COURT FILE NO.: 98-CV-158832
DATE: 20050321

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
SHEILA WILSON	)	***Joel Rochon, Vincent Genova*** and ***Sakie Tambakos*** for the National Class
	)	
Plaintiff	)	
	)	***David Klein*** and ***Gary Smith*** for the B.C. Sub Class
- and -	)	
	)	
SERVIER CANADA INC., LES LABORATOIRES SERVIER, SERVIER AMERIQUE, INSTITUT DE RECHERCHES INTERNATIONALES SERVIER (“I.R.I.S.”), SCIENCE UNION ET CIE, ORIL S.A., SERVIER S.A.S., ARTS ET TECHNIQUES DU PROGRES, BIOLOGIE SERVIER INSTITUT DE DEVELOPEMENT ET DE RECHERCHE SERVIER, ORIL INDUSTRIE, BIO RECHERCHE SERVIER, INSTITUTO DI RICERCA, IDUX, BIOPHARMA ARTEM, SCIENCE UNION S.A.R.L., LABORATOIRES SERVIER INDUSTRIE, I.R.I.S. ET CIE DEVELOPEMENT, INFORMATION SERVIER, SERVIER MONDE, SERVIER INTERNATIONAL, I.R.I.S. SERVICES S.A.R.L., ADIR, SERVIER R&D BENELUX, DR. JACQUES SERVIER and BIOFARMA S.A.	)	***William W. McNamara***, ***Stephen A. Scholtz***, and ***Seana Carson*** for the Defendants
	)	
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	)	
Defendants	)	
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	)	**HEARD:** October 18 and 19 and November 1 and 2, 2004

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

REASONS FOR DECISION

CUMMING J.

The Motions

[1] These Reasons for Decision deal with motions brought by class counsel under the *Class Proceedings Act, 1992*, S.O. 1992, c. C.6 as am. ("*CPA*") in respect of this class action: first, for approval of a proposed settlement; and second, assuming settlement approval, approval of the counsel fees.

[2] This class action involves a national class comprising all residents in Canada (except for Quebec) and a British Columbia subclass. The national class and B.C. subclass have each made discrete motions but they are conveniently treated together as one. I shall refer to Rochon Genova as National Class Counsel and Klein Lyons as B.C. Class Counsel and collectively, the two firms simply as "class counsel." (Capitalized terms employed in these Reasons are found in the definition section of the Settlement Agreement.)

[3] This was a cooperative effort by the two law firms and both gained significantly by the contribution of the personnel and resources of the other in this very demanding and protracted litigation. The two law firms have determined and agreed to a division between the two firms of the global class counsel fees approved by the Court. Thus, on the matter of the second motion as to the approval of class counsel fees, the Court will address the matter as though there is a single class counsel law firm.

[4] At the conclusion of the hearing in respect of the first motion, approval of the settlement was granted orally, so that implementation could be expedited, with reasons to follow. These are the Reasons for Decision in respect of that settlement approval and these are the Reasons for Decision in respect of the second motion, being the matter of the determination and approval of class counsel fees.

The Motion for Settlement Approval

[5] The representative plaintiff, Ms. Sheila Wilson, moves for approval of the Settlement Agreement in this national class action commenced November 17, 1998 on behalf of all residents in Canada, except for those individuals resident in Quebec, who had ingested the diet drugs Ponderal, Ponderal Recaps and/or Redux (collectively, the "diet drugs" or "Products"). Representative plaintiff Ms. Beverley Greenlees moves for approval on behalf of the B.C. subclass.

[6] Fenfluramine, and later dexfenfuramine, the active ingredients in the diet drugs, were anorexigens introduced in Europe in the 1960s and in Canada in the 1970s. The claim alleges

that the diet drugs caused primary pulmonary hypertension ("PPH") and/or valvular heart disease ("VHD") in some users of the diet drugs.

[7] Ms. Wilson ingested diet drugs between August, 1995 and August, 1996. She became ill in late 1996 and was ultimately diagnosed in March, 1998 as having PPH. This disease reportedly results in diminished right-heart function and leads ultimately to heart failure and death. The reported mean survival period from the onset of symptoms to death for PPH patients is about two to three years.

[8] VHD involves the failure of one or more of the valves of the heart to open or close properly. This results in regurgitation or the backwards flow of blood. This can lead to severe and potentially fatal complications, including congestive heart failure, shortness of breath, arrhythmias and bacterial endocarditis. Surgery may be necessary to repair or replace the defective valves.

[9] Ms. Greenlees consumed Ponderal and developed VHD. Her daughter also consumed Ponderal. She developed PPH and had a double lung transplant but has died.

[10] The first case report of a claimed association between PPH and the use of fenfluramine was published in the scientific literature in 1981. Ultimately, a multi-centre case-controlled epidemiologic study (known as the International Primary Pulmonary Hypertension Study ("IPPHS") led by Dr. Lucien Abenheim published its findings in the *New England Journal of Medicine* in August, 1996, concluding that there was a "causal relationship" between the use of fenfluramine derivatives and PPH. Several later scientific reports reached the same conclusion, being that a person's use of the diet drugs added definite risk factors for the development of PPH.

[11] The diet drugs were withdrawn from the Canadian market and other markets around the world in September, 1997. The claim alleges that the diet drugs increased the risk of developing PPH and VHD, were unfit for the purpose for which they were intended as designed and that the defendants negligently failed to adequately disclose the risks to physicians and consumers and negligently misrepresented the safety of the drugs.

[12] The defendant Servier Canada Inc. ("Servier") was the Canadian distributor of the diet drugs. The defendant Biofarma S.A. ("Biofarma"), a corporation in France, is the parent of Servier. Ultimately, several foreign corporations affiliated with Biofarma as well as its founder, Dr. Jacques Servier, were named and added as defendants. It is claimed that one or more of these foreign corporations manufactured and marketed the Products.

[13] The certification motion was granted pursuant to written reasons released September 13, 2000. *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (Sup. Ct.); motion for leave to appeal to Divisional Court denied November 21, 2000, 52 O.R. (3d) 20; leave to appeal to Supreme Court of Canada dismissed, [2001] S.C.C.A. No. 88.

[14] It is believed this class action has involved more court appearances than any other class action seen to date in Canada. There have been countless case conferences with at least thirty-five motions, and fifteen stay and leave applications and related appeals, including: (2000), 50

O.R. (3d) 219 (Sup. Ct.); [2000] O.J. No. 3722 (Sup. Ct.); (2000), 52 O.R. (3d) 20 (Sup. Ct.); [2001] S.C.C.A. No. 88; [2001] O.J. No. 1615 (Sup. Ct.); [2001] O.J. No. 4636 (Sup. Ct.); [2001] O.J. No. 4947 (Sup. Ct.); [2001] O.J. No. 5278 (Div. Ct.); [2001] O.J. No. 4636 (Sup. Ct.); [2001] O.J. No. 4626 (Sup. Ct.); [2001] O.J. No. 4716 (Div. Ct.); [2001] O.J. No. 4717 (Sup. Ct.); [2001] O.J. No. 4947 (Sup. Ct.); [2002] O.J. No. 60 (Div. Ct.); [2002] O.J. No. 1021 (Sup. Ct.); (2002), 58 O.R. (3d) 753 (Sup. Ct.); [2002] O.J. No. 1663 (Div. Ct.); (2002), 213 D.L.R. (4th) 751 (Sup. Ct.); [2002] O.J. No. 2138 (Sup. Ct.); [2002] O.J. No. 3470 (Sup. Ct.); [2002] O.J. No. 3722 (Sup. Ct.); [2002] O.J. No. 3723 (Sup. Ct.); (2002), 220 D.L.R. (4th) 191 (C.A.); [2002] O.J. No. 4566 (Div. Ct.); [2003] O.J. No. 155 (Sup. Ct.); [2003] O.J. No. 156 (Sup. Ct.); [2003] O.J. No. 157 (Sup. Ct.); [2003] O.J. No. 179 (Sup. Ct.); [2003] O.J. No. 280 (Sup. Ct.).

[15] The common issues trial was scheduled to commence February 24, 2003. A nine-month trial, conducted largely in the French language, was anticipated. A Court-ordered formal mediation under the supervision of Mr. Justice W. Winkler resulted in a settlement agreement-in-principle, reduced to writing February 21, 2003, three days before the scheduled commencement of the trial. An included provision stipulated that if agreement could not be reached on an implementing specific term, that the issue would be submitted to Winkler J. for a determination. He appointed Mr. Randy Bennett, a Toronto lawyer, as a Court-appointed Monitor, to facilitate the resolution of disputes in the process to achieve a final settlement agreement. A Settlement Agreement was ultimately accomplished with finality after more than 18 months, on September 17, 2004.

The Settlement Agreement

[16] Information and detailed particulars as to the Settlement Agreement can be found on the web sites of class counsel: www.rochongenova.com and www.kleinlyons.com. Important matters and details pertinent to the motion for settlement approval at hand are dealt with in affidavits in the motion records of the plaintiff class and subclass, including the affidavits of: Ms. Sheila Wilson, Ms. Beverley Greenlees, Ms. Annelis Thorsen, Mr. Dana Graves, Dr. John Granton, Dr. Stephen Raskin and Mr. Kerry F. Eaton (of the claim administrator, Crawford Class Action Services).

[17] The Settlement Agreement provides for a payment by the defendant, Servier Canada Inc. ("Servier"), to establish a Settlement Fund of $25 million. This Fund is to be administered by Crawford Class Action Services as Settlement Administrator. A further $15 million in "Additional Settlement Funds" is to be made available in the event that the Fund is insufficient to satisfy the claims made by class members. In addition, Servier is obliged to pay the administration costs and the costs of the two notice programs.

[18] The Settlement Agreement provides for a reversionary interest in the $25 million Fund whereby, if the claimants' take-up does not exhaust the Fund, the residual unused amount will largely revert to Servier, and an additional amount will revert to provincial health providers.

[19] If the $25 million is exhausted by claimants but the entirety of the guaranteed Additional Settlement Funds of $15 million is not necessary for claimants, any residual amount of this committed amount remains with Servier.

[20] Given the reversionary interests of Servier in respect of the settlement monies, defendants' counsel asked to make submissions relating to the determination of the question of approved class counsel fees.

[21] The Court welcomed this submission. In the usual course of events, a court is left alone when it comes to considering the reasonableness of the requested class counsel fees. Defendants have agreed to a settlement and want it approved in the interest of their own clients and are indifferent to the fees paid to class counsel by class members.

[22] Given the reversionary interest of Servier in the instant situation, defendants seek the Court's determination of "reasonable" class counsel fees that accord with their own view of reasonableness.

[23] While the Court welcomes the submission of the defendants on this matter as a positive, constructively critical aid, this Court does not view the intervention of the defendants as a "right." The defendants have a clear "interest" in the outcome of the motion for the approval of class counsel fees. They are permitted to make submissions for that reason. But, in my view, they do not have the "right" to intervene in the determination of class counsel fees.

[24] In *Parsons v. Canadian Red Cross Society*, [2001] O.J. No. 214 (C.A.), leave to appeal to Supreme Court of Canada denied, [2001] S.C.C.A. No. 190, the Court of Appeal found at para. 13 that "[t]he settlement agreement… was the place where the defendants, if they intended to participate in the subsequent fixing of the fees and disbursements of class counsel, could have reserved their rights in this regard. There is no provision in the settlement agreement to this effect." The present case differs slightly in that paragraph 11(c) of the Settlement Agreement provides that the defendants are entitled to notice of a motion to determine "any further amount of Class Counsel Fees." The defendants submit that paragraph 11(c), on its face, clearly permits them to participate fully at the hearing of the motion to approve Class Counsel Fees. I disagree. On its face, the provision entitles them to reasonable notice of the hearing. That provision should not be extended to include a *right* to make submissions. As in *Parsons*, the defendants could have, but did not, ensure their right to make submissions by specifically including words to that effect in paragraph 11(c).

[25] The defendants further submit that to deny them full participation in the hearing would be contrary to fundamental principles of justice and fairness, given their interest in the issue. They submit that theirs is the only interpretation of paragraph 11(c) that is consistent with the Settlement Agreement. The Settlement Agreement does not require that paragraph 11(c) be interpreted to include a right to standing and a right to make submissions. A contractual right to notice can be consistent with the lack of a corresponding right to full participation. Under various provisions of the Claims Administration Procedures, the defendants have a right to review all information and correspondence regarding approved claims, but no standing with regard to their determination by the claims adjudicators. I note that the defendants cannot challenge a claims adjudicator's determination. The defendants' various rights to information and notice reflect their role in the overall implementation of the settlement, but do not automatically include full participation rights in every hearing.

[26] In *Parsons*, *supra* the Ontario Court of Appeal found at para. 12 that having made submissions to assist Winkler J. in approving counsel fees did not mean that the defendants were parties to the motion since they did not seek, and were not granted, party status. While finding that the defendants were not parties, the court went on to say at para. 19 that "[n]othing we have said, of course, is intended to reflect a view on whether or not defendants in some class proceedings should have the right to participate as parties with rights of appeal in fee-fixing motions or applications. Much will depend on the facts of the particular case." In this case, the defendants attempt to distinguish *Parsons* based on the fact that they have "a clearly-defined contractual" interest in any residual Settlement Funds, and control of the Additional Settlement Funds. At para. 17 of *Parsons* the Court of Appeal recognized that the defendants had an interest in the fund surplus, but that the interest was "highly speculative and contingent." In my view, and I so find, the defendants' interest in the present case is similarly contingent and speculative. That the contingent, speculative interest is a contractual one does not sufficiently distinguish the facts of *Parsons*.

[27] Finally, Servier is committed to pay $3 million in respect of partial indemnity costs to the plaintiff class plus $1 million in compensation for the plaintiffs' litigation disbursements. It is noted parenthetically as well that class counsel was awarded some $626,000 in party and party (or partial indemnity) costs resulting from the plaintiffs' success in motions throughout the course of litigation. Servier has also agreed to pay all reasonable costs of the notice programs and the costs of settlement administration. Thus, the overall global benefits to the plaintiff class from the settlement approximates a potential total of some $45 million.

[28] The Settlement Agreement is subject to the express stipulation that there is not any admission on the part of any of the defendants as to liability. In particular, there is no admission that the defendants' products are the cause of any of the injuries for which the class members may claim.

[29] Payment from the Fund of a total $1 million is to be made to Canada's provincial and territorial health ministries in satisfaction of their subrogated claims. If monies remain in the fund at the expiration of the Administration Period (a period of five years commencing immediately upon the expiration of the Claim Period – being in turn the period of 15 months following first publication of the Approval Notice) the public health insurers are entitled to a share of such remaining monies.

[30] Medical experts have prepared a Medical Conditions List (Exhibit "E" to the Settlement Agreement) ("MCL"). A roster of Canadian physicians with the requisite medical expertise has been created to act as Claims Adjudicators. They will review a claimant's submitted Claim Package and determine whether the claimant is entitled to benefits from the related medical records. An appeal process allows a claimant to challenge in writing before the Court any final determination regarding a claimant's eligibility for benefits.

[31] The MCL stipulates specific eligibility criteria in respect of benefits for a range of levels of disease severity for claimants who have ingested the defendants' Products and who suffer from VHD. Benefits are accorded to a matrix which identifies varying levels of VHD severity. Product Recipients with PPH can also make claims pursuant to the eligibility criteria.

[32] The compensation values for Matrix level benefits are incorporated into the Matrix Grid (Exhibit "F" to the Settlement Agreement) and vary based on the level of disease severity and the Product Recipient's age at diagnosis.

[33] One level of benefit under the Settlement Agreement is for FDA Positive valvular regurgitation. There will be a *per capita* payment up to $2,500.00 in recognition of an individual FDA Positive Benefit, subject to an overall ceiling of $3 million for such claimants. An FDA Positive is a defined physiological condition. Product Recipients who qualify for an FDA Positive or greater VHD benefit and whose VHD worsens during the Administration Period can submit a progressive claim such that the initial benefit may be increased accordingly.

[34] The estimated class is one of approximately 160,000 members, being the estimated number of individuals who consumed the Products, whether or not any injury has been sustained.

[35] National Class Counsel advise they have been contacted by some 886 individuals to date, with 126 of that number providing information regarding injuries or diseases they believe are related to the ingestion of the Products. National Class Counsel estimates on the basis of an initial review that 69 of the 126 have provided medical information which allows a claim to be advanced. Of these 69 class members, 27 may qualify for FDA Positive Benefits with the remaining 42 perhaps qualifying for Matrix-level benefits because of having VHD or PPH.

[36] B.C. Class Counsel estimate 29 class members within the B.C. subclass suffer from PPH (15 primary and 14 secondary to VHD) and 86 class members who have VHD (including the 14 who appear to have PPH) with 45 of this number having FDA positive levels as defined in the MCL and the remaining 41 having Matrix level conditions as defined in the MCL.

[37] Class members asserting claims which are derivative to the claims of Product Recipients and are based upon the loss of care, guidance and companionship of the Product Recipient may be compensated within a range of $1,000 to $10,000 if the Product Recipient's claim is other than a FDA Positive of Matrix Level I claim.

[38] Claimants must submit a Claim Package (which includes a Claim form and Medical diagnosis form along with instructions) to the Settlement Administrator within the Claim Period.

[39] A settlement of a class proceeding is not binding unless approved by the Court. In order to approve a settlement, the Court must find that it is fair, reasonable, and in the best interests of the class. See *CPA* s. 29(2); *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 OR. (3d) 429 at 444 (Gen. Div.), aff'd at (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to Supreme Court of Canada dismissed, [1998] S.C.C.A. No. 372.

[40] In general terms, the Court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the Court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a "zone or range of reasonableness":

> all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a

> standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation: *Dabbs v. Sun Life Assurance Co. of Canada, supra*, at 440 (Gen. Div.); H. Newberg, A. Conte, *Newberg on Class Actions,* 3d ed., looseleaf (Colorado: Shepard's/McGraw-Hill Inc., 1992) at 11-104.

[41] The representative plaintiffs for both the national class and for the British Columbia sub-class have approved the settlement. There were only two class members who have raised any objections or queries.

[42] In determining whether to approve a proposed settlement a court takes into its assessment several factors, including:

(a) the likelihood of recovery or likelihood of success if the action were to proceed to trial;
(b) the amount and nature of discovery, evidence or investigation;
(c) the settlement terms and conditions;
(d) the recommendation and experience of class counsel;
(e) the future expense and likely duration of on-going litigation;
(f) the number of objectors and the nature of objections;
(g) the presence of arms-length bargaining and the absence of collusion; and
(h) the degree and nature of communications by class counsel and the representative plaintiff(s) with class members during the litigation.

See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 at para. 13 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at paras. 71-72 (Sup. Ct.).

[43] As stated above, the litigation in respect of the subject class action has been a very lengthy process with extensive discovery evidence. Settlement was only achieved through the office of an effective mediator at the last moment with a nine-month trial scheduled to commence shortly.

[44] Class counsel had significant information about the case and a good understanding of liability and damages issues before embarking upon the settlement negotiation process. Class counsel's grasp of these issues was assisted by medical experts and by experienced American counsel, familiar with like litigation involving diet drugs in the United States.

[45] Given that the settlement was achieved only some three days before the scheduled trial, there was considerable trial preparation time required of class counsel. Some 20 expert reports had been exchanged.

[46] Given the information available to class counsel, they were well situated to negotiate, and ultimately to agree to a settlement for the resolution of the class action.

[47] There is sufficient evidence before the Court to allow it to exercise an objective assessment of the fairness of the proposed Settlement Agreement.

[48] There is the risk that if the matter had proceeded to trial, any judgment against Servier might exceed its exigible assets. Servier has $15 million in insurance coverage but that amount is subject to reduction for defence costs which, while unknown, might well have exhausted the coverage. Finally, there are uncertainties regarding any eventual judgment being effectively enforceable in France where the defendants' major assets are located.

[49] The function of the Court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of possibly improving the terms of the settlement. It is within the power of the Court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. However, the Court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 at para. 10 (Gen. Div.); *Manual for Complex Litigation*, Third §30.42 (1995).

[50] Possible concerns, as raised by the Court during the course of submissions, include: that there will be sufficient funds to meet all proper claims, that sufficient and effective notice is given to prospective claimants, that the process for claiming is straightforward and expeditious, and that the latency period for the diseases or injuries alleged to arise from the ingestion of the Products has already passed such that all medical problems will be known by Product Recipients or, at least known well before the end of the Claim Period. Class counsel have provided explanations and assurances in respect of these queries.

[51] The Product Recipient class members with viable claims in this class action, such as Ms. Wilson and Ms. Greenlees, have suffered grievous and serious injury and illness (indeed, in some cases, death), because of the defendants' allegedly defective Products.

[52] The path to a resolution of the litigation has been long and extremely arduous. Taking into account all the circumstances, in my view and I so find, the Settlement Agreement is fair and reasonable and in the best interests of all the class members.

The Motion for Approval of Class Counsel Fees

[53] Class counsel (including Ontario, British Columbia and United States counsel) seek approval of class counsel fees of $13 million at this time. They do this with the express proviso that they will seek additional fees to a maximum of $5 million if at the conclusion of the Claim Period it appears "there will be sufficient funds remaining." About $626,000 in party and party (partial indemnity) costs (an estimated $500,000 toward fees and $126,000 for reimbursement of disbursements) has been paid by the defendants in the course of the proceedings of the litigation to date.

[54] Affidavit evidence in support of the motion by class counsel for the approval of fees includes the affidavits of Ms. Annelis Thorsen, Ms. Sheila Wilson, Mr. Dana Graves, and Ms. Beverley Greenlees.

[55] Public notice was given in advance of this hearing as to the quantum of fees being requested by class counsel. There has not been any objection by class members to the fees requested.

[56] A United States law firm, Lieff Cabraser Heimann & Bernstein, with considerable expertise in product liability class actions, has been joined in the application for class fees by the submission of the Canadian class counsel. The factum of class counsel of Rochon Genova includes the U.S. firm, together with the B.C. subclass counsel, Klein Lyons.

[57] I do not question the value of the contribution of the U.S. firm to the conduct of the class action and its successful conclusion. However, in my view, the U.S. firm is properly to be paid from the counsel fees awarded to class counsel. The U.S. law firm was not appointed as class counsel by the Court nor is there anything on record to indicate the firm is licensed to provide legal services directly to the public and to represent the class in court in Ontario.

[58] The U.S. firm has provided legal advice to class counsel and it is the responsibility of class counsel to meet their obligation of payment to the U.S. firm, whatever that commitment might be. The services provided by the U.S. firm are, of course, legal services indirectly for the benefit of the class but it is not an obligation of the class to pay this charge. Hence, my use of the term “class counsel” embraces only the counsel for the national class, Rochon Genova, and the counsel for the B.C. subclass, Klein Lyons.

[59] Class counsel assumed a truly daunting task in pursuing this class action given that it became quickly apparent the defendants were certain to challenge them in every way possible at every single step of the litigation process.

[60] The efficacy of the underlying three policy objectives to the *CPA* are seen in the litigation at hand. The first policy objective is ‘access to justice.’ The individual class members most certainly could not realistically have had access to justice if forced to pursue their claims individually. The short answer, in effect, of the defendants throughout the course of the litigation to the Canadian class members’ claims (in respect of allegedly defective drugs marketed by the defendants in Canada) was that each claimant should come to France and individually sue the defendants.

[61] The second policy objective is to achieve ‘efficiency in the use of resources’ necessary to the litigation process. By combining all claimants in one class action there is obvious greater efficiency and economy for all participants (including the courts) in the adjudication of common issues. One cannot realistically imagine a nine-month trial for each of a vast multitude of claimants to determine issues common to all, in particular, whether the defendants’ Products cause VHD or PPH.

[62] Finally, the third policy objective is ‘behaviour modification.’ There are limited public resources available to ensure that defective drugs are not brought into or maintained in the Canadian market upon it being realized there are possible problems. The public regulator is assisted greatly by the private sector through the *CPA* enabling class actions. In exchange for the possibility of sizeable legal fees through a class action on behalf of a private group of claimants, class counsel indirectly serves a public purpose. The drug industry knows that it is more likely to be held accountable for unlawful behaviour in the marketplace. Hence, it is more likely that drug companies will act responsibly in the first instance in researching, manufacturing and marketing drugs and in advising and disclosing to the public known risk factors in using drugs.

[63] As stated above, there was a plethora of pre-trial motions and appeals (about 50 in total). These included, to give a few examples, several motions by the defendants challenging jurisdiction, challenging the constitutionality of a national class action, asserting the purported 'blocking' provisions of Article 15 of France's *Civil Code*, and asserting non-compliance with the service rules of the *Hague Convention*. Court orders were also required for the discovery of representatives from the Health Protection Branch of Health Canada.

[64] Class counsel were obliged to bring several motions to add defendants as knowledge of the defendants' large corporate empire gradually unfolded. To gain meaningful access to documentary production, some seven motions were necessary for answers to undertakings given and for answers which had been improperly refused.

[65] There was voluminous documentary production. The initial production was reportedly some 2,895 documents without an index nor a searchable database or electronic coding. Some 80,000 individual documents were reportedly delivered by the defendants unbound (albeit each separated by a blue sheet of paper) on April 2002 in 122 banker's boxes without being organized according to chronology or subject matter. A later agreement between counsel for production of electronic copies with a searchable index was in fact reportedly not searchable by keyword.

[66] Class counsel was required to bring a motion to force the release of relevant documents produced in the U.S. Multi-District Litigation *Re: Diet Pills*. Another motion was required to gain access to the non-privileged documents in the defendants' electronic database of over 300,000 documents.

[67] Class counsel were required to develop a database maintained by a California-based document management company.

[68] The oral discovery took place mainly in France. Discovery had to be conducted to a considerable extent before there was any meaningful production. Examinations for discovery took an approximate total of 11 weeks. There were hundreds of thousands of pages of production. Court orders were required for consular authority to gain access to the release of documents.

[69] There were extreme difficulties in piercing the corporate maze of the defendants' business empire consisting of dozens of privately-held companies whose interconnectivity was not readily apparent. An order was required to force the defendants to produce a meaningful organizational chart identifying the various corporate entities involved in bringing the Products to the Canadian market. This ultimately resulted in the plaintiff class moving successfully to add 19 new defendants.

[70] Two excerpts from decisions of this Court in the course of the litigation are illustrative, as examples, of the nature of the litigation faced by class counsel. The first is from *Wilson v. Servier*, [2001] O.J. No. 4717 at paras. 22-23 (Sup. Ct.):

> It is fundamental to the administration of justice in Canada that plaintiff consumer users of an alleged defective product which allegedly has caused very severe health problems (and allegedly death for some class members) have a

determination of the common issues on the merits through their certified class action in a timely way. Even if they are successful in the trial of the common issues there will then remain a lengthy process to determine individual issues.

Our society's concept of justice dictates that fairness is inherently fundamental to our court processes. Timeliness in the determination of claims on their merits is critical to achieving fairness to the parties. Justice must be done and it must be seen to be done in a timely way and manner. It is prejudicial to plaintiffs to deny them fairness through further substantial delays by granting Servier's motion. To grant Servier's motion would inevitably have the result of delaying and frustrating a determination of the common issues on their merits. A basic objective of the judicial system is access to justice. Indeed, that is an express policy objective underlying the CPA [citation omitted]. Access to justice means access to timely justice. A fair judicial process requires much more than simply an endless war of attrition waged by defendants with considerably greater resources than an individual representative plaintiff and the plaintiff class.

[71] The second excerpt is from *Wilson v. Servier*, [2003] O.J. No. 157 at paras. 31-33 (Sup. Ct.):

The record establishes that the defendants resist providing any fulsome understanding as to the role of Dr. Servier and the nature of the vast and complex structure of the Servier enterprise which manufactured and marketed the subject diet drugs sold in Canada. The defendants have volunteered nothing and have confronted the plaintiff with a confusing, complex and extensive corporate enterprise which is largely situated in France. Plaintiff's counsel has been forced to comb through more than 100,000 documents and endure a multitude of discoveries with many objections, simply to try to establish incrementally the nature of the Servier enterprise and the structure of decision-making in respect of the subject diet drugs. See (2000), 50 O.R. (3d) 219 at 228 (Sup. Ct.), leave to appeal denied (2000), 52 O.R. (3d) 20, leave to appeal to S.C.C. denied September 6, 2001; [2002] O.J. No. 1002 (Sup. Ct.) at para. 10.

The approach of the defendants could have been to elucidate voluntarily and in a straightforward manner upon the true nature of the Servier enterprise and its relationship to the subject diet drugs in Canada, and proceed to meet the issues in this class action directly on their merits.

However, the defendants have chosen to resist the plaintiff at every stage in this proceeding on every procedural and asserted legal basis imaginable, through seemingly endless motions. The defendants have attempted to try to throw up an impenetrable defensive wall whereby plaintiff's counsel has been forced to expend extensive resources and time simply to attempt to determine the factual history and corporate structure underlying the manufacturing and marketing of the subject drugs in Canada.

[72] The technical subject matter involved emerging, complex and unsettled areas of medicine and medical science. Topics requiring expert reports included: whether epidemiological principles supported a conclusion of causation between the use of the Products and the development of PPH and VHD; the incidence, diagnosis, latency period, treatment options and prognosis for patients suffering form PPH or VHD; the issue of progression in the disease process of VHD; the applicable regulatory and industry standards relating to adverse reaction reports and whether the defendants complied with such standards; whether there was adequate disclosure of known risks associated with use of the Products and whether potential benefits from the use of the Products outweighed the attendant risks.

[73] The fixing of counsel fees is governed by sections 32 and 33 of the *CPA*. The essential criterion is whether the requested fees are fair and reasonable.

[74] Factors to consider include the time expended by class counsel, the legal and factual complexity of the matters dealt with, the risk of success or failure assumed by class counsel in pursuing the litigation, the degree of skill and competence demonstrated by class counsel, the degree of responsibility assumed by class counsel, the results achieved, the benefits achieved for class members through a settlement, the importance of the matter to the class members, and the client's expectation as to the quantum of fees to be paid.

[75] The fairness and reasonableness of the requested fee is commonly measured by several standards. One is the use of a multiple of the base fee for the docketed time expended, that is, for the opportunity cost to class counsel of not being able to bill for his/her time as would be done in the normal course in respect of a fee paying client.

[76] The retainer contingency fee agreement of National Class Counsel with Ms. Wilson in the first instance set forth a 25 percent fee plus any award of costs, disbursements and applicable taxes. Ms. Wilson has signed a revised retainer authorizing an award of legal fees to class counsel in accordance with the amount now sought in total.

[77] The retainer contingency fee agreement with Ms. Greenlees in respect of the B.C. subclass provides for 40 percent of the recovery; however, B.C. Class Counsel have agreed to request fees on the same basis as National Class Counsel. That is, class counsel as a single group, seek for fees 25 percent of the settlement amount of $40 million plus applicable taxes plus the $3 million in the partial indemnity costs and $1 million in disbursements contributed by the defendants, plus an additional $5 million if there are funds which remain after all claims are met.

[78] Rochon Genova state that they have docketed time of some 14,800 hours (this includes 2,000 hours in respect of discovery, 2500 hours in reviewing documentary productions, 5,500 hours in respect of court appearances and some 1,500 hours in respect of settlement negotiations and drafting) resulting in docketed fees of about $5 million. Rochon Genova spent some 11 weeks in examinations for discovery of representatives of the defendants in France, Canada and Belgium. They say they have disbursements of $720,883.32, inclusive of G.S.T. They advise that their American legal advisers, Lieff Cabraser, have docketed time of some 3,661.5 hours with docketed fees of about CDN $1.5 million and disbursements totaling $465,926.61.

[79] The defendants question two aspects of the base fee as calculated by Rochon Genova. First, they say that 700 hours of time up to the successful certification motion was not included in an earlier Bill of Costs given to defendants' counsel. Rochon Genova answer that the earlier lesser calculation was an error. Second, defendants question the hourly rates employed, asserting that 2004 rates are used retrospectively.

[80] As an aside, it is noted that defendants' counsel do not volunteer their own docketed time, fees and disbursements in support of this class action. They are, of course, under no obligation to do so. Yet their own fees would offer an additional rough standard by which to measure the reasonableness of class counsel's base fee and requested counsel fees.

[81] B.C. Class Counsel put their docketed time at some 8700 hours, including more than 3000 hours by Mr. Gary Smith of the Klein Lyons firm. The defendants say that these rates are higher than prevailing market rates. They also assert that some of the time charges relate to administrative matters for which costs have been awarded and paid.

[82] The defendants hired KPMG Forensic Inc. ("Forensic") to thoroughly analyze the charges comprising the asserted base fee by class counsel. That analysis would reduce the base fee to $3,005,681 from the base fee calculated by Rochon Genova of $4,997,884. Forensic's analysis would reduce the base fee of Klein Lyons from $3,753,270 to $2,452,811. Thus, the two base fees would be reduced in the range of some 35 to 39 percent by the analysis of Forensic.

[83] Taking the combined reduced base fee from the analysis of Forensic of $5,458,492 one is in all events left with a very substantial base fee. Moreover, this omits a notional revised base fee of CDN $1,349,732 as calculated by Forensic for the value of the contribution by Lieff Cabraser.

[84] It is not necessary for me to deal with the differences in the calculation of the base fee and determine which figure is more probably accurate. I say this because, in my view, the counsel fee approved in this case, taking into account all the circumstances (putting aside for the moment the factor of the total amount of recovery), could certainly justify a multiplier of 4 times the base fee.

[85] It is enough to say that the record establishes a base fee of class counsel of at least $5,458,492. The defendants themselves submit that a reasonable base fee would be this figure of $5,458,492.

[86] As class counsel are seeking maximum fees of $18 million, if approval of this amount were to be granted, it would imply a multiplier of only 3.3 upon the base fee (*i.e.*, 3.3 times $5,458,492).

[87] The defendants also have done an analysis of the claimed disbursements. The defendants take the position that $2,619,536 represents the total reasonable disbursements (this includes the notional base fee of $1,349,732 of Lieff Cabraser being treated as a disbursement).

[88] The defendants propose a formula for class counsel fees which would cap the overall fees at a maximum of $9.4 million. The defendants propose that class counsel receive an interim

payment of fees at this time of $6.4 million, $2.6 million for disbursements and the right to apply for additional fees when the 'take-up' by claimants is known. The defendants would fix such additional fees at an amount equal to the lesser of 10 percent of the settlement take-up by claimants or $3 million. By this approach, the maximum in additional fees would be $3 million.

[89] By the defendants' formula, the maximum possible fees of $9.4 million would imply a multiplier of only 1.72 on the base fee (said by the defendants to be reasonable) of $5,458,492. If the take-up was less than $30 million the effective multiplier would be even less.

[90] The defendants submit in their factum that "even when fees are awarded on the basis of a fixed sum or a multiplier basis, the percentage of the potential fee awarded as compared to the quantum of the settlement or judgment becomes a significant factor in determining the fee awarded" (*Gagne v. Silcorp Ltd.* (1998), 41 O.R. (3d) 417 at 425). Certainly, the amount of the settlement or judgment is one important factor to be taken into account. If the base fee as multiplied constitutes an excessive portion of total recovery, the multiplier may be too high. As I have said above, leaving this single factor of total recovery aside, a multiplier of 4 is appropriate in this case, given all other factors.

[91] But other significant factors must also be kept in mind given the idiosyncratic nature of this class action. Class counsel could not reasonably estimate the total number of class members actually injured by ingestion of the defendants' diet drugs. Even if it is determined ultimately it is only a relatively few of the total users who have been injured, their injuries are severe (including death in several instances) and these persons would not have achieved any redress at all but for the efforts of class counsel.

[92] Finally, the very extensive cost in time and resources in respect of this prolonged litigation has been largely because the defendants refused to deal with their customers' claims (notwithstanding cogent evidence suggesting a foundation to the claims) until just immediately before trial, but rather 'circled the wagons' and imposed every hurdle imaginable (as was their *legal* right, if not the preferred *moral* position) at every step of the legal process to block the claimant customers and their counsel in seeking to gain justice.

[93] As an aside, I mention that one can argue that any provider for profit of prescription drugs to consumers in the marketplace, as a responsible corporate citizen, should want to see a neutral, independent process established immediately upon any plausible medical problems surfacing, whereby the medical/scientific issues of causation and effect are addressed expeditiously, seriously and authoritatively with an administrative/arbitral regime then established to provide appropriate compensation if suggested by the results of the medical/scientific inquiry.

[94] It is hardly an appropriate answer for an off-shore multinational, global enterprise drug provider to say, in effect, to individual Canadian consumers 'if you claim our drug has seriously injured you, come to France and prove it.' Nor is it arguably an appropriate answer for the Canadian Government, as the public health regulator through Health Canada, to remove a drug from the market when serious medical problems for consumers surface, and not then also require the drug seller to agree to an appropriate mechanism to address immediately in a cost-effective and fair manner the consequences of the medical problems left in the wake of the marketing.

[95] National Class Counsel requests a separate payment for Ms. Wilson from the Settlement Fund of $15,262 as compensation on a *quantum meruit* basis based on some 230 hours at $65 per hour. I do not dispute Ms. Wilson's significant contribution to the carriage of this class action. However, National Class Counsel can deal with this add-on claim by making the requested payment to her out of their pocket.

[96] Class counsel have stipulated that there will not be any additional fees payable by class members for their services beyond those awarded pursuant to the motion at hand. In particular, this means that even if there might be separate contingency fee agreements with individuals who are now in the B.C. subclass there will be no extra fees charged to such individuals. (That is, there will be no so-called double-dipping.)

[97] The individual class members have a maximum fund available for their claims of $43 million (provincial health authorities receiving $1 million from the $40 million Fund). I consider the $3 million added in the settlement for partial indemnity of costs and the $1 million added for partial indemnity of disbursements to be properly considered as part of the global fund available for class members.

Disposition

[98] In my view, and I so find, class counsel fees in the amount of $10 million plus applicable G.S.T. of $700,000 plus $2,619,536 (inclusive of any taxes on disbursements) are approved and to be paid at this time. (The disbursement calculation includes $619,699 allocated for Rochon Genova, $203,566 for Klein Lyons and $1,796,271 to Rochon Genova on account of Lieff Cabraser.) (The party and party costs awarded throughout the litigation process, about $700,000, are apart from, and over and above, the $10 million in fees awarded. However, the $4 million in partial indemnity costs paid as part of the settlement are credited to the global Fund (or considered otherwise, are credits against the $10 million in fees and $2,619,536 for disbursements hereby awarded.)

[99] It is appropriate for the Court to know how the claims process has worked for claimants, the actual take-up by claimants, and the overall achievement of the settlement for class members before determining with finality the full and final amount of class counsel fees.

[100] Without implying any appropriate overall final quantum of class counsel fees at this time, I will remain seized of the motion for approval of class counsel fees. The hearing is adjourned for a continuance to a date to be fixed by the Court. A further hearing on the matter is appropriate after the Settlement Administrator, Crawford Class Action Services, has provided a comprehensive report on the implementation of the settlement. Such report should not be provided until after at least a year following the expiry of the Claim Period *i.e.*, until after at least a full year has been completed in the Administration Period. Given the reversionary interest of

Servier in respect of the settlement monies, the defendants are permitted to make such submissions as they consider appropriate at the continued hearing to assist the Court in its determination of the appropriate overall final quantum of class counsel fees.

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Cumming J.

Released: March 21, 2005

COURT FILE NO.: 98-CV-158832
DATE: 20050321

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

SHEILA WILSON

Plaintiff

- and -

SERVIER CANADA INC., LES LABORATOIRES SERVIER, SERVIER AMERIQUE, INSTITUT DE RECHERCHES INTERNATIONALES SERVIER ("I.R.I.S."), SCIENCE UNION ET CIE, ORIL S.A., SERVIER S.A.S., ARTS ET TECHNIQUES DU PROGRES, BIOLOGIE SERVIER INSTITUT DE DEVELOPEMENT ET DE RECHERCHE SERVIER, ORIL INDUSTRIE, BIO RECHERCHE SERVIER, INSTITUTO DI RICERCA, IDUX, BIOPHARMA ARTEM, SCIENCE UNION S.A.R.L., LABORATOIRES SERVIER INDUSTRIE, I.R.I.S. ET CIE DEVELOPEMENT, INFORMATION SERVIER, SERVIER MONDE, SERVIER INTERNATIONAL, I.R.I.S. SERVICES S.A.R.L., ADIR, SERVIER R&D BENELUX, DR. JACQUES SERVIER and BIOFARMA S.A.

Defendants

REASONS FOR DECISION

Cumming J.

Released: March 21, 2005