Plaintiffs plead there is no juristic reason for Defendant's enrichment and the Plaintiffs' corresponding deprivations. It would be inequitable for Defendant to retain any profits, or other compensation it obtained from its wrongful conduct related to the sale of its sun-protection products and Defendant's violation of the *Consumer Protection Act*, the *Food and Drug Act* and the *Competition Act*.
84. Plaintiffs seek restitution of all profits derived by Defendant that are rationally related to Defendant's misleading advertising and labeling practices.

Waiver of Tort

85. Plaintiffs reserve the right to waive the tort of negligence and seek restitution of the profits derived from the sale of its sun-protection products.

Legislation

86. The Plaintiffs plead and rely on:
- a. *Class Proceedings Act*, 1992, 5.0. 1992, c. 6;
 - b. *Competition Act*, R.S.C. 1985, c. C-34, as amended;
 - c. *Consumer Protection Act*, 2002, c. 30, Sched. A, as amended.
 - d. *Food and Drugs Act*, R.S., 1985, c. F-27.
87. The plaintiff proposes that this action be tried in the City of Toronto.

Respectfully Submitted:

JUROVIESKY AND RICCI LLP

Henry Juroviesky (LSUC # 53233S)

Eliezer Karp (LSUC#54317P)

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BRIAN SINGER
Plaintiff

v. **SCHERING-PLOUGH CANADA INC.**
Defendant

Court File No: CV-08-00-3595310000

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McCarthy Tétrault LLP
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Law
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**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

AMENDED STATEMENT OF CLAIM

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