

CV.19.00632601.0006A
Court File No.

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ROBERT DRYNAN

Plaintiff

and

BAUSCH HEALTH COMPANIES INC.; BAUSCH HEALTH, CANADA
INC.; VALEANT CANADA GP LIMITED; VALEANT CANADA LIMITED;
VALEANT CANADA LP

Defendants

(Proceeding under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6)

STATEMENT OF CLAIM

TO THE DEFENDANTS

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.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: December 11, 2019 Issued by  _____
Local Registrar

Address of Superior Court of Justice
court office: 393 University Avenue, 10th Floor
Toronto ON M5G 1E6

- TO:
- BAUSCH HEALTH COMPANIES INC.**
2150 boul. St-Elzéar Ouest
Laval, Québec H7L 4A8

 - BAUSCH HEALTH, CANADA INC.**
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 - VALEANT CANADA LP**
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CLAIM

1. The Plaintiff, Robert Drynan, claims on his own behalf and on behalf of the Class (as defined below):

- (a) A declaration that the Defendants engaged in unfair practices under the *Consumer Protection Act, 2002*, S.O. 2002, c. 30 (the "*CPA*") and similarly Equivalent Consumer Protection Legislation in other provinces (defined below);
- (b) An order, to the extent necessary, waiving the notice provisions of the *CPA* and of Equivalent Consumer Protection Legislation;
- (c) A declaration that the Defendants have breached section 52 of the *Competition Act*, R.S.C. 1985, c. C-34;
- (d) A declaration that the Representations (defined below) made by the Defendants are false and/or misleading;
- (e) Compensatory damages in the amount of \$300,000,000 (or some other amount to be determined by the Court) pursuant to:
 - (i) Section 18 of the *CPA* and similar provisions of the Equivalent Consumer Protection Legislation; and/or
 - (ii) Section 36 of the *Competition Act*;
- (f) Restitution and/or disgorgement damages equivalent to the monies wrongfully obtained by the Defendants on grounds of unjust enrichment

and/or waiver of tort (including to the extent necessary an accounting of these amounts);

- (g) Exemplary or punitive damages in the amount of \$30,000,000;
- (h) An order, pursuant to section 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the "***Class Proceedings Act***") directing an aggregate assessment of damages, or, alternatively, an order under section 25 of the *Class Proceedings Act* directing individual hearings in respect of damages;
- (i) An order permanently enjoining the Defendants from claiming that the efficacy of COLD-FX Products is "Proven by Science" and from making the other Representations;
- (j) A reference to decide any issues not decided at the trial of the common issues;
- (k) Pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C-43;
- (l) The costs of this Action on a substantial indemnity basis, plus applicable goods and services and harmonized sales taxes;
- (m) The costs of notice and administering the plan of distribution of the recovery in this Action, plus applicable taxes;
- (n) The costs of the investigation of this proceeding pursuant to section 36 of the *Competition Act*; and

- (o) Such further and other relief as may be required and as this Honourable Court deems just.

A. OVERVIEW

2. This Action concerns the Defendants' persistent, misleading and deceitful marketing campaign to promote and sell the COLD-FX® brand of natural health products.

3. The Defendants have bombarded Canadian consumers with representations (described in detail below) that the COLD-FX family of products, including COLD-FX First Signs®, are "Proven by Science" to, among other things, prevent and cure colds and flu. These representations are false. The Defendants have disseminated and continue to disseminate these and other misrepresentations through several marketing channels, including the COLD-FX website, product packaging, point-of-sale displays, social media, elevator advertising and in television advertising, despite knowing that these representations are false and misleading.

4. The Defendants know that the efficacy of COLD-FX is demonstrably not "Proven by Science" and that the COLD-FX family of products is not effective at preventing or curing colds or flu and is not scientifically proven to prevent or effectively relieve the symptoms of cold and flu.

5. The Defendants made and continue to make these false, misleading, and deceptive representations in respect of the full suite of current and former COLD-FX branded products, namely:

- (a) COLD-FX (regular and extra strength);

- (b) COLD-FX Daily Defence (regular and extra strength);
- (c) COLD-FX Daily Support (regular, chewable, and extra strength);
- (d) COLD-FX First Signs; and
- (e) COLD-FX First Signs Nighttime (collectively, the “**COLD-FX Products**”).

6. The Defendants’ representations amount to a breach of consumer protection legislation in Ontario and other Canadian provinces and territories, and of federal competition law. The Defendants’ conduct also violates the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (the “**FDA**”) and Health Canada’s advertising guidelines for natural health products.

7. The Defendants have made, and continue to make, these representations knowing that they are unsubstantiated, false, misleading and deceptive (or with a reckless disregard to whether these representations are true) with the intention that Canadian consumers rely on them in order to boost the sales of COLD-FX Products. The Defendants know that, but-for these misrepresentations, many consumers would not purchase COLD-FX Products and/or would not pay the price charged for COLD-FX Products.

8. In particular, the Defendants’ primary marketing slogan since at least 2017 is that the efficacy of COLD-FX Products is “Proven by Science” to, among other things, prevent and cure colds and flu. The Defendants have not conducted any clinical or other studies on the COLD-FX First Signs products to support this claim. Moreover, the Defendants know that the results of the limited clinical studies that they have commissioned and

conducted on the effective ingredient in COLD FX, namely, an extract of North American ginseng described by the Defendants as CVT-E002™, are speculative, uncertain, contradictory, highly qualified, and inconclusive.

9. The Defendants' misrepresentations are not merely false and misleading, they are also unconscionable and demonstrate a careless disregard for the health of consumers. By deceiving consumers into believing that COLD-FX Products are effective at preventing and curing colds and flu, they dissuade consumers of COLD-FX from taking measures that *are* effective in preventing colds and flu. The flu is a serious health issue in Canada; over 12,000 people in Canada are hospitalized and over 3,000 people die each year because of the flu.

10. Falsely representing that COLD-FX Products are "Proven by Science" or "clinically proven" to prevent and cure the flu is egregious and unconscionable and poses a risk to the health of Canadian consumers who may chose COLD-FX rather than the flu shot or other proven prophylactics against, or treatments of, colds and flu. As such, the Court should sanction the Defendants' conduct by ordering disgorgement of the benefit derived by the Defendants from their misconduct and a substantial award of punitive damages. Such relief will serve to deter other suppliers from engaging in aggressive and unlawful advertising tactics in Ontario and elsewhere in Canada.

11. This Action is commenced by Mr. Drynan pursuant to the *Class Proceedings Act* on behalf of consumers in Ontario and elsewhere in Canada who purchased COLD-FX Products while the Defendants' misleading misrepresentations were in market.

B. THE PARTIES

The Plaintiff

12. The Plaintiff, Robert Drynan, lives in Toronto.

13. On March 13, 2019, Mr. Drynan purchased a package of COLD-FX Daily Support (containing sixty 200 mg capsules) from a Shoppers Drug Mart location in Toronto. He paid \$29.99 plus Harmonized Sales Tax.

The Class

14. Mr. Drynan brings this Action on his own behalf and on behalf of all persons in Canada who purchased one or more COLD-FX Products between the date when the Representations were first made to consumers (believed to be at least January 1, 2017) and the date this proceeding is certified (the “**Class**”).

The Defendants

15. The Defendant, Bausch Health Companies Inc. (“**Bausch Companies**”), is a corporation continued from the federal jurisdiction of Canada to the Province of British Columbia, and is registered under the laws of British Columbia as if it had been incorporated under the *British Columbia Business Corporations Act*, S.B.C. 2002, c. 57. It is headquartered in Laval, Quebec. Until on or around July 13, 2018, Bausch Companies was known as Valeant Pharmaceuticals International, Inc.

16. The Defendant, Bausch Health, Canada Inc. (“**Bausch Canada**”), is a pharmaceuticals company incorporated under the *Canada Business Corporations Act*,

R.S.C. 1985, c. C-44. It is a wholly owned subsidiary of Bausch Companies and directly controlled by Bausch Companies. Bausch Canada has its headquarters in Laval, Quebec, and has manufacturing facilities in Manitoba, Ontario, and Quebec.

17. The Defendants, Valeant Canada GP Limited, Valeant Canada Limited, and Valeant Canada LP, are each companies or partnerships wholly owned and directly controlled by Bausch Companies.

18. The Defendants function as a joint enterprise for the manufacturing, promotion, marketing and sale of COLD-FX Products in Ontario and throughout Canada. The specific nature and details of the legal, business, and financial relationships between the Defendants is known to the Defendants.

19. The Defendants (and their predecessors) are collectively referred to in this Statement of Claim as "**Bausch**".

C. NORTH AMERICAN GINSENG

20. The central ingredient in all COLD-FX Products is described by the Defendants as CVT-E002™, a proprietary extract of North American ginseng.

21. As described in detail below, Bausch markets COLD-FX Products to consumers as a prophylactic product that prevents and/or protects against the onset of the common cold and flu and helps cure colds and flu. Bausch does so by representing to consumers that the efficacy of COLD-FX Products is both "clinically proven" and "Proven by Science".

22. The available scientific evidence does not, however, support Bausch's claims that COLD FX Products are "Proven by Science" to prevent or cure colds and flu or provide the myriad other benefits identified by the Defendants in the Representations.

23. Although ginseng has long been promoted as a natural health product to address a wide-range of issues, from erectile dysfunction to immune system deficiency, its efficacy has never been proven by rigorous scientific tests, it is not a "drug" under Canada's *Food and Drugs Act* R.S.C., 1985, c. F-27, and it cannot be sold for the treatment or prevention of a disease or abnormal physical state.

24. There have been five clinical trials that have examined the effectiveness of COLD-FX in preventing and curing colds and flu, or upper respiratory track infections ("RTIs"), in adults. These trials were limited in scope and duration and the results were highly qualified. Significantly, there are no known clinical trials on the COLD-FX First Signs products and none of the clinical trials conducted on COLD-FX, considered individually or in combination, provide any basis for the claim that the efficacy of COLD-FX Products is "Proven by Science".

25. Among other things, the trials of COLD-FX suffer from a multitude of design flaws, limitations and biases all of which undermine the reliability of the results of these studies, including the following:

- (a) The trials rely on self-reported symptoms associated with colds and flu rather than clinically verified incidences of cold and flu. Many symptoms of flu and colds are similar and are shared with allergies and other conditions unrelated to upper RTIs;

- (b) Many of the trials were conducted on groups of individuals possessing specific characteristics and profiles, including, for example, being over the age of 65, flu vaccinated and residents of community dwellings. The results of studies on individuals sharing these characteristics are not capable of generalization to the population at large;
- (c) The various trials yielded inconsistent results. In many cases, the results from one trial were not reproduced in subsequent trials;
- (d) Studies combine the results of different tests and analyses in artificial ways in order to derive "statistically significant" results;
- (e) The results of the trials that have been conducted demonstrate that COLD-FX is not effective if taken for less than eight weeks; and
- (f) The trials were funded by the manufacturers of COLD-FX Products, which calls into question the independence of the trials and raises the prospect that the results are influenced by bias.

26. In summary, the limited, inconclusive and highly qualified trials that have been conducted fall well short of any meaningful, reliable or reproducible assurance that COLD-FX prevents or cures colds or flu and fall well short of the evidence required to adequately support the Defendants' claim that the efficacy of COLD-FX Products is "Proven by Science".

D. BAUSCH'S AGGRESSIVE COLD-FX MARKETING CAMPAIGN

27. Until approximately 2015, Bausch (or its predecessors) manufactured and marketed two COLD-FX product formulations: COLD-FX and COLD-FX Extra Strength, which were also sold for a time as "COLD-FX Daily Defence" (collectively the "**Former COLD-FX Products**"). Both formulations contained CVT-E002.

28. For more than a decade, Bausch engaged in an aggressive, tactical and multi-million-dollar annual marketing campaign to promote and advertise the Former COLD-FX Products. This marketing campaign targeted consumers through multiple channels, including product packaging, website advertising, social media advertising, print advertisements in various magazines, television and radio commercials, a Brand Ambassador program, direct mailing initiatives, pharmacy displays, brochures, local event advertising, elevator advertising and sponsorships.

29. Through its marketing campaign, Bausch advertised to consumers that the Former COLD-FX Products were "clinically proven" and provided a variety of health benefits including quick or immediate relief of cold and flu symptoms. These representations left a general impression on consumers that the Former COLD-FX Products were clinically proven to provide instant relief of symptoms at the first signs of a cold or flu.

30. In or around 2015 Bausch changed its COLD-FX product offerings. The Former COLD-FX Products have been replaced with the following two lines of COLD-FX Products:

- (a) **COLD-FX Daily Support:** the Defendants manufactured, marketed and sold three distinct COLD-FX Daily Support products, namely Daily

Support, Daily Support COLD-FX Extra Strength, and Daily Support COLD-FX Chewable, all of which contain CVT-E002 as their only active ingredient; and

(b) **COLD-FX First Signs:** the Defendants manufactured, marketed and sold two distinct products in the COLD-FX First Signs line:

(i) the regular COLD-FX First Signs product, which contains four natural health product ingredients: CVT-E002, andrographis (or green chiretta), echinacea, and zinc; and

(ii) COLD-FX First Signs Nighttime, which contains four natural health product ingredients: CVT-E002, andrographis, melatonin, and ginger (at times the First Signs Nighttime product also contained valerian).

31. After launching its new line of products, Bausch changed and amplified its false and misleading messaging. In 2017, Bausch revamped its COLD-FX marketing campaign to include the overarching and unqualified slogan that the family of COLD-FX Products, including COLD-FX First Signs, are “Proven by Science”. The Defendants know that the alleged benefits of COLD-FX are not “Proven by Science”. These representations are false and misleading and are designed to entice consumers to purchase COLD-FX Products.

32. The Defendants’ “Proven by Science” slogan was and continues to be deployed extensively by Bausch on the COLD-FX website (www.cold-fx.ca), television

commercials, closed circuit advertising, in social media, and pharmacy and point-of-sale displays across Ontario and elsewhere in Canada.

33. Throughout the entire COLD-FX Product marketing campaign, Bausch knew that the limited number of, and heavily qualified results from, clinical trials (which were funded by Bausch, its predecessors, or affiliates) on the Defendants' proprietary extract of North American ginseng, CVT-E002™, did not support Bausch's broad and unqualified representations that COLD-FX Products are "Proven by Science" to deliver the wide range of benefits promoted through the Representations (described below).

E. THE REPRESENTATIONS

34. The Defendants have made, approved, or authorized a number of representations (including by omission) regarding the degree of effectiveness of COLD-FX Products using various platforms, including among others, product packaging, website advertising, social media advertising, and point-of-sale display. Examples of the representations made by the Defendants in respect of COLD-FX Products and known by them to be false, misleading, or deceptive (the "**Representations**") are set out below.

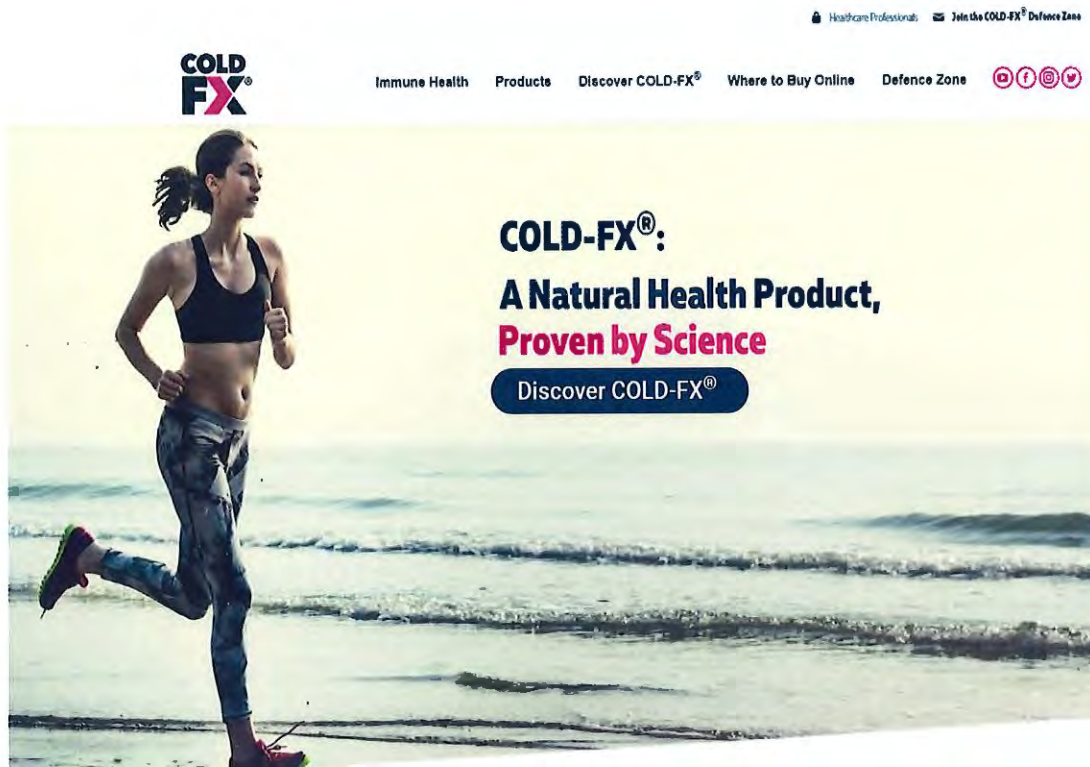
35. The overarching Representation made by the Defendants is that the effectiveness of the full suite of COLD-FX Product is "Proven by Science" to provide a variety of benefits. These benefits are alleged by the Defendants to include: "keeping colds away"; "Help[ing] Reduce the Chance of Catching Cold & Flu"; "help[ing] reduce the frequency, severity and duration of cold & flu symptoms by boosting the immune system"; "increase[ing] the proportion of natural killer cells and T-helper cells"; "Complement[ing]

the Flu Shot”; and “When taken with a flu shot ... further reduc[ing] the frequency, severity and duration of cold and flu symptoms”.

36. The Representations also include descriptions on the COLD-FX website of the clinical studies that have been carried out on COLD-FX Products. These Representations include the following: “over six clinical trials have been carried out on COLD-FX. COLD-FX has been found to be effective in reducing the frequency, severity and duration of cold and flu symptoms by boosting the immune System”; and, on the “You Ask, We Answer” section of the COLD-FX website, “Is There Research to Support the Effectiveness of COLD-FX? The science of COLD-FX is backed by: 10+ years of clinical research; 6 published randomized controlled trials; 18+ published articles studying the effects of CVT-E002; 1,600+ subjects enrolled in clinical studies with CVT-E002”. These Representations imply that extensive clinical trials and research have consistently and repeatedly demonstrated and confirmed the effectiveness of COLD-FX Products. These Representations are false. As set out above, the results of the research on COLD-FX Products have been inconclusive, contradictory and highly qualified and, in the case of COLD-FX First Signs, non-existent.

37. The Representations also include the statement on the COLD-FX website that COLD FX “can be used for the duration of the cold and flu season” without disclosing that the Defendants’ own studies have established that COLD-FX is not effective if used for less than an eight-week period.

38. The following example is a screen shot from the COLD-FX website depicting the Defendants’ unqualified “Proven by Science” Representation:



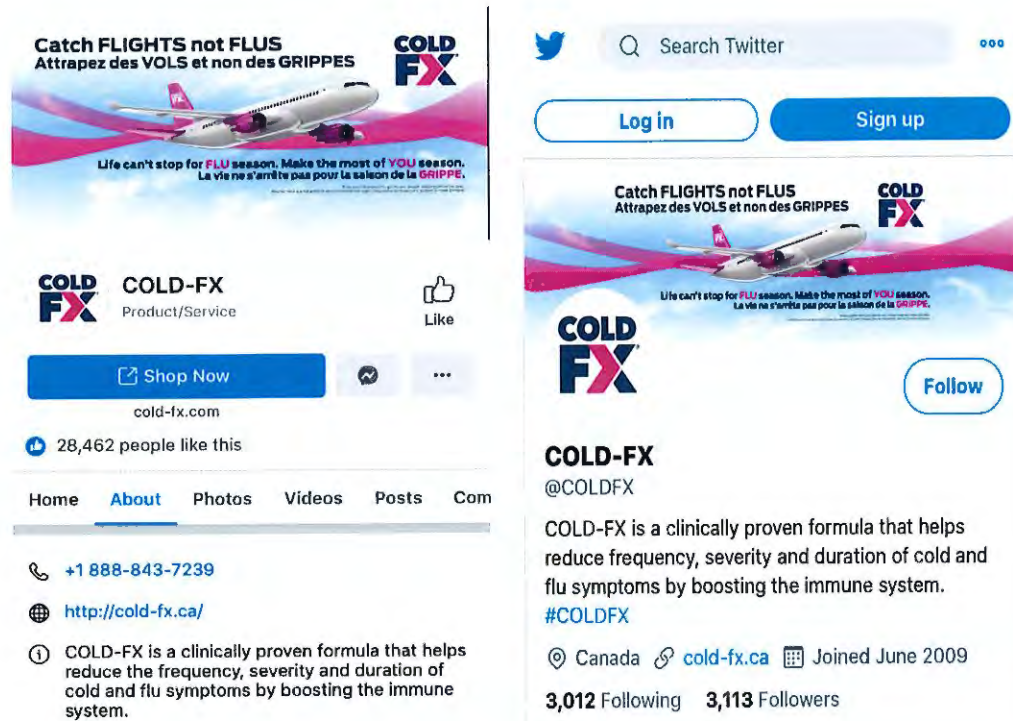
39. The COLD-FX website also includes the Representation below directly linking the “Proven by Science” slogan to the Defendants’ assertion that COLD-FX helps “reduce the frequency, severity and duration of cold & flu symptoms by boosting the immune system”:

Let's Break it Down: The Immune System Explained

The immune system is your body's natural defense system. It works to defend your body against “invaders,” such as: bacteria, viruses, parasites, even a fungus, all with the potential to make you sick. COLD-FX[®] is a Natural Health Product, Proven By Science. Take COLD-FX[®] daily to help reduce the frequency, severity and duration of cold & flu symptoms by boosting the immune system.

40. Further examples of the Representations made in respect of the full suite of COLD-FX products include those set out below:

- (a) Representations on both the COLD FX Twitter feed and Facebook page that COLD-FX is “a clinically proven formula that helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system”:



- (b) the Representation on the COLD-FX website that COLD-FX “has been demonstrated in clinical studies to increase the proportion of natural killer cells and T-helper cells [both of which] play an important role in both the innate and adaptive immune response”:

How does COLD-FX[®] prepare your immune system?

CVT-E002[®], the active ingredient in COLD-FX[®], has been demonstrated in clinical studies to increase the proportion of natural killer cells and T-helper cells⁽¹⁾. These cells play an important role in both the innate and adaptive immune response.

- (c) the Representation on the COLD-FX website that COLD-FX “when taken with a flu shot further reduces the frequency, severity and duration of cold and flu symptoms” according to “a clinical study”:

COLD-FX[®] Complements the Flu Shot

The flu shot is the single best defence against flu virus⁽⁶⁾. The flu shot gives our immune system a head start in the fight against flu season. When taken with a flu shot, COLD-FX[®] further reduces the frequency, severity and duration of cold and flu symptoms. A clinical study, evaluating the effectiveness of COLD-FX[®] in influenza-vaccinated adults (65+), showed COLD-FX[®] provides further reduction of cold and flu symptoms when taken with a flu shot⁽⁷⁾.

- (d) testimonials posted on the COLD-FX website, Facebook page, and Twitter page repeating the Representation that COLD-FX prevents colds, including for example:

- (i) “Thanks to COLD-FX I was able to prevent getting a cold when the rest of my family got it. – Anne”



- (ii) “COLD-FX is the best, have been using it for years and it does the job of keeping colds away. – Cindy”



41. The Representations made by the Defendants in respect specifically of COLD-FX Daily Support (and the Former COLD-FX Products) include that it is “Proven by Science” and:

- (a) that it has a “clinically proven formula” that “helps reduce [the] frequency, severity & duration of cold & flu symptoms by boosting the immune system”, as stated on the front of the product packaging shown below; and



- (b) that it “Helps Reduce the Chance of Catching Cold & Flu” and “has a clinically proven formula to help prepare the immune system to help reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system”, as stated on the Defendants’ COLD-FX website shown below:

Helps Reduce the Chance of Catching Cold & Flu >>>



Immune health is a daily commitment.

Our body has the natural capacity to defend itself, but sometimes it needs our help. COLD-FX[®] Daily Support has a clinically proven formula to help prepare the immune system to help reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system.

[View Products](#)

42. The Representations made by the Defendants in respect specifically of COLD-FX First Signs include that it: is “Proven by Science” and “Clinically Proven” when taken at the “first signs of a cold or flu” to help: will “relieve symptoms of sore throat, fever, cough, runny nose, and fatigue”; will “shorten the duration of cold and flu symptoms”; will “shorten the duration of cold and flu”; and will “reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system”.

43. Images of COLD-FX First Signs packaging and screen shots from the COLD-FX website depicting examples of the above Representations are reproduced below:

- (a) Packaging of COLD-FX First Signs includes the Representation that First Signs is “Clinically Proven” to “relieve symptoms of sore throat, fever, cough, headache, runny nose, fatigue”:



- (b) A screen shot from the “Product Information” section for First Signs from the COLD-FX website contains the Representations, among others: that First Signs “Helps to shorten the duration and relieve the symptoms of upper respiratory tract infections”; “Take at the first signs of cold to help reduce the frequency of colds and flus”; and “Helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system”:

Product Information

Recommended Use:

Helps to shorten the duration and relieve the symptoms of upper respiratory tract infections such as sore throat, fever, cough, headache, running nose and fatigue. Take at the first signs of cold to help reduce the frequency of colds and flus. Helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. Helps to maintain immune function.

- (c) Testimonials on the COLD-FX website and Facebook and Twitter pages include various Representations regarding COLD-FX First Signs, such as:
- (i) “It really worked well for me the last time I had flu-like symptoms. I had a cough, sore throat and runny nose. My symptoms were all gone after taking the First Signs capsule. – Madelaine1073”:



- (ii) "Best product out there. As soon as you feel a cold coming, just take these and voila! Cold is gone. – Jeff 7007":



44. The Representations made by the Defendants in respect specifically of COLD-FX First Signs Nighttime include that it is "Proven by Science" and "clinically proven" to provide the following benefits if taken "at first signs of cold or flu": "to help shorten the duration of cold and flu symptoms"; "Helps relieve symptoms of sore throat, cough, runny nose, fever and headache"; "relieve nausea, bronchitis, as well as coughs and colds"; "helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system" and to "relieve sleeplessness associated with common cold".

45. Images of COLD-FX First Signs Nighttime packaging and from the COLD-FX website depicting examples of the above Representations are reproduced below:



Product Information

Recommended Use:

Take at first signs of cold or flu to help shorten the duration of cold and flu symptoms. Helps relieve symptoms of sore throat, cough, runny nose, fever and headache. Ginger is traditionally used in Herbal Medicine as an expectorant and anti-tussive to help relieve nausea, bronchitis, as well as coughs and colds. Helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. Helps relieve sleeplessness associated with common cold.

46. The Representations made by the Defendants about Cold-FX Products, including COLD-FX First Signs, are false and misleading for the reasons stated above. In addition, these Representations are false and misleading because:

- (a) the Defendants have conducted no clinical studies on the COLD-FX First Signs products, including First Signs Nighttime;
- (b) the clinical studies conducted by the Defendants on their proprietary extract of North American ginseng known as CVT-E002™ (which is contained in all formulations of COLD-FX Products) demonstrated that CVT-E002 is *not* effective in preventing, reducing the frequency of, or curing the common cold or flu if taken at the “first signs” of a cold or flu;
- (c) the reference to “clinically proven” in Health Canada’s natural product licence for COLD-FX Daily Support applies only to effects on individuals over 65 years of age, a fact not generally disclosed by the Defendants;

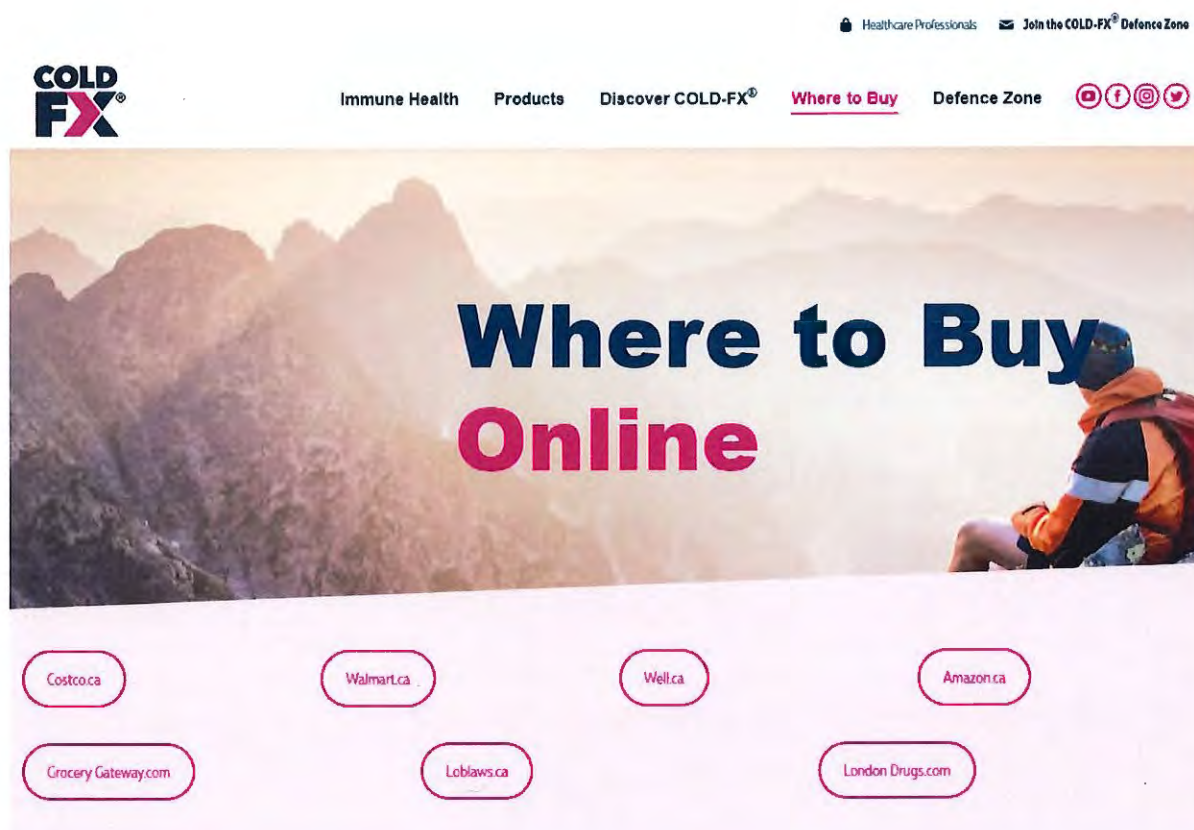
- (d) aside from CVT-E002 (which the Defendants' own studies have demonstrated provides no benefits within the first 8 weeks of use) all the active ingredients in the First Signs family of products are natural health ingredients, none of which has been "Proven by Science" to be effective in preventing or curing cold and flu, or in relieving the symptoms of cold and flu;
- (e) under the heading "Recommended Dose" on the COLD-FX website, consumers are cautioned not to use First Signs or First Signs Nighttime "beyond 8 weeks" without consulting a healthcare practitioner; however, as noted above, the Defendants' own studies on the efficacy of COLD-FX demonstrated that it is not effective if taken for *less than* eight weeks. Nowhere do the Defendants disclose this significant limitation on the effectiveness of COLD-FX or COLD-FX First Signs; and
- (f) Health Canada's natural product licences for both COLD-FX First Signs Daytime and COLD-FX First Signs Nighttime specifically make no reference to the effectiveness of the formula or ingredients being "clinically proven" or "Proven by Science".

F. SALES AND DISTRIBUTION OF COLD-FX PRODUCTS

47. The Defendants sell COLD-FX Products through the COLD-FX website, using on-line sales agents and through various "bricks and mortar" sales agents, including pharmacies, grocery stores, "big-box" retailers and online sellers such as Amazon.ca and Walmart.ca.

Website and On-line Sales Channels

48. The Defendants sell to consumers from their website. The home page of the COLD-FX website contains a “Where to Buy” tab. Clicking the “Where to Buy” tab takes consumers to a “Where to Buy Online” page of the COLD-FX website. Set out below is a screenshot of the “Where to Buy Online” page from the COLD-FX website:



49. Clicking the links provided on the “Where to Buy Online” page takes a consumer to the websites of some of the Defendants’ on-line sales agents which offer for sale on-line the full suite of COLD-FX Products. In addition, the Defendants sell directly to consumers through on-line distributors such as Amazon.ca. Versions of many of the

Representations are repeated verbatim or in a modified form on the webpages of the Defendants' on-line sales agents. For example:

- (a) clicking the LondonDrugs.com link on the COLD-FX "Where to Buy" webpage takes a consumer directly to a landing page of londondrugs.com that repeats the Representation that COLD-FX Products are "Proven by Science" and "clinically proven" to "reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system" and "increase the proportion of Natural Killer cells and T-helper cells". A screen shot of this londondrugs.com landing page is reproduced below:



A Natural Health Product,
Proven by Science

PHARMACIST
#1
RECOMMENDED BRAND

**COLD
FX**

**Life can't stop for FLU season.
Make the most of YOU season.**

**COLD-FX® Daily Support by Boosting
the Immune System**

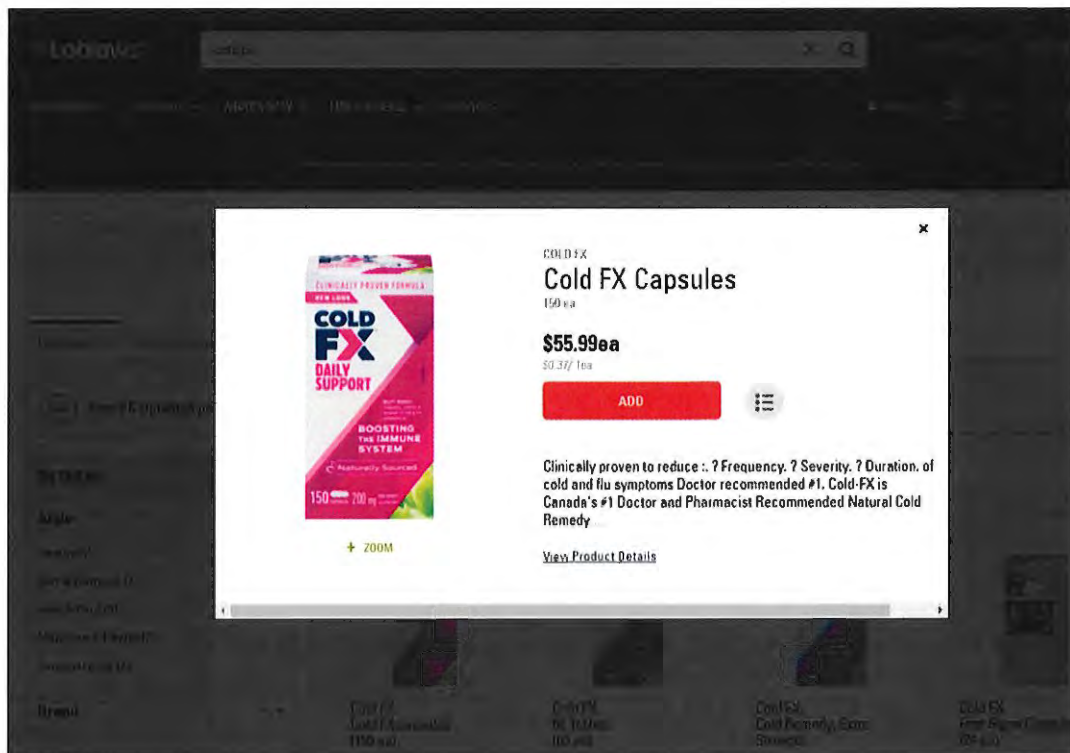
Building a strong immune system is a daily commitment. COLD-FX® Daily Support products have a clinically proven formula and contain a proprietary, patented, naturally sourced North American ginseng extract, that helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system.

**COLD-FX® Daily Support helps
prepare your immune**

COLD-FX® prepares your internal defence system, to help you in the fight against cold and flu. Your immune system is composed of both the innate and adaptive immunity. The innate immunity is rapid and general, while the adaptive immunity is specific. CVT-E002®, the active ingredient in COLD-FX®, has been demonstrated in clinical studies to increase the proportion of Natural Killer cells and T-helper cells, important for both the innate and adaptive immune response.



- (b) clicking the Loblaws.ca link and then on the image of the COLD-FX Daily Support product takes consumers to a page that repeats the Representation that “COLD-FX Capsules” are “Clinically proven to reduce: frequency, severity, duration of cold and flu symptoms.” A screen shot of the Loblaws.ca landing page is reproduced below:



- (c) clicking the Walmart.ca link and then on the image of the COLD-FX First Signs product takes consumers to a page that repeats the Representations that COLD-FX First Signs “Helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. Helps to maintain immune function. Helps to shorten the duration and relieve the symptoms of upper respiratory tract infections such as sore throat, coughing, running nose, fatigue, fever and headache. Take at the

first signs of cold to help reduce the frequency of colds and flus.” A screen shot of the Walmart.ca landing page is reproduced below:

The screenshot shows the Walmart.ca website interface. At the top, there is a search bar with the text "What are you looking for?". To the right of the search bar is a banner for "TOY & VIDEO GAME EVENT". Below the search bar, there are navigation links for "Departments", "Black Friday Early Deals", "Christmas", "Gift ideas", "Shop grocery", "Store finder", "Flyers", and "Sign in My account". The breadcrumb trail reads: "Walmart.ca > Health > Pharmacy > Cold, Cough & Flu > Cold & Flu > COLD-FX First Signs Capsule Box".

The product listing for "COLD-FX First Signs Capsule Box" is displayed. It includes a product image of the box, which features the text "CLINICALLY PROVEN INGREDIENTS", "NEW LOOK", "COLD-FX", "FIRST SIGNS", and "HELPS TO RELIEVE SYMPTOMS OF SORE THROAT • FEVER COUGH • HEADACHE RUNNY NOSE • FATIGUE". The price is listed as "\$16.47" (69¢/each). There are options for "Free pickup" and "Add to cart".

Should you require consultation with pharmacist, you may contact your local Walmart Pharmacist [here](#).

This item is available through Walmart Pharmacy. For Québec customers, some products may only be available for purchase at Accès Pharma, Wal-Mart's Québec-based affiliated pharmacies <http://www.accespharma.ca/en>.

Every medication or natural health product may cause serious adverse reactions or interactions with other medications or natural health products. Read the label, warnings and inserts provided by the manufacturer and consult your healthcare professional when purchasing medications or natural health products to be sure the product is right for you. No health, wellness, prescription or pharmaceutical information is intended to substitute for the diagnosis, treatment and advice of a healthcare professional. Always keep medications and natural health products out of reach of children.

Description

Helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. Helps to maintain immune function. Helps to shorten the duration and relieve the symptoms of upper respiratory tract infections such as sore throat, coughing, running nose, fatigue, fever and headache. Take at the first signs of cold to help reduce the frequency of colds and flus.

- At the first sign of cold, take 2 capsules three times daily for day 1, 2 and 3, then 1 capsule three times daily for day 4 and 5
- Take with food a few hours before or after taking other medications
- Do not exceed the recommended daily dose
- For use beyond 8 weeks, consult a health care practitioner

- (d) clicking the Well.ca link and then on the image of the COLD-FX First Signs Nighttime product leads to a page that repeats the Representations that

the product is “Specifically formulated to be taken at first sign of a cold to help reduce frequency, severity and duration of cold and flu symptoms” and “Helps relieve symptoms of sore throat, cough, runny nose, fever and headache. Helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. Helps relieve sleeplessness associated with common cold.” A screen shot from the Well.ca webpage that makes these Representations is reproduced below:

The screenshot shows the Well.ca website interface. At the top, there is a search bar with the text "Shop for products, brands or categories...". To the right of the search bar are links for "Wellness Delivery", "THE BLOG", and "HOLIDAY SHOP". Below the search bar is a navigation menu with categories: "BABY & KIDS", "BEAUTY & SKINCARE", "PERSONAL CARE", "DIET & FITNESS", "MEDICINE & HEALTH", "HOME & LIFESTYLE", "FOOD & SNACKS", "VITAMINS & SUPPLEMENTS", "GREEN & NATURAL", "SHOP BY BRAND", "SERVICES", and "PHARMA".

The breadcrumb trail reads: "Home → Medicine & Health → Cough, Cold & Flu → Cough, Cold & Flu Medicine → COLD-FX First Signs Nighttime". Below the breadcrumb trail, it says "24 capsules".

The product image shows a box of "COLD-FX FIRST SIGNS NIGHTTIME" capsules. The box is green and blue with white text. It lists "CLINICALLY PROVEN INGREDIENTS" and "SLEEP AID HELPS TO RELIEVE SYMPTOMS OF COUGH · NASAL CONGESTION · RUNNY NOSE · SORE THROAT · FEVER · NAUSEA". It also mentions "24 VEGETARIAN CAPSULES".

Below the product image are social media sharing buttons for "Save" and "Tweet".

The product title is "COLD-FX First Signs Nighttime" with "24 capsules" below it. There are two small icons (a green leaf and a red maple leaf) and a star rating area that says "No reviews yet".

The price is "\$17.99". Below the price is a "Quantity:" section with a minus sign, the number "1", and a plus sign. To the right of the quantity is an orange "Add to Cart" button.

Below the "Add to Cart" button are two links: "View all products by Cold-FX" and "Log in to add this to your Wish List".

Description & Features

Specifically formulated to be taken at first sign of a cold to help reduce frequency, severity and duration of cold and flu symptoms

Take at first signs of cold or flu to help shorten the duration of cold and flu symptoms. Helps relieve symptoms of sore throat, cough, runny nose, fever and headache. Helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. Helps relieve sleeplessness associated with common cold.

Similar Items

Two product images are shown side-by-side. Each is a box of "COLD-FX FIRST SIGNS" capsules. Below each image is an orange "Add to Cart" button. The text below the images reads "COLD-FX First Signs with Echinacea & Andrographis".

50. The Defendants' online sales agents make Representations on behalf of the Defendants and make Representations in a form and manner that makes these Representations their own. For example, on the screen shot above, Well.ca includes under the heading "Description & Features" additional product information in a manner that a consumer would interpret as a Well.ca endorsement of the efficacy of COLD-FX. Included in this endorsement are the false and misleading Representations that COLD-FX First Signs is "specifically formulated to be taken at the first sign of a cold to help reduce frequency, severity and duration of cold and flu symptoms".

51. These types of Representations, and the manner and in the context in which these Representations are made, convey to consumers the sales agents' endorsement of the efficacy of COLD-FX Products. In this way, the Defendants' sales agents and distributors play an active role in promoting, marketing and endorsing COLD-FX Products, and the alleged benefits of COLD-FX promoted by the Representations, in order to boost sales of COLD-FX.

52. This active effort to promote and endorse COLD-FX Products independently of Bausch is made particularly clear by the Defendants' online distributor, Amazon.ca. Clicking on the Amazon.ca link on the COLD-FX "Where to Buy Online" page and then the image of the COLD-FX Daily Support product takes consumers to a page that repeats the Representation that "COLD-FX 60 Capsules" have a "Clinically Proven Formula ... of North American ginseng [that] helps to increase production of certain types of cytokines that may signal and activate the immune system in high performing athletes." A screen shot of this Amazon.ca landing page is reproduced below:

The screenshot shows the Amazon.ca product page for COLD-FX 60 Capsules. The page layout includes a top navigation bar with the Amazon.ca logo, a search bar containing 'cold fx', and various account and order links. Below the navigation bar, there are category-specific links like 'Health & Personal Care' and 'Deals'. The main content area is divided into three columns: a product image on the left, a central product information section, and a right-hand sidebar with pricing and shipping details. The product image shows a box of COLD-FX 60 Capsules with text like 'CLINICALLY PROVEN FORMULA', 'NEW LOOK', 'COLD-FX DAILY SUPPORT', and 'BOOSTING THE IMMUNE SYSTEM'. The central section displays the product title, price, ratings, and a list of key features. The sidebar provides the current price, shipping information, and purchase options.

53. Clicking the Amazon.ca link on the COLD-FX website and then on the COLD-FX Daily Support product image takes a consumer to a page that contains further information about the product, including under a heading “Editorial Review – Amazon.ca Product Description”. The Amazon.ca Product Description repeats certain of the Defendants’ Representations and provides additional information about COLD-FX. The impression left on consumers is that Amazon has independently evaluated the efficacy of COLD-FX and is providing its endorsement of the alleged efficacy and benefits of COLD-FX.

54. The impression that the “Editorial Review” functions as Amazon’s endorsement of the efficacy of COLD-FX Products is reinforced by a separate part of the Amazon.ca page titled “From the manufacture” which contains manufacturer’s information on COLD-FX.

55. Set out below is a screen shot of the Amazon app page that contains the COLD-FX Daily Support “Editorial Review – Amazon.ca Product Description”, “Product features”, and “From the manufacturer” sections :



Editorial Reviews

Amazon.ca Product Description

Recommended Use: Your immune system gives you the innate ability to fight off germs, but factors like stress, fatigue and a poor diet can weaken your defenses. This can leave you vulnerable to that cough on the bus, your co-worker with a "sore throat", or a sniffing 5-year old. Taking COLD-FX daily you can help reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. Couple this with good diet, rest and stress management, and you're doing your immune system a huge favour. Taking COLD-FX daily helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. It provides further reduction of cold and flu symptoms when taken with a flu shot.

Product features

- Clinically Proven Formula, Naturally Sourced, Non Drowsy, Gluten Free. Unique patented extract of North American ginseng
- Strenuous exercise and stress, suppress your immune system. COLD-FX helps to increase production of certain types of cytokines that may signal and activate the immune system in high performing athletes.
- Recommended Dose: Adults: Take 1-2 capsules 2 times daily, up to 9 capsules per day. Children 12 years of age and older: Take 1 capsule 2 times daily.
- Additives: Naturally sourced. Non-drowsy

From the manufacturer



COLD-FX 60 Capsules

Recommended Use:

COLD-FX helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. It helps reduce overall symptoms of sore throat, fever, cough, headache, runny nose, nasal congestion, sneezing, malaise, ear-aches and hoarseness. It provides further reduction of cold and flu symptoms when taken with a flu shot. COLD-FX helps to increase production of certain types of cytokines that may signal and activate the immune system in high performing athletes.

Recommended Dose:

- Children 12 years of age and older: Take 1 capsule 2 times daily.
- Adults: Take 1-2 capsules 2 times daily, up to 9 capsules per day.
- COLD-FX may be taken for the duration of the Cold and Flu Season.



[View larger](#)

Also available in other flavors
Medicinal Ingredient:

Each capsule contains 200 mg of the active ingredient CVT-E002, which is uniquely derived from the root of Panax quinquefolius (North American ginseng, 4:1, 800 mg*). CVT-E002 is naturally sourced and tested by a proprietary (ChemBioPrint) technology to ensure quality and consistency.

*Herbal equivalent.

56. Similarly, clicking on the image of COLD-FX First Signs packaging on the Amazon.ca app COLD-FX landing page, takes a consumer to a page that contains further information about COLD-FX First Signs, including under the heading “Editorial Reviews – Amazon.ca Product Description”. The Amazon.ca Product Description and product features for COLD-FX First Signs contain a number of false or misleading Representations. These Representations include that when taken at the first signs of cold or flu, First Signs can “reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system” and “Take at the first signs of cold to help reduce the frequency of colds and flus”.

57. The impression left on consumers by the manner in which these Representations are made, including the use of the heading “Editorial Reviews”, is that Amazon.ca has independently evaluated the efficacy of COLD-FX First Signs and is providing its endorsement of the alleged benefits provided by COLD-FX First Signs.

58. Set out below is a screen shot of the page that contains the “Editorial Reviews – Amazon.ca Product Description” and “Product features” for COLD-FX First Signs:

Editorial Reviews

Amazon.ca Product Description

Recommended Use: 1 Capsule combines 4 trusted Ingredients: Andrographis Andrographis paniculata is a herb that is native to Asia and India where it has been valued for centuries for its numerous medicinal benefits. Helps to relieve the symptoms of upper respiratory tract infections, such as sore throat, coughing, running nose, fatigue, fever and headache Zinc Helps to maintain immune function COLD-FX CVT-E002 A patented extract of North American Ginseng Helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system Echinacea purpurea Helps to relieve the symptoms and shorten duration of upper respiratory tract infections

Product features

- Take at the first signs of cold to help reduce the frequency of colds and flus.
- Helps to relieve symptoms of sore throat, fever, cough, headache, runny nose and fatigue.
- Recommended Dose: Adults: Days 1 to 3: Take 2 capsules 3 times. Total 6 capsules daily. Days 4 and 5: Take 1 capsule 3 times. Total 3 capsules daily.

59. The Amazon.ca app page for COLD-FX First Signs Nighttime also contains “Editorial Reviews – Amazon.ca Product Description” and “Product features” sections that collectively repeat certain of the Defendants’ Representations and provide additional product information. Set out below is a screenshot of the Amazon app page that contains the “Editorial Reviews – Amazon.ca Product Description” and “Product features” for COLD-FX First Sign Nighttime:

Editorial Reviews

Amazon.ca Product Description

Take at first signs of cold or flu to help shorten the duration of cold and flu symptoms. Helps relieve symptoms of sore throat, cough, runny nose, fever and headache. Ginger is traditionally used in Herbal Medicine as an expectorant and anti-tussive to help relieve nausea, bronchitis, as well as coughs and colds. Helps reduce the frequency, severity and duration of cold and flu symptoms by boosting the immune system. Helps relieve sleeplessness associated with common cold.

Product features

- Melatonin to help you obtain the sleep needed to recover
 - Ginger as an expectorant and anti-tussive
 - Vegetarian Capsules
-

60. The Defendants other on-line sales agents provide similar active endorsements of the efficacy of COLD-FX Products.

61. To the extent that the Representations are reflected on the websites of the Defendants’ on-line sales agents, these agents knew that these Representations are false or misleading or have shown a reckless disregard for the truth of these Representations.

62. The details and exact nature of the agency relationship between the Defendants and their on-line sales agents is known only to the Defendants and their on-line sales agents.

“Bricks and Mortar” Retailers

63. The Defendants also sell through traditional “bricks and mortar” sales agents, including pharmacies, grocery stores and “big-box” retailers. These sales agents display many of the Representations, including the Defendants’ “Proven by Science” Representation, in the form of product packaging, signage, coupons, brochures and point-of-sale advertising. The Defendants’ “bricks and mortar” partners sell COLD-FX Products on behalf of the Defendants.

64. To the extent that these Representations were repeated by the Defendants’ “bricks and mortar” sales agents, these agents knew that the Representations are false or misleading or have shown a reckless disregard for the truth of these Representations.

65. The details and exact nature of the agency relationship between the Defendants and their “bricks and mortar” sales agents is known only to the Defendants and their sales agents.

66. Set out above are examples of the Representations. The full particulars of the Representations made to Class members are known only to the Defendants and their sales agents.

G. BREACH OF THE CONSUMER PROTECTION ACT

67. Mr. Drynan pleads and relies on the *CPA* and equivalent consumer protection legislation of other provinces and territories, including the *Consumer Protection Act*, R.S.A. 2000, c. C-26.3 (formerly the *Fair Trading Act*, R.S.A. 2000, c. F-2); *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2; *The Business Practices Act*,

C.C.S.M c. B120; *Consumer Product Warranty and Liability Act*, S.N.B. 1978, c. C-18.1; *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1; *Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17; *Consumer Protection Act*, R.S.N.S. 1989, c. 92; *Consumer Protection Act*, R.S.N.W.T. (Nu) 1988, c. C-17; *Business Practices Act*, R.S.P.E.I. 1988, c. B-7; *Consumer Protection Act*, CQLR c. P-40.1; *The Consumer Protection and Business Practices Act*, S.S. 2013, c. C-30.2; and *Consumers Protection Act*, R.S.Y. 2002, c.40 (collectively, the “**Equivalent Consumer Protection Legislation**”).

68. Mr. Drynan and the Class members are each a “consumer” pursuant to the *CPA* and Equivalent Consumer Protection Legislation.

69. The Defendants and their sales agents are a “supplier” which includes “an agent of the supplier” pursuant to the *CPA* and Equivalent Consumer Protection Legislation. The Defendants’ sales agents acted as agents of the Defendants in, among other things, making Representations and actively marketing, endorsing and selling COLD-FX to consumers.

70. The Defendants and their sales agents engaged in “consumer transactions” pursuant to the *CPA* and Equivalent Consumer Protection legislation by conducting business and other dealings with consumers in marketing, promoting, advertising, and offering for sale the COLD-FX Products.

71. The Defendants and the Defendants’ sales agents entered into “agreements” and/or “consumer agreements” and engaged in consumer transactions with consumers pursuant to the *CPA* and Equivalent Consumer Protection Legislation.

72. The Defendants are jointly and severally liable under section 18(12) of the CPA with the Defendants' sales agents who entered into consumer agreements with Class members

73. The Representations made by the Defendants and the Defendants' sales agents are false, misleading, or deceptive and constitute unfair practices contrary to section 14 and section 17 of the CPA and similar provisions of Equivalent Consumer Protection Legislation. Among other things, the Representations are false, misleading or deceptive because they:

- (a) state or convey a general impression to the average consumer that the COLD-FX Products:
 - (i) have approval, performance characteristics, benefits, and qualities that they do not have; and
 - (ii) are of a particular standard, quality, and grade (including "clinically proven" and "Proven by Science") that they are not; and
- (b) fail to state, or use exaggeration, innuendo or ambiguity as to material facts in respect of the COLD-FX Products that deceive or tend to deceive.

74. In making the Representations, the Defendants and their sales agents have acted unconscionably and have engaged in unfair practices contrary to sections 15 and 17 of the CPA and similar provisions of Equivalent Consumer Protection Legislation. Among other things, the Defendants and their sales agents knew or ought to have known that:

- (a) Consumers would be unable to receive a substantial benefit (or any benefit) from the COLD-FX Products as stated in the Representations;
- (b) The consumer transactions were excessively one-sided in favour of the Defendants; and
- (c) The Representations, including testimonials endorsed and disseminated by the Defendants, contained misleading statements of opinion upon which consumers were likely to rely to their detriment.

75. The limited extent of clinical studies conducted on CVT-E002, the Defendants' proprietary active ingredient in the COLD-FX Products, cannot support the Representations for the reasons described above at paragraphs 22 to 26, including because the results of the clinical studies are speculative, uncertain, contradictory, highly qualified, and inconclusive in respect of the subject matter of the Representations.

76. The Defendants have knowingly concealed or misrepresented the results of the clinical studies on COLD-FX.

77. Mr. Drynan and the Class purchased the COLD-FX Products after or during the time period in which the Defendants and their sales agents made or were making the Representations.

78. The Class members are entitled to damages under section 18 of the *CPA* and similar provisions of Equivalent Consumer Protection Legislation because the return or restitution of the COLD-FX Products purchased is no longer possible.

79. It is in the interests of justice that the Class members obtain, to the extent necessary, a waiver of any notice requirements under the *CPA* and Equivalent Consumer Protection Legislation.

80. The Representations made on the containers or labels of the COLD-FX Products are express warranties, the breach of which entitles the Class to damages pursuant to the applicable provisions of the Equivalent Consumer Protection Legislation.

H. BREACH OF THE *COMPETITION ACT*

81. The Representations are false or misleading in a material respect, based on both their literal meaning and the general impression conveyed by the Representations, including for the reasons described above.

82. In making the Representations to Mr. Drynan, the Class, and the public, the Defendants breached section 52 of the *Competition Act* because the Representations were and continue to be:

- (a) false and misleading in a material respect;
- (b) made knowingly or recklessly; and
- (c) made for the purpose of promoting, directly or indirectly, the supply or use of the COLD-FX Products and the business interests of the Defendants.

83. Mr. Drynan and the Class paid for goods having certain characteristics, standards, benefits, and qualities described in the Representations, but received COLD-FX Products that did not possess those characteristics, standards, benefits, and qualities. Moreover,

the Representations caused Mr. Drynan and Class members to purchase the COLD-FX Products based on an expected value that was above the true value that they acquired from the COLD-FX Products.

84. Mr. Drynan and the Class members suffered losses and damages as a result of the Defendants' breach of section 52 equal to the full price they paid for the COLD-FX Products and are entitled to recover damages from the Defendants together with investigative costs pursuant to section 36 of the *Competition Act*.

I. DAMAGES FOR STATUTORY BREACHES

85. Mr. Drynan and the Class suffered losses or damages as a result of the Defendants' conduct. It is appropriate that these damages be assessed on an aggregate basis under section 24 of the *Class Proceedings Act*.

86. The Representations caused Mr. Drynan and the Class members to suffer losses and damages equal to the full price they paid for the COLD-FX Products.

87. In the alternative, the Representations caused Mr. Drynan and Class members to pay more for COLD-FX Products than they would have absent the Representations, and Mr. Drynan and Class members are entitled to recover damages in the amount of this difference.

J. UNJUST ENRICHMENT

88. The Defendants have been unjustly enriched by the conduct set out above in breach of the *CPA* and Equivalent Consumer Protection Legislation, in contravention of section 9(1) of the *FDA* and Health Canada's *Consumer Advertising Guidelines for*

Marketed Health Products (for Nonprescription Drugs including Natural Health Products) and in breach of the *Competition Act*. Their enrichment is in the form of sales revenues that they would not otherwise have received but-for their misconduct.

89. Mr. Drynan and Class members suffered a deprivation corresponding to the Defendants' enrichment.

90. There is no juristic reason for the Defendants' enrichment and corresponding deprivation. The Defendants' conduct contrary to the *CPA*, the Equivalent Consumer Protection Legislation, the *Competition Act*, and the *FDA* negate or render void any juristic reason that might otherwise exist, including the contracts between the Class members and the Defendants or their agents.

91. Class Members are entitled to a remedy in the form of restitution or disgorgement (and to the extent necessary an accounting) of the profits the Defendants earned as a result of their misconduct.

K. WAIVER OF TORT

92. In the further alternative, Mr. Drynan and the Class claim disgorgement of the benefits received by the Defendants on grounds of waiver of tort, including all profits received from the sale of Cold-FX Products while the Representations were in market.

93. The Defendants committed multiple wrongs by making the Representations, including the breaches of statutes as described above. These wrongs conferred benefits on the Defendants, in the form of additional sales revenues, that they would not have acquired but for their wrongdoing. Mr. Drynan purchased COLD-FX after reviewing the

Defendants' "Proven by Science" and other Representations, relied upon these representations and would not have purchased COLD-FX but-for these Representations.

94. The Defendants were aware that their Representations were false, deceptive, and misleading. The Defendants' misconduct was premeditated, deliberate, deceptive, and sustained over a period of many years. The misconduct was motivated by the Defendants' desire to maximize the amount of profits they could reap from Class members, who as consumers were vulnerable to the predatory conduct of the Defendants due to the imbalance of knowledge and power that exists between them.

95. There is no legitimate justification for allowing the Defendants to retain the profits derived from their wrongdoing. An award of compensatory damages against the Defendants would be an inadequate remedy and would fail to deter the type of misconduct exhibited by the Defendants.

96. It is appropriate that disgorgement of profits be assessed on an aggregate basis for the Class.

L. PUNITIVE DAMAGES

97. This Court should order the Defendants to pay substantial exemplary and punitive damages. The conduct of the Defendants was high-handed, malicious and reprehensible, and it departs to a marked degree from the standards expected of Canadian manufacturers, marketers, sellers and distributors of pharmaceutical and natural health products.

98. Over the course of a decade, the Defendants consistently and repeatedly made the false, misleading, deceptive, and unconscionable Representations as part of their aggressive COLD-FX marketing campaign. They did so despite knowing that the clinical studies and trials that they commissioned or funded failed to provide adequate scientific and clinical support for the Representations. By their misconduct the Defendants adversely impacted the health of Canadian consumers by deterring them from pursuing treatments for cold and flu the effectiveness of which has a valid scientific basis. A substantial exemplary and punitive damages award is appropriate to deter the Defendants and other suppliers of consumer goods from engaging in this predatory and abusive conduct.

M. SERVICE OUTSIDE ONTARIO

99. This Statement of Claim may be served outside Ontario without a court order pursuant to the Rules of Civil Procedure because the claims are:

- (a) in respect of personal property in Ontario (Rule 17.02(a));
- (b) in respect of the interpretation or enforcement of a contract or other instrument in respect of personal property in Ontario (Rule 17.02(c));
- (c) in respect of a contract where the contract was made in Ontario and a breach of contract has been committed in Ontario (Rule 17.02(f));
- (d) authorized by statute to be made against a person outside Ontario by a proceeding commenced in Ontario (Rule 17.02(n)); and/or
- (e) brought against a person carrying on business in Ontario (Rule 17.02(p)).

N. PLACE OF TRIAL

100. The Plaintiff requests that the trial of the Action take place in Toronto.

December 11, 2019

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RT DRYNAN

-and- BAUSCH HEALTH COMPANIES INC.; BAUSCH HEA
CANADA INC.; VALEANT CANADA GP LIMITED; VA
CANADA LIMITED; VALEANT CANADA LP.
Defendants **CV 19-00632601**

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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