

CANADA

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL  
No.: 500-06-

500-06-000654-133

(Class Action)

**SUPERIOR COURT**

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**VINCENT BLAIS**, domiciled and resident, 9  
Chipman Hill Suite #3, Saint-John, New-Brunswick,  
E2L 2A7

**Petitioner**

- vs -

**JOYCE TSANG**, domiciled and resident at 418  
Franklin Ave, Princeton, New Jersey, United States  
of America, 08540-3951

- and -

**KAREN HONG**, domiciled and resident at 69  
Parkside Dr, Princeton, New Jersey, United States  
of America, 08540-4812

- and -

**ERIC LINSLEY**, domiciled and resident at 101  
Quarry PI Chapel Hill, North Carolina, United  
States of America, 27517-8386

- and -

**SOMESH SHARMA**, domiciled and resident at an  
unknown address,

-and-

**JEANNE BERTONIS**, domiciled and resident at an  
unknown address,

-and-

**RUDY HUBER**, domiciled and resident at 128  
Avenue Laurier, Dollard des Ormeaux, Québec,  
H3B 3B2,

-and-

**ANDRÉ ARCHIMBAUD**, domiciled and resident,  
1581 Avenue Docteur-Penfield, Montreal, Quebec,  
QC H3G1C6

-and-

**JEAN-PIERRE DESMARAIS**, domiciled and  
resident at 3136 Rue De La Chevauchee, Saint  
Lazare, QC, J7T 3L5

**Respondents**

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**MOTION FOR AUTHORIZATION TO INSTITUTE A CLASS ACTION  
AND OBTAIN THE STATUS OF REPRESENTATIVE**

**(C.C.P. Articles 1002 et seq.)**

122,00

0278668-0093-1641

PALAIS JUSTICE MONTRÉAL

2013-05-13

Gouvernement du Québec

Droits de greffe

TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT OF QUEBEC SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONER ALLEGES THE FOLLOWING:

The Respondent Directors of BioSyntech Inc. oversaw a troubling pattern of negligence that resulted in the sale of its intellectual property and the subsequent bankruptcy of the company, when it was on the verge of completing pivotal, stage III, clinical results for its promising, flagship medical device to repair damaged knee cartilage. After having taken a risk and invested in a promising biotechnology start up, securities holders were deprived of the fruits of their investment by the negligence of the Respondents. This proceeding seeks damages to compensate securities holders for their losses.

**1. The Petitioner wishes to institute a class action on behalf of persons forming part of the Class hereinafter described and of which he is also a member, namely:**

All natural persons and legal persons which, in the 12 months previous to May 13 2013, had fewer than 50 employees, who held securities of BioSyntech Inc. on May 12, 2010, except the Respondents, ProQuest Investments LLP, Fonds de Solidarité des Travailleurs du Québec, Pappas Ventures, Nicholas Piramal India Limited, and Highland Capital Management;

**2. The facts that give rise to an individual action on behalf of the Petitioner against the Respondents., and which give rise to individual actions on behalf of class members against the Respondents, are as follows:**

2.1. The petitioner alleges that the Respondents breached their duties as Directors of BioSyntech Inc. ("**BioSyntech**") under section 122(1) of the *Canada Business Corporations Act* R.S.C., 1985, c. C-44 and articles 322 and 1457 of the *Civil Code of Quebec*, which read as follows:

**CBCA section 122(1)** Every director and officer of a corporation in exercising their powers and discharging their duties shall

(a) act honestly and in good faith with a view to the best interests of the corporation; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

**CCQ article 322.** A director shall act with prudence and diligence.

He shall also act with honesty and loyalty in the interest of the legal person.

**CCQ article 1457.** Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.

He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

- 2.2. The Petitioner makes this claim on the basis of an investigation that included the review and analysis of information concerning the bankruptcy of BioSyntech, which was obtained from the following sources, among others:
- a. Securities law filings of BioSyntech;
  - b. Documents from BioSyntech's Bankruptcy and Insolvency Act proceedings;
  - c. Radio-Canada's Enquête investigative report on BioSyntech's bankruptcy that aired on January 31, 2013; and
  - d. Publicly available press releases, news articles and other media reports;
- 2.3. These sources demonstrate that the Respondents committed a series of faults that resulted in the avoidable sale of BioSyntech's intellectual property and the bankruptcy which inevitably followed;

## **THE RESPONDENTS, BIOSYNTech, AND BST-CARGEL**

### **The Respondents**

- 2.4. The Respondents were the eight members of the Board of Directors of BioSyntech when it filed a notice to make a proposal on May 12, 2010;
- 2.5. Joyce Tsang was a partner at ProQuest Investments Management Canada Corp, and represented ProQuest Investments LLP ("**ProQuest**") on the BioSyntech Board from 2006 until May 12, 2010, as appears from a copy of BioSyntech's 2009 Notice of Annual Meeting of Shareholders, filed as Exhibit **P-1**;
- 2.6. Karen Hong is a Principal at ProQuest and represented ProQuest on the Board from 2008 until May 12, 2010, as appears from P-1;
- 2.7. André Archimbaud was the Chairman of the Board from August 2009 until May 12, 2010, appointed by the Fonds de Solidarité des Travailleurs du Québec ("**FTQ**"), as appears from P-1;
- 2.8. Rudy Huber was an independent Board member appointed by FTQ from 2006 until May 12, 2010, as appears from P-1;
- 2.9. Eric Linsley is a managing partner at Pappas Ventures ("**Pappas**") and represented Pappas on the Board from 2008 until May 12, 2010, as appears from P-1;
- 2.10. In a June 3, 2009 presentation on the FTQ's activities, ProQuest and Pappas were listed as specialized funds of the FTQ, as appears from a copy of this FTQ presentation, filed as Exhibit **P-2**;
- 2.11. Jeanne Bertonis was the Chief Executive Officer of BioSyntech and a board member from August 2009 until May 12, 2010, as appears from a copy of BioSyntech's August 24, 2009 news release, filed as Exhibit **P-3**;

- 2.11.1. Ms. Bertonis had previously held the positions of Chief Business Officer and Vice President, Corporate Development for Angiotech Pharmaceuticals from 2000-2006, as appears from a copy of BioSyntech's August 14, 2009 news release, filed as Exhibit **P-4**;
- 2.11.2. She had previously worked with ProQuest and was hired by a Committee of the Board led by Joyce Tang of ProQuest, as appears from a copy of a transcript of Jeanne Bertonis' testimony at BioSyntech's June 2, 2010 Superior Court bankruptcy court hearing, filed as Exhibit **P-5**;
- 2.12. Somesh Sharma, Ph.D. was the Chief Scientific Officer of Nicholas Piramal India Limited ("**Piramal**"), and represented Piramal on the Board from 2005 until May 12, 2010, as appears from P-1;
- 2.13. Jean-Pierre Desmarais was an independent board member from 2008 until May 12, 2010, as appears from P-1;
  - 2.13.1. Jean-Pierre Desmarais is the current President of Piramal Life Sciences' Bio-orthopedics division in Montreal, as appears from a copy of his profile on the Piramal Group's website, filed as Exhibit **P-6**;
- 2.14. The remaining seat on the board of Directors was vacant on May 12, 2010. Highland Capital Management ("**Highland**") had the right to nominate its holder;

## **BioSyntech**

- 2.15. BioSyntech was a public biotechnology corporation based in Laval, Quebec and was governed by the *Canada Business Corporations Act*, R.S.C. (1985), c. C-44, as appears from a copy of BioSyntech's entry in the Quebec corporate registry, filed as Exhibit **P-7**;
- 2.16. BioSyntech was listed and posted for trading on the Toronto Stock Exchange ("**TSX**") under the symbol *TSX: BSY*;
- 2.17. As Joseph Benarrosh, BioSyntech's Chairman in 2006 stated, the success of a biotechnology start up like BioSyntech, rested on two key factors: an innovative, beneficial, and proprietary technology, and access to the capital required to develop and market the products derived from this technology, as appears from a copy of BioSyntech's 2006 Annual Report, filed as Exhibit **P-8**;
- 2.18. In partnership with researchers at the École Polytechnique of the Université de Montréal, BioSyntech conducted extensive research towards the development of biotherapeutic thermogels designed to repair tissue;
- 2.19. With the help of \$24 million in public grants and loans and the investments of shareholders, these research and development activities produced a promising, proprietary technological platform called BST-Gel, a family of novel non-toxic, biodegradable hydrogels that are liquid at room temperatures but solidify at human body temperature, which makes it a unique biomaterial for therapeutic devices and injectable drug-delivery systems;

- 2.20. In 2006, BioSyntech had leveraged this BST-Gel platform to develop three late-stage tissue-repair products, BST-CarGel, BST-InPod<sup>1</sup>, and BST-DermOn<sup>2</sup>, which it expected to bring to market in 2008 in Canada and Europe and in 2009 in the USA, as appears from P-8;
- 2.21. As is typical of biotechnology start ups, BioSyntech operated at a loss every year as it had minimal revenues and focused its work on completing the requisite clinical trials for these products and obtaining market approval;
- 2.22. Having developed the technological products, BioSyntech's survival thus depended upon minimizing its operating costs and capital expenditures, and securing financing to complete its clinical trials and bring its products to the market;

### **BST-CarGel**

- 2.23. BioSyntech's lead product was BST-CarGel;
- 2.24. Composed of BST-Gel and the blood of the treated patient, BST-CarGel was a medical device designed to rebuild the cartilage of an injured, worn-out, or aged joint.
- 2.25. BioSyntech's CEO, Claude Leduc, described the medical device as follows in P-8:

"Our first lead product, BST-CarGel, addresses the enormous problem of cartilage damage. Cartilage is essential to pain-free movement. It cushions joints, absorbs shock and dissipates load. Damage to this tissue, as a result of either arthritis or trauma from an injury, is one of the most common causes of chronic joint pain. Given North America's aging demographic and the trend of increasing body weight, incidence of cartilage damage is only expected to increase.

Existing treatments for cartilage lesions have significant drawbacks. Microfracture, one of the most commonly used methods to help regenerate cartilage, often results in poor quality tissue that degrades quickly and leads inevitably to the progression of pain. Another treatment using a patient's own cartilage cells to grow new cartilage involves two surgeries, long rehabilitation periods and is prohibitive to most patients. Artificial joint replacement is both painful, costly and has a limited lifespan of about 10 to 15 years.

BST-CarGel addresses the inadequacies of current treatment options. Applied during a minimally invasive treatment, it acts as a biodegradable scaffolding that supports the body's own natural repair process, enabling it to regenerate its own cartilage. The results of an extensive pre-clinical study, published in the prestigious Journal of Bone and Joint Surgery, found that BST-CarGel regenerates more, higher quality cartilage than microfracture";

- 2.26. In 2003, human patients began to be treated for the first time with BST-CarGel under Health Canada's Special Access Programme;
- 2.27. One of those patients was Serge Savard who had experienced knee problems for years and taken an interest in the orthopedics industry. Upon learning of

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<sup>1</sup> BST-InPod was an injectable product that restores the comfort of the plantar fat pads.

<sup>2</sup> BST-DermOn was a topical therapy designed for the treatment of chronic wounds

BioSyntech, Mr. Savard bought shares in BioSyntech and accepted a seat on the Board of Directors in 2001. After undergoing treatment with BST-CarGel in 2003, Mr. Savard was able to walk without a cane and regularly play golf again, as appears from Radio-Canada Enquête's January 31, 2013 investigative report on BioSyntech's bankruptcy;

- 2.28. The U.S. Food and Drug Administration, Health Canada, and the European authorities classified BST-CarGel as a medical device, as appears from a copy of BioSyntech's 2005 Annual Report, filed as Exhibit **P-9**;
- 2.29. In a message to shareholders, CEO Claude Leduc described the advantage of this classification to shareholders as follows in P-9:

"[it] represents a significant advantage since regulatory requirements for market approval of medical devices can usually be met much faster than for drugs and therapeutics products. One pilot study and one pivotal (equivalent to stage III) human clinical trial on relatively low numbers of patients are usually sufficient to demonstrate safety and to sustain efficacy claims"
- 2.30. BioSyntech designed a thorough, 80-patient, pivotal, phase III clinical trial for BST-CarGel ("**pivotal trial**") in order to fulfill regulatory requirements and obtain market approval from Canada and the European Union, as appears from a copy of BioSyntech's 2004 Annual Report, filed as Exhibit **P-10**;
- 2.31. In November 2005, Health Canada approved BioSyntech's pivotal trial to compare the safety and effectiveness of using BST-CarGel to microfracture, one of the most common existing cartilage repair surgical treatments, as appears from P-8;
- 2.32. Amine Selmani, the founder of BioSyntech, testified that at the time BioSyntech went bankrupt in summer 2010, BioSyntech was only the third or fourth biotechnology company to reach phase III in Quebec history, as appears from a copy of a transcript of Amine Selmani's testimony at BioSyntech's June 2, 2010 Superior Court bankruptcy court hearing, filed as Exhibit **P-11**;
- 2.33. In April 2005, before BioSyntech's pivotal trial was approved, AngioTech Pharmaceuticals, Inc. ("**Angiotech**") submitted an offer to purchase BioSyntech for \$38 million or \$1 a share;
- 2.34. In May 2009, Laurentian Bank Securities ("**Laurentian**") gave BioSyntech a valuation range of \$77 million to \$182 million if it obtained positive BST-CarGel pivotal trial results, as appears from a copy of Laurentian's BioSyntech Financing Strategy dated May 2009, filed as Exhibit **P-12**;
- 2.35. On May 19, 2010, Piramal, a shareholder in BioSyntech that was represented by Respondent Somesh Sharma on the Board, bought BioSyntech's core assets, including the patents for BST-CarGel, for \$4,556,000, as appears from a copy of the June 3, 2010 bankruptcy decision of Judge Claude Auclair of the Superior Court, filed as Exhibit **P-13**;
- 2.36. On April 11, 2012, Piramal announced that BST-CarGel had received European CE-mark approval enabling commercialization across the European Union, as

appears from a copy of Piramal's May 14 and April 11, 2012 news releases, filed as Exhibit **P-14**, en liasse;

2.37. Piramal further stated that the European approval will serve as the basis to obtain commercial authorization for BST-CarGel in the Middle East, the Asia Pacific region, and South America, as appears from P-14;

2.38. P-14 reads in part as follows:

"Commenting on the development, Mr Ajay Piramal, Chairman, Piramal Group said, "BST-CarGel provides us with a superior way to address significant unmet medical needs in the global knee cartilage repair market where approximately 300,000 people undergo treatment each year. With the expansion of this treatment into other areas of cartilage repair, there is a market opportunity of more than one billion dollars";

## **THE EVENTS LEADING UP TO BANKRUPTCY**

### **The BST-CarGel Pivotal Trial**

2.39. On June 14, 2007, BioSyntech announced that it had enrolled the first 20 patients in its BST-CarGel pivotal trial, as appears from a copy of BioSyntech's news release on this date, filed as Exhibit **P-15**;

2.40. On March 17, 2008, BioSyntech announced positive preliminary results from a prospectively planned six-month interim analysis of the first 20 patient subset of its BST-CarGel pivotal trial, as appears from a copy of BioSyntech's news release on this date, filed as Exhibit **P-16**;

2.41. On this same date, BioSyntech indicated that it had enrolled over half of the 80 patients in its BST-CarGel clinical trial, as appears from P-16;

2.42. On February 2, 2009, BioSyntech announced that all 80 patients necessary to the BST-CarGel pivotal trial have been enrolled, as appears from a copy of BioSyntech's news release on this date, filed as Exhibit **P-17**;

2.43. Michel Lagueux, Interim CEO of BioSyntech and Chairman of the Board, is quoted in part as follows in P-17:

"With enrolment now complete, we look forward to the final results from this pivotal trial, which will be available in the first quarter of 2010";

2.44. On March 12, 2009, BioSyntech announced that it would conduct an interim analysis on 40 patients in its BST-CarGel pivotal trial to entice potential partners and investors, as appears from a copy of BioSyntech's news release on this date, filed as Exhibit **P-18**;

2.45. Michel Lagueux is quoted as follows:

"BioSyntech is in a situation where we can gain much earlier access to quality 12 month outcome data that will be of significant interest to potential orthopaedic partners, investors and stakeholders. This is a full interim analysis of safety and effectiveness derived from 40 subjects after a 12 month follow-up, which

represents half of the study population and should provide a good indication as to the effect of BST-CarGel(R) in the treatment of cartilage lesions in the knee compared to the standard of care.”

[...]

“To ensure the integrity of the study, the data will be handled, analyzed and reported by third parties whom will remain blinded throughout the process along with our Clinical Investigators. It is our plan to complete the trial and carry out the final clinical analysis on the 80 subjects to maintain the scientific validity of the trial. The final clinical results should be available in the first half of 2010”;

- 2.46. On June 17th, 2009, BioSyntech published positive interim results from an analysis of 22 patients, who had completed their 12 month follow-up in the BST-CarGel pivotal trial. Biopsies from the knees of the 22 patients showed statistically significant evidence of improved repair tissue quality due to BST-CarGel, as appears from a copy of BioSyntech’s news release on this date, filed as Exhibit **P-19**;
- 2.47. BioSyntech reiterated that it expected final results on all 80 patients in the first half of 2010;
- 2.48. After the positive 22 patient results, BioSyntech never disclosed the full results of the 40 patient interim analysis;
- 2.49. The one mention of this interim analysis came in BioSyntech’s November 13, 2009 news release where then CEO Jeanne Bertonis is quoted as follows:

“In addition, we are completing our interim analysis from our ongoing pivotal study; I am pleased to report that our MRI data is positive and supports the previously reported positive biopsy findings. We look forward to obtaining the final results from the pivotal trial for this product in the summer of calendar year 2010”,

as appears from a copy of this news release, filed as Exhibit **P-20**;
- 2.50. BioSyntech disclosed this material information in a news release announcing financial results instead of a separate news release as it had in every other prior occasion, as appears from P-20;
- 2.51. On February 12, 2010, BioSyntech declared that it expected the final results of the trial during the summer of 2010, as appears from a copy of BioSyntech’s news release on this date, filed as Exhibit **P-21**;

### **The Restructuring of BioSyntech and the Change in Control of the Board**

- 2.52. In summer 2008, the Board of directors determined that BioSyntech was in serious financial difficulty, as appears from a copy of BioSyntech’s July 8, 2010 news release, filed as Exhibit **P-22**;
- 2.53. On July 18, 2008, to address this financial hardship and implement a new streamlined business plan, BioSyntech raised \$12 500 000 through a public offering of 12% subordinated secured convertible debentures (the "**2008 Debentures**") that were set to mature on December 31, 2009, as appears from



P-22 and a copy of BioSyntech's July 18, 2008 news release, filed as Exhibit P-23;

- 2.54. Subject to regulatory approval and to the consent of holders of Debentures representing 2/3 of the principal amount of Debentures outstanding, the Corporation could repay the principal amount of the Debentures at maturity by issuing freely tradable Shares listed on the TSX to the holders of Debentures, as appears from P-22;
- 2.55. Subject to regulatory approval and to the satisfaction of certain conditions described in the prospectus, the Corporation could also satisfy its obligation to pay interest on the Debentures by issuing freely tradable Shares listed on the TSX to the holders of Debentures, as appears from P-22;
- 2.56. BioSyntech also agreed to increase the number of directors on the board of directors of the Corporation to nine and grant the four largest purchasers of Units under the Offering the right to appoint a director, as appears from P-22;
- 2.57. The four largest purchasers of Debentures were ProQuest, FTQ, Highland, and Pappas;
- 2.58. In order to complete this deal, the Board obtained an exemption due to financial hardship from the TSX Company Manual rules requiring shareholder approval for a prospectus involving a potential for a change of control or the involvement of insiders, as appears from P-22;
- 2.59. To address its financial hardship, BioSyntech pledged to use the net proceeds of this offering to take four actions to restructure the company:
  - a. "implement a streamlined business plan focused on maximizing value for all shareholders";
  - b. "complete the pivotal European and Canadian clinical trial for BST-CarGel(R)";
  - c. "hire a consultant to augment the management team in their exploration of strategic alternatives, such as partnerships and M&A transactions; and"
  - d. "support working capital and general corporate purposes."as appears from P-22;
- 2.60. The Company's streamlined business plan notably involved limiting expenses by focusing all of its research and development expenses on the BST-Cargel clinical trial and suspending work on all the Company's other projects, including the late-stage BST-DermOn and BST-InPod devices, as appears from P-22;
- 2.61. On July 22, 2008, the four new debenture holders exercised their new powers to appoint directors to represent them: Karen Hong for ProQuest; Michel Lagueux for FTQ, Eric Linsley for Pappas, and Winston Black for Highland, as appears from P-24;
- 2.62. On the same day, Joseph Benarrosh, Serge Savard and Christophe Guy resigned from the Board;

- 2.63. When asked why he resigned by Radio-Canada's Enquête for their January 31, 2013 investigative report on BioSyntech's bankruptcy, Mr. Savard said the following:

« Qu'est-ce que je viens faire sur un conseil d'administration où il y a cinq votes sur neuf qui sont contrôlés? [...] La FTQ était l'alliée de ProQuest là-dedans. C'est quelque chose qui s'est fait dans l'antichambre, c'est une prise de contrôle dans le fond »

[English Translation] "What am I doing on a Board of Directors where five of the nine votes are controlled? [...] The FTQ was the ally of ProQuest in this. This is something that was done in the antechamber; it's basically a takeover";

### **The Merger and Acquisition Process, Torreya, and PwC**

- 2.64. As part of its restructuring under the streamlined business plan, BioSyntech had pledged to use the proceeds from the June 2008 debentures to hire a consultant to explore strategic alternatives such as partnerships and a M&A transaction;
- 2.65. In January 2009, the Board mandated Interim CEO Michel Lagueux and CSO Matthew Shive to find an investment banker to act as a deal manager for the merger and acquisition process, as appears from P-11;
- 2.66. That same month, Lagueux and Shive travelled to San Francisco to meet potential deal managers at a large financial conference organized by J.P. Morgan. They made presentations to seven investment banks and six of these groups were very interested to act as BioSyntech's deal manager<sup>3</sup>;
- 2.67. After a rigorous selection process, Lagueux and Shive selected two banks, which had experience with orthopedics, to meet the Board and compete for the right to act as BioSyntech's deal manager<sup>4</sup>;
- 2.68. Torreya Partners LLC, a leading boutique advisory firm that provides strategic advice and assistance with Mergers & Acquisitions, Partnering and Financings to life science companies worldwide, was one of those banks;
- 2.69. In mid-March 2009, Torreya and the other investment bank travelled to Montreal to present to the Board. The Board refused their services despite Lagueux and Shive's recommendation<sup>5</sup>;
- 2.70. Two weeks later, the Board formed a special committee to review strategic alternatives with the objective of assessing commercial partnerships involving BST-Cargel or a sale of the corporation. Its chair was Joyce Tsang, and its members included Jean-Pierre Desmarais and Rudy Huber, as appears from a copy of BioSyntech's March 30, 2009 news release, filed as Exhibit **P-25**;
- 2.71. On June 29, 2009, BioSyntech issued a press release announcing the resignation of Chairman of the Board and Interim CEO Michel Lagueux, and CFO Louis Lemire. This same press release publicized the fact that the company was

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<sup>3</sup> Exhibit P-11 (Selmani testimony), at 8-9.

<sup>4</sup> Exhibit P-11 (Selmani testimony), at 9-10.

<sup>5</sup> Exhibit P-11 (Selmani testimony), at 10, 13.

facing significant financial difficulties and announced that it could have to cease activities if it did not find additional financing, as appear from exhibit **P-26**;

- 2.72. When questioned by shareholder Gaston Blais, the petitioner's father, as to why he resigned, Michel Lagueux said that he did not want to go to prison and that the information released by the Board had been manipulated, as appears from a December 13, 2010 article on BioSyntech's bankruptcy published by TVA's Argent, filed as Exhibit **P-27**;
- 2.73. BioSyntech's Chief Scientific Officer, Matthew Schive, further testified that it seemed to him that the Board did not want to issue the June 17, 2009 press release sharing positive results for the first 22 patients, as appears from Exhibit P-11;
- 2.74. On July 21, 2009, one year after it received the proceeds of the August 2008 debentures, BioSyntech announced that it had retained the services of PricewaterhouseCoopers LLP ("**PwC**") to act as its financial advisor for its review of strategic alternatives, as appears from a copy of BioSyntech's news release on this date, filed as Exhibit **P-28**;
- 2.75. According to BioSyntech's news releases, by the time PwC started its work in August 2009, BioSyntech still had not completed the 40 patient interim analysis that was intended to entice potential investors, partners or purchasers;
- 2.76. On August 14, 2009, BioSyntech raised a further \$1 400 000 through secured convertible debentures (the "2009 Debentures") with ProQuest, FTQ, Highland Capital Management ("Highland"), and Pappas, as appears from a copy of BioSyntech's news release on this date, filed as Exhibit **P-29**;
- 2.77. According to this agreement, the term for 2008 debentures was extended from December 31st 2009 to March 31st 2010, as appears from P-29;
- 2.78. Under the terms of this agreement, a rights offering was made to its shareholders for an additional 310 000 Units at a price of 10\$ per unit. The gross aggregate of this issuance is 3 100 000\$, as appears from P-29;
- 2.79. On August 31st, BioSyntech announced it has filled the prospectus for the rights offering, as appears from a copy of BioSyntech's news release on this date, filed as Exhibit **P-30**;
- 2.80. The majority of these rights (169 716) were purchased by ProQuest. The remaining ones were purchased by other shareholders (140 284);
- 2.81. From the Autumn 2009 until April 2010, PwC conducted a merger and acquisition process, ostensibly in order to find a partner, investor or buyer for BioSyntech. After contacting 102 companies, they received three non-binding offers for between \$1 to 2.2 million, as appears from P-13;
- 2.82. On April 30, 2010, after management asked the Board to provide further financing, the only response that they received was an offer from ProQuest to acquire BioSyntech's assets, as appears from P-5;

### **Excessive Operating Expenses leading up to Bankruptcy**

- 2.83. On May 12, 2010, BioSyntech had seventeen employees and six management consultants. Twelve of the employees worked on research and development and the remaining five carried out corporate and administrative activities, as appears from a copy of BioSyntech's Motion to Appoint an Interim Receiver, filed as Exhibit **P-30**;
- 2.84. However, Dr. Abdellatif Chenite, a creator of the BST-Gel technology platform and the senior Director of Research and Development Biomaterials & Therapeutics Delivery at BioSyntech, testified on June 2, 2010 in Quebec Superior Court that research and development activities at BioSyntech had all but ceased in the summer of 2008, as appears from P-11;
- 2.85. Dr. Chenite further testified that for the last two years, he was the only member of the Research and Development department and he spent his days reading and writing scientific articles, as appears from P-11;

## **BANKRUPTCY AND THE SALE OF BIOSYNTech**

### **BIA Proceedings and the Sale of BioSyntech to Piramal**

- 2.86. On May 12, 2010, the Board announced that it had authorized the company to seek court protection under the *Bankruptcy and Insolvency Act* (Canada) ("**BIA**") and have Pricewaterhouse Coopers ("**PwC**") appointed as trustee and interim receiver, as appears from a copy of BioSyntech's May 12, 2010 news release, filed as Exhibit **P-31**;
- 2.87. On the same day, the company filed a Notice of Intention to Make a Proposal to creditors under subsection 50.4(1) of the **BIA**, as appears from a copy of the notices, filed as Exhibit **P-32**, en liasse;
- 2.88. On May 13, 2010, the registrar of the Quebec superior court granted an order to appoint PwC as interim receiver with the power to initiate a solicitation process for the sale of BioSyntech's core assets, and accept an offer subject to the approval of the Superior Court, as appears from a copy of the May 13, 2010 order, filed as Exhibit **P-33**;
- 2.89. On May 13, 2010, the day after it was appointed, PwC invited seven companies to bid on BioSyntech's core assets. PwC set a May 19 deadline for the submission of all offers, as appears from a copy of the Trustee's Report to the Court for the Approval of the Offer to Sell the Debtor's Assets, filed as exhibit **P-34**;
- 2.90. This one day delay demonstrates that there was never any intention to make a proposal nor any attempt to ensure the survival of the company;
- 2.91. Moreover, the five-business day deadline to submit a bid was exceptionally and needlessly short for the sale of BioSyntech's intellectual property since these assets would not decay or lose value in the short term;
- 2.92. On May 19, 2010, the leading offers were from Piramal and ProQuest, two firms who had representatives on BioSyntech's Board;

- 2.93. PwC accepted Piramal's bid of \$4 556 000 because it was slightly higher than ProQuest's offer of \$4 519 000, as appears from P-13;
- 2.94. On June 3, 2010, when PwC sought to have the sale approved by Auclair J. of the Quebec Superior Court, ProQuest attempted to increase its offer to buy BioSyntech by \$1 M in the middle of the hearing. Since PwC had already accepted Piramal's offer, the judge refused ProQuest's last minute offer and authorized PwC to accept Piramal's offer, as appears from P-13;

### **Shareholder Opposition to Bankruptcy and the Sale of the Company**

- 2.95. Class members expected that PwC would submit a proposal to creditors and were not immediately notified of the expedited sale of BioSyntech's core assets;
- 2.96. The Respondents' decision to not file a proposal and instead sell BioSyntech's core assets, thereby rendering any continued operations impossible, was negligent and shocked many class members for primarily four reasons:
- 2.96.1. By February 12, 2010, BioSyntech had completed gathering data for the remaining 40 patients in its pivotal trial and announced that it expected the final results in the summer of 2010, as appears from P-11 and P-21;
- 2.96.2. On March 25, 2010, BioSyntech announced that it had obtained a \$1,000,000 loan with Investissement Québec to finance its refundable tax credits for 2009. BioSyntech indicated that this loan was expected to provide BioSyntech with the resources required to continue its operations until June 2010, the whole as appears from a copy of BioSyntech's news release on this date, filed as Exhibit **P-35**;
- 2.96.3. At the same time as it announced this loan, BioSyntech indicated that the due date on all outstanding debentures had been extended from March 31 to June 30, 2010, as appears from P-35;
- 2.96.4. As of May 12, 2010, not a single creditor had demanded repayment of money owed by BioSyntech, as appears from P-30;
- 2.97. On May 14, 2010, upon learning of the May 17 deadline for the solicitation of bids, a group of shareholders representing over 5% of the BioSyntech's outstanding shares, requested a Special Shareholders Meeting to be called, pursuant to section 143 of the *CBCA*. The Purpose of the meeting was to explore immediate options for financing and to keep the company going, as appears from a copy of a letter written to the Company on the same date, filed as Exhibit **P-36**;
- 2.98. In a letter dated May 17, 2010, BioSyntech denied the shareholders' request for a special shareholder's meeting. It informed them that it would limit its efforts to find an investor or purchaser for BioSyntech and its assets, as appears from a copy of the May 17, 2010 letter, filed as Exhibit **P-37**;
- 2.99. The Respondents never approached shareholders to provide further financing or buy more shares in the company;

- 2.100. Other sources of financing were available in order to allow it to complete the BST-CarGel pivotal trial in September 2010:
- 2.100.1. In August 2009, shareholders participated in a \$3M public offering and could have been called upon again;
  - 2.100.2. Shareholder and BioSyntech founder, Amine Selmani, testified that he was willing to mortgage his house, use his own money, and work for free until September 2010, as appears from P-13;
  - 2.100.3. On June 17, 2010 as shareholders appealed the sale of BioSyntech, Charles Beaudoin, a partner at real estate firm Multivesco and shareholder in BioSyntech, sent a letter of intent to provide \$1 000 000 of financing to BioSyntech in order to allow it to complete the pivotal trial and conclude a financing with an investment bank to restructure the company. Mr. Beaudouin further provided a plan for achieving these objectives and indicated that he was willing to increase the amount if it did not prove to be sufficient, the whole as appears from a copy of Mr. Beaudouin's June 17, 2010 email and letter to BioSyntech, filed as Exhibit P-38, en liasse;

## **THE FAULTS OF THE RESPONDENTS CAUSED THE BANKRUPTCY OF BIOSYNTECH**

- 2.101. As appears from the foregoing, the available evidence demonstrates that the Respondents committed a pattern of faults that resulted in an avoidable bankruptcy, which, it goes without saying, was contrary to the best interests of the company;
- the Respondents failed to bring down BioSyntech's excessive burn rate;
  - the Respondents failed to diligently pursue opportunities to obtain additional financing for BioSyntech;
  - the Respondents allowed the company to file a Notice of intent to make a proposal to its creditors which was immediately followed by a Motion to allow the sale of the core assets thus rendering any proposal clearly moot;
- 2.102. Obtaining successful results for the final forty patients in the BST-CarGel pivotal trial was essential to the ability of BioSyntech to demonstrate that it had an innovative, beneficial and safe medical device;
- 2.103. Without the successful completion of the pivotal trial, BioSyntech could not assure potential investors, partners, or buyers that it would obtain market approval and thus could address its existing liabilities and raise the millions required to commercialize BST-CarGel;
- 2.104. After fifteen years of work and \$76 million were invested to obtain market approval for BioSyntech's innovative product, the Respondents put BioSyntech into bankruptcy when it was within months of achieving this milestone for its lead medical device BST-CarGel;

- 2.105. The positive results achieved by Piramal and used to obtain market approval for BST-CarGel in the European Union were well within the reach of BioSyntech and were expected to be positive;
- 2.106. The faults of the Respondents have deprived class members of their right to share in the profits of what Piramal calls a billion dollar global market;

### **THE CASE OF THE PETITIONER**

- 2.107. On May 12, 2010, the Petitioner held approximately 400,000 shares in BioSyntech;
- 2.108. The Petitioner had purchased these shares for approximately \$125,000;
3. **The composition of the Class makes the application of articles 59 and 67 C.C.P. difficult or impracticable in that:**
  - 3.1. The size of the Class is estimated to include thousands of members;
4. **The Petitioner seeks to have the following questions of fact and law, which are identical, similar or related and unite each member of the Class, decided by a class action:**
  - 4.1. Did the Respondents breach their duties to exercise care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances under section 122(1)(b) of the *CBCA*?
  - 4.2. Did the Respondents breach their duties to act with prudence and diligence under article 322 of the *CCQ*?
  - 4.3. Did the Respondents breach their duties to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another under article 1457 of the *CCQ*?
  - 4.4. Did the Respondents cause damages to the class members?
  - 4.5. Are the class members entitled to compensatory damages, and if so, to how much?
5. **The questions of fact and law individual to each member of the Class are the following:**
  - 5.1. What amount must the Respondents reimburse to each class member?
6. **It is appropriate to authorize a class action on behalf of the class members for the following reasons:**
  - 6.1. Only the institution of a class action will provide the class members with reasonable access to justice;
  - 6.2. The cost of bringing each individual action would disproportionately exceed the amount sought by each against the Respondents;

- 6.3. If class members actually exercised their rights, the sheer number of victims would lead to a multitude of individual actions instituted in various different jurisdictions, which could lead to contradictory rulings on questions of fact and law that are for all intents and purposes identical to all the class members;
- 6.4. A class action would serve to deter the Respondents and Directors in other industries from ignoring their legal obligations under the CCQ and the CBCA;

**7. The nature of the action that the Petitioner seeks to institute is:**

- 7.1. An action in compensatory damages for an amount to be determined by a judge in a trial on the merits;

**8. The conclusions that the Petitioner seeks are the following:**

AUTHORIZE the exercise of a class action by Petitioner on behalf of class members against the Respondents, with costs;

GRANT the Petitioner' Motion to obtain the Status of Representative of all class

ORDER the Respondents to pay each member of the Class their respective claims, plus interest at the legal rate as well as the additional indemnity provided for by law in virtue of article 1619 C.C.Q.;

THE WHOLE with costs at all levels, including the cost of all exhibits, experts, expertise reports and notices;

**9. The Petitioner is apt to assume an adequate representation of the class members that she intends to represent for the following reasons:**

- 9.1. The Petitioner was a significant shareholder BioSyntech;
- 9.2. The Petitioner has the time, energy, will and determination to assume all the responsibilities incumbent upon him in order to diligently carry out the action;
- 9.3. The Petitioner is determined to do his part in order to hold the Respondents' accountable for their behavior;
- 9.4. The Petitioner cooperates and will continue to fully cooperate with his attorneys;

**10. Petitioner requests and proposes that the class action be brought before the Superior Court, sitting in the district of Montreal, for the following reasons:**

- 10.1. Counsel for the Petitioner practice in the district of Montreal;
- 10.2. A large amount of the class members reside in Montreal;

**FOR THESE MOTIVES, MAY IT PLEASE THE COURT:**

**GRANT** the Petitioner's Motion;

**AUTHORIZE** the class action hereinafter described as:



All natural persons and legal persons which, in the 12 months previous to May 13 2013, had fewer than 50 employees, who held securities of BioSyntech Inc. on May 12, 2010, except the Respondents, ProQuest Investments LLP, Fonds de Solidarité des Travailleurs du Québec, Pappas Ventures, Nicholas Piramal India Limited, and Highland Capital Management;

**IDENTIFY** as follows the principle questions of fact and law to be determined collectively:

Did the Respondents breach their duties to exercise care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances under section 122(1)(b) of the CBCA?

Did the Respondents breach their duties to act with prudence and diligence under article 322 of the CCQ?

Did the Respondents breach their duties to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another under article 1457 of the CCQ?

Did the Respondents cause damages to the class members?

Are the class members entitled to compensatory damages, and if so, to how much?

**IDENTIFY** as follows the conclusions sought in relation thereof:

**AUTHORIZE** the exercise of a class action by Petitioner on behalf of class members against the Respondents, with costs;

**GRANT** the Petitioner' Motion to obtain the Status of Representative of all class

**ORDER** the Respondents to pay each member of the Class their respective claims, plus interest at the legal rate as well as the additional indemnity provided for by law in virtue of article 1619 C.C.Q.;

**THE WHOLE** with costs at all levels, including the cost of all exhibits, experts, expertise reports and notices;

**DECLARE** that, unless excluded, the class members will be bound by all judgments to be rendered with respect to the class action in accordance with the law;

**FIX** the delay for exclusion from the Class at sixty (60) days from the date of the notice to the members, after which those members which did not avail themselves of their option to be excluded shall be bound by all judgments to be rendered with respect to the class action;

**ORDER** the publication of a summary notice (in accordance with article 1046 C.C.P.) to the members of the Class according to the terms to be determined by the Court;

**REFER** the present file to the Chief Justice for determination of the district in which the class action should be brought and to designate the Judge who shall preside over the hearing;

THE WHOLE with costs, including the cost of all notices;

MONTREAL, May 13, 2013

*Trudel & Johnston*

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**TRUDEL & JOHNSTON**

Petitioner's Attorney

CANADA

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL  
No.: 500-06-

(Class Action)

**SUPERIOR COURT**

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**VINCENT BLAIS**, domiciled and resident, 9  
Chipman Hill Suite #3, Saint-John, New-Brunswick,  
E2L 2A7

**Petitioner**

- vs -

**JOYCE TSANG**, domiciled and resident at 418  
Franklin Ave, Princeton, New Jersey, United States  
of America, 08540-3951

- and -

**KAREN HONG**, domiciled and resident at 69  
Parkside Dr, Princeton, New Jersey, United States  
of America, 08540-4812

- and -

**ERIC LINSLEY**, domiciled and resident at 101  
Quarry Pl Chapel Hill, North Carolina, United  
States of America, 27517-8386

- and -

**SOMESH SHARMA**, domiciled and resident at an  
unknown address,

-and-

**JEANNE BERTONIS**, domiciled and resident at an  
unknown address,

-and-

**RUDY HUBER**, domiciled and resident at 128  
Avenue Laurier, Dollard des Ormeaux, Québec,  
H3B 3B2,

-and-

**ANDRÉ ARCHIMBAUD**, domiciled and resident,  
1581 Avenue Docteur-Penfield, Montreal, Quebec,  
QC H3G1C6

-and-

**JEAN-PIERRE DESMARAIS**, domiciled and  
resident at 3136 Rue De La Chevauchee, Saint  
Lazare, QC, J7T 3L5

**Respondents**

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**NOTICE OF PRESENTATION**

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ADDRESSEES:

**Joyce Tsang**

418 Franklin Ave, Princeton, New Jersey, United States of America, 08540-3951

**KAREN HONG**

69 Parkside Dr, Princeton, New Jersey, United States of America, 08540-4812

**ERIC LINSLEY**

101 Quarry Pl Chapel Hill, North Carolina, United States of America, 27517-8386

**SOMESH SHARMA**

unknown address,

**JEANNE BERTONIS**

unknown address

**RUDY HUBER**

128 Avenue Laurier, Dollard des Ormeaux, Québec, H3B 3B2

**ANDRÉ ARCHIMBAUD,**

1581 Avenue Docteur-Penfield, Montreal, Quebec, QC H3G1C6

**JEAN-PIERRE DESMARAIS**

3136 Rue De La Chevauchee, Saint Lazare, QC, J7T 3L5

**TAKE NOTICE** that the present request for authorization to institute a class action and obtain the status of representative will be presented *pro forma* before this Honourable Court, in the city and district of Montreal on June 30, 2013, in room **2.16** at **9:00 am**, at the Palais du Justice in Montréal, located at 1, Notre-Dame East, or any other date that the coordinating judge of the class actions chamber deems convenient to set.

**PLEASE ACT ACCORDINGLY**

Montréal, May 13, 2013



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**TRUDEL & JOHNSTON s.e.n.c**  
Counsel for the Petitioner



CANADA

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL  
No.: 500-06-

(Class Action)

**SUPERIOR COURT**

---

**VINCENT BLAIS**, domiciled and resident, Québec,  
**Petitioner**

- vs -

**JOYCE TSANG**, domiciled and resident,  
Québec,

- and -

**KAREN HONG**, domiciled and resident, Québec,

- and -

**ERIC LINSLEY**, domiciled and resident, Québec,

- and -

**SOMESH SHARMA**, domiciled and resident,  
Québec,

-and-

**JEANNE BERTONIS**, domiciled and resident,  
Québec,

-and-

**RUDY HUBER**, domiciled and resident, Québec,

-and-

**ANDRÉ ARCHIMBAUD**, domiciled and resident,  
Québec,

-and-

**JEAN-PIERRE DESMARAIS**, domiciled and resident,  
Québec,

**Respondents**

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**NOTICE OF EXHIBITS**

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**Exhibit P-1:** 2009 Notice of Annual Meeting of Shareholders;

**Exhibit P-2:** June 3, 2009 presentation on the FTQ's activities;

**Exhibit P-3:** BioSyntech's August 24, 2009 news release;





- Exhibit P-4:** BioSyntech's August 14, 2009 news release;
- Exhibit P-5:** June 2, 2010 Superior Court bankruptcy court hearing
- Exhibit P-6:** Profile on the Piramal Group's website;
- Exhibit P-7:** BioSyntech's entry in the Quebec registry;
- Exhibit P-8:** BioSyntech's 2006 Annual Report;
- Exhibit P-9:** BioSyntech's 2005 Annual Report;
- Exhibit P-10:** BioSyntech's 2004 Annual Report;
- Exhibit P-11:** Health Canada approved BioSyntech's pivotal trial to compare the safety and effectiveness;
- Exhibit P-12:** Laurentian's BioSyntech Financing Strategy dated May 2009;
- Exhibit P-13:** Bankruptcy decision of Judge Claude Auclair of the Superior Court dated June 3, 2010;
- Exhibit P-14:** Piramal's May 14 and April 11, 2012 news releases;
- Exhibit P-15:** BioSyntech's news release on June 14, 2007;
- Exhibit P-16:** BioSyntech's news release March 17, 2008;
- Exhibit P-17:** BioSyntech's news release on February 2, 2009;
- Exhibit P-18:** BioSyntech's news release March 12, 2009;
- Exhibit P-19:** BioSyntech's news release on June 17, 2009;
- Exhibit P-20:** BioSyntech news release on November 13, 2009;
- Exhibit P-21:** BioSyntech's news release on February 12, 2010;
- Exhibit P-22:** BioSyntech's news release on July 8, 2010;
- Exhibit P-23:** BioSyntech's news release on July 18, 2008;
- Exhibit P-24:** BioSyntech's news release on July 22, 2008;
- Exhibit P-25:** BioSyntech's news release on March 30, 2009;
- Exhibit P-26:** BSY's press release on June 29, 2009;
- Exhibit P-27:** December 13, 2010 article from TVA Argent;
- Exhibit P-28:** BioSyntech's news release on July 21, 2009;



- Exhibit P-29:** BioSyntech's news release on August 14, 2009;
- Exhibit P-30:** BioSyntech's Motion to Appoint an Interim Receiver;
- Exhibit P-31:** BioSyntech's news release on May 12, 2010;
- Exhibit P-32:** Notice of intention to Make a Proposal to creditors;
- Exhibit P-33:** Superior Court decision on May 13, 2010;
- Exhibit P-34:** Trustee's Report to the Court for the Approval of the Offer to Sell the Debtor's Assets;
- Exhibit P-35:** BioSyntech's news release March 25, 2010;

MONTRÉAL, May 13, 2013

*Trudel & Johnston*

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TRUDEL & JOHNSTON  
Attorneys for Petitioner





No.: 500-06-

500-06-000654-133

(CLASS ACTION)  
SUPERIOR COURT  
DISTRICT OF MONTRÉAL

VINCENT BLAIS

Petitioner

- vs -  
JOYCE TSANG

- and -  
KAREN HONG

- and -  
ERIC LINSLEY

- and -  
SOMESH SHARMA

- and -  
JEANNE BERTONIS

- and -  
RUDY HUBER

- and -  
ANDRÉ ARCHIMBAUD

- and -  
JEAN-PIERRE DESMARAIS

Respondents

Our file:

1306-1

BT 1415

MOTION FOR AUTHORIZATION TO INSTITUTE A  
CLASS ACTION AND OBTAIN  
THE STATUS OF REPRESENTATIVE, NOTICE OF  
PRESENTATION AND NOTICE OF EXHIBITS  
(C.C.P. Arts. 1002 et al.)

ORIGINAL

Mes Philippe H. Trudel, Bruce W. Johnston, and  
Andrew E. Cleland

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