Court File No.: 98-CV-158832

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SHELIA 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

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT OF ANNELIS K. THORSEN

(Sworn in support of Class Counsel's Motion for Fee Approval)

I, ANNELIS K. THORSEN, of the City of Toronto, Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am an associate at the law firm of *Rochon Genova LLP ("Rochon Genova")*, solicitors for the Plaintiff and Class Counsel for the National Class, and as such have knowledge of the matters to which I hereinafter depose. Where any matters are stated to be based upon information and belief, I have identified the source of

that information and belief, and hereby state that I believe such assertions to be true.

2. This affidavit is sworn in support of a motion for approval of Class Counsel[1] fees in connection with a settlement reached between the Parties hereto. Attached as Exhibit "A" is a true copy of the Settlement Agreement.

Background

3. This lawsuit began in 1998. At all times, the litigation was complex, high risk and hard fought. The Defendants' position throughout the process was extremely adversarial, and this posture resulted in extraordinary delay and expense. In one of this Court's numerous rulings on interlocutory motions, the Honourable Mr. Justice Cumming described the proceeding aptly as a "war of attrition".

4. The allegations in this action relate to the risk of developing physical injury, including the potentially fatal conditions of Valvular Heart Disease ("VHD") and Primary Pulmonary Hypertension ("PPH") associated with the use of the diet drugs Ponderal, Ponderal Pacaps and Redux ("the Products").

5. I am advised by Joel Rochon, and believe, that he and Vincent Genova were retained by Sheila Wilson in or about November 1998 to commence a class action on behalf of Canadians who had ingested the Products.

---

[1] Class Counsel includes *Rochon Genova*, *Lieff Cabraser Heimann & Bernstein* and counsel for the British Columbia subclass, *Klein Lyons*. Although Class Counsel bring this fee application jointly, this affidavit is sworn and filed on behalf of *Rochon Genova* and *Lieff Cabraser Heimann & Bernstein*, who will collectively be referred to for the purposes only of this affidavit as "National Class Counsel". I understand that counsel for the British Columbia subclass will be filing additional material in support of the within fees application.

6. The Statement of Claim was issued on November 18, 1998, against the Canadian corporation, Servier Canada Inc. ("Servier Canada") and its French parent company, Biofarma S.A. ("Biofarma"). These Defendants served their Notices of Intent to Defend on January 19, 1999, and their Statements of Defence on November 1, 2000.

7. As a result of information obtained during the lengthy discovery process and various court proceedings, amendments were made to the Statement of Claim, resulting in the addition of twenty-three new corporate Defendants and Dr. Jacques Servier in his personal capacity. Attached hereto at Exhibit "B" is a copy of the Fresh as Amended Statement of Claim.

8. After more than four years of litigating this action, and following a mediation conducted under the supervision of the Honourable Mr. Justice Warren K. Winkler ("Justice Winkler"), the Parties eventually arrived at an Agreement in Principle on February 21, 2003.

9. Because the matters addressed in this litigation relate to a multitude of complicated issues involving developing areas of medicine, because aspects of the framework provided in the Pondimin settlement in Canada and the United States were rejected, and because of the Defendants' ongoing litigation posture during the settlement negotiations, a further year and half was required to reach final consensus on most of the fundamental terms of the Settlement Agreement.

Complexity of the Litigation

10. There was a multitude of complicated aspects to this lawsuit, both from a legal and a scientific perspective. The following discussion outlines some of the challenges *Rochon Genova* was required to address and overcome in the course of moving this case through to settlement.

11. This case was legally complex because, *inter alia,*:

- obtaining documentary production from the foreign Defendants required consular authority;
- the conduct of counsel for the Defendants delayed *Rochon Genova's* timely and meaningful review of the documents;
- examinations for discovery of the Defendants were held mainly in France through the use of a translator and were delayed and hindered by the conduct of counsel for the Defendants;
- the Defendants repeatedly challenged the jurisdiction of the Ontario Superior Court;
- the Defendants failed to comply with their disclosure obligations under the *Rules of Civil Procedure* and Orders of the Court; and
- the Servier group of companies was part of a complicated and intricate structure of privately-held corporations whose interconnectivity was not readily apparent, and never disclosed without Court intervention.

12. This case also involved a number of complex medical and scientific issues, including, but not limited to:

- Whether the Products cause PPH;
- Whether the Products cause VHD;
- Whether the Products were reasonably fit for their intended purpose;

- Whether the Defendants complied with their obligations under the *Food and Drugs Act* and associated Regulations and whether they adequately warned Canadian physicians and consumers of the risks associated with the Products; and
- What the appropriate diagnostic parameters and eligibility criteria for Compensable Claims under the settlement should be.

(a) Documentary Discovery

13. This case centred around the safety and efficacy of two pharmaceutical products, one of which had been on the market for several decades. It was therefore essential to establish what was known, by whom, and when. A critical tool in assessing this was documentary discovery. The following discussion addresses some of the challenges faced by *Rochon Genova* in this process.

14. A procedural impediment to obtaining timely documentary production from the foreign Defendants was that the release of these documents required court Orders for consular authority. This added delay to the proceeding, particularly with the addition of each new foreign Defendant.

15. A further challenge to performing a timely and efficient review of the documentary productions was the manner in which the documents were produced to *Rochon Genova.* I am advised by Joel Rochon, and believe, that the initial production of 2,895 documents from the original Defendants was delivered without an index and did not include a searchable database or electronic coding.

16. In order to conduct a meaningful review of these documents, *Rochon Genova* had them coded in an internet database which was prepared under the supervision of

our colleagues at the American firm of *Lieff, Cabraser, Heimann & Bernstein ("Lieff Cabraser")* and maintained by Case Central, a California-based document management company. This process was time-consuming and expensive, but it was also necessary for the meaningful and ultimately more time-efficient review of this voluminous production.

17. Following the addition of five French Defendants to the lawsuit, and the delivery of their documentary productions, *Rochon Genova's* ability to conduct a meaningful and efficient review was further delayed. On April 30, 2002, 80,000 documents were delivered unbound, in 122 banker's boxes, without any logical or coherent order. Although the documents were separated by a blue sheet of paper with a document number printed on it, the documents themselves were not organized according to chronology or subject matter.

18. *Rochon Genova* was also provided with multiple bound volumes of an index that purported to correlate the document number with a description of the document as required by the *Rules*. This correlation was frequently inaccurate, and so these bound indices were of no practical utility.

19. I am advised by Joel Rochon, and believe, that an agreement was reached between *Rochon Genova* and Defendants' counsel for production of electronic copies of the documents with an index, all of which were to be searchable by keyword. The index that was provided was not searchable by keyword. In addition, each page of each document had been stored as a separate "tiff" image

file and had to be opened individually. None of the documents was searchable by keyword.

20. One of the Defendants in this action, Les Laboratoires Servier ("LLS") was also a Defendant in the U.S. Multi-District Litigation ("MDL") *Re: Diet Pills,* litigation which related to the Products. In the context of the U.S. proceeding, LLS had produced documents in electronic format.

21. I am advised by Joel Rochon, and believe, that in December 2001, LLS sought and obtained a ruling from Special Master Gregory Miller of the U.S. District Court that, among other things, Canadian parties in this action were not entitled to receive copies of documents filed in the MDL. Notwithstanding this ruling, LLS retained the right to consent to a disclosure of the discovery material.

22. I am further advised by Joel Rochon, and believe, that various efforts were made by *Rochon Genova* to overrule or vary this order. These efforts were not successful and, as a result, *Rochon Genova* brought a motion in Ontario to compel LLS to consent to a release of the documents produced to the MDL. This motion was successful.

23. In addition, *Rochon Genova* sought access to the Defendants' electronic documents in conjunction with the *Summation* legal data processing system. This motion was granted in August 2002 and *Rochon Genova* was eventually provided access to a database consisting of more than of 300,000 documents. Full access to the *Summation* database was not available until the fall of 2002, and by this stage

in the proceeding, several weeks of oral examinations had already been conducted without the benefit of this full disclosure.

24. Throughout the lengthy task of document review, we sought to locate and identify what we considered to be "Hot Documents" and to compile topical binders to use in oral discoveries and in trial preparation. Following this process of compilation, our colleagues at *Lieff Cabraser* assisted in reviewing the documents and provided valuable insights, particularly with respect to the scientific and technical issues.

25. The net result of the way in which the Defendants produced their documents was significant delay in *Rochon Genova's* ability to review the productions and prepare for meaningful examinations for discovery.

(b) Oral Discovery

26. Examinations for discovery of key personnel at the Defendant corporations was another important task in the prosecution of this lawsuit. As the following discussion demonstrates, the process of conducting oral discoveries in this case carried its own set of legal and logistical complexities.

27. The witnesses produced by most of the Defendants lived in France, and I am advised by Joel Rochon, and believe, that counsel for the Defendants refused to consent to their examination in Canada. As a result, the majority of the examinations for discovery were conducted in Paris.

28. In addition, because most of the witnesses were French-speaking, the discoveries had to be conducted with the assistance of a translator. While the quality of the translators was generally good, there were numerous and sometimes lengthy off the record discussions among counsel to canvass the accuracy of the translated question and/or answer.

29. Because the examinations were taking place in Europe and access to this Court for directions was not readily available, this Court issued a blanket Order which required that any questions to which the Defendants wished to refuse, were to be answered, subject to a noted objection. The validity of such refusals would then be dealt with later in Toronto and, where the objection was upheld, the answer would be excised from the record.

30. In spite of this standing Order, counsel for the Defendants repeatedly raised inappropriate objections and refused to allow certain questions to be answered, which hindered the progress of the examinations.

31. In addition to the extensive examinations for discovery of the Defendants, *Rochon Genova* obtained Orders for the discovery of representatives from the Health Protection Branch of Health Canada ("HPB")[2]. The purpose of these examinations was to ascertain what information had been given to them by the relevant Defendants about the Products, both before and after market introduction in Canada.

---

[2] The current name of this department at Health Canada is the Therapeutic Products Directorate ("TPD").

32. The preparation for and conduct of these examinations required an understanding of the Canadian regulatory framework, which was complicated by the fact that some of the Products had been on the market for several decades. During this time-frame, the applicable legislative framework had undergone modifications. As a result, our preparation required a time-consuming chronological review of the documents produced by the Defendants, cross-referenced with the documents which had been produced by HPB, as well as the applicable regulations.

(c) Pre-Trial Motions

33. Another complicating feature of the pre-settlement conduct of this litigation was the multiplicity of interlocutory motions. The following is a list of the many motions and appeals initiated by the Defendants and which we were required to respond to, as well as the motions that National Class Counsel were required to bring against the Defendants:

(1) *Plaintiff's Motion for Undertakings / Refusals #1;*

(2) *Plaintiff's Motion for Certification / Defendants' Motion to Stay Prior to Certification;*

(3) *Defendants' Motion to Stay Certification Order Pending Appeal;*

(4) *Defendants' Motion for Leave to Appeal Certification Order (Divisional Court);*

(5) *Defendants' Motion for Leave to Appeal Certification Order (Supreme Court of Canada);*

(6) *Plaintiff's Motion to Add British Columbia Subclass;*

(7) *Defendants' Motion to Consolidate With or Intervene in Knowles Action;*

(8) *Plaintiff's Motion to Fix a Trial Date;*

(9) *Defendants' Motion for Leave to Appeal Decision Denying Consolidation / Intervention in Knowles;*

(10) *Plaintiff's Motion to Amend the Second Amended Statement of Claim;*

(11) *Defendants' Motion for Consular Authority #1;*

(12) *Plaintiff's Motion for Further Case Management;*

(13) *Plaintiff's Motion to Validate Service of the Statement of Claim on Biofarma;*

(14) *Plaintiff's Motion to Allow Attendance of Thomas Smith at Examinations for Discovery;*

(15) *Defendants' Motion to Stay Order re Thomas Smith;*

(16) *Defendants' Motion to Extend Time for Issuing Third Party Claim;*

(17) *Plaintiff's Motion to Validate Service of the Third Amended Statement of Claim;*

(18) *Defendants' Appeal of Decision to Deny Intervention in Knowles;*

(19) *Defendants' Motion to Set Aside, Vary or Re-Open the Order re Thomas Smith;*

(20) *Defendants' Motion for Leave to Appeal Order re Thomas Smith;*

(21) *Defendants' and PMC Motions re MDL Productions & PTO 27;*

(22) *Newly Added Defendants' Motion for Stay / Dismissal of Action on Jurisdictional Grounds;*

(23) *Plaintiff's Motion for Undertakings / Refusals #2;*

(24) *Plaintiff's Motion for Undertakings / Refusals #3;*

(25) *Defendants' Motion for Consular Authority #2;*

(26) *Plaintiff's Motion for Discovery of Non-Party Witnesses (Health Canada);*

(27) *Defendants' Motion for Leave to Appeal Decision re Refusals;*

(28) *Defendants' Motion Challenging the Constitutionality of the Court's Jurisdiction to Entertain a National Class Action Against the Newly Added Foreign Defendants;*

(29) *Plaintiff's Motion to Amend Certification Order;*

(30) *Plaintiff's Motions for Further and Better Affidavit of Documents and for Declaration that Biofarma was in Contempt of Court;*

(31) *Defendants' Motion for Consular Authority #3;*

(32) *Plaintiff's Motion for Undertakings / Refusals #4;*

(33) *Plaintiff's Motion for Production of MDL Documents;*

(34) *Plaintiff's Motion for Production of IRIS Pharmacovigilence Database;*

(35) *Plaintiff's Motion for Discovery of Non-Party Witness (Health Canada);*

(36) *Plaintiff's Motion for Undertakings / Refusals #5;*

(37) *Plaintiff's Motion to Direct Defendant LLS to Consent to Release of MDL Database;*

(38) *Defendants' Appeal of the Decision re Constitutionality of National Class Action;*

(39) *Plaintiff's Motion to Further Amend the Statement of Claim;*

(40) *Plaintiff's Motions for Undertakings / Refusals #6 & #7*

(41) *Motions Respecting Further Productions from LLS and for Contempt of LLS;*

(42) *Defendant's Motions for Stay of Order re LLS Productions;*

(43) *Plaintiff's Motion to Validate Service of the Fresh As Amended Statement of Claim;*

(44) *Defendants' and Plaintiff's Motions re Expert Reports;*

(45) *Defendants' Motion to Stay / Dismiss Action Against Newly Added Defendants on Jurisdictional Grounds;*

(46) *Defendants' Motion to Strike Claim Against Dr. Servier; and*

(47) *Defendants' Motion to Prevent Further Discovery of Dr. Servier*

34. A more detailed chronology of these motions and proceedings is attached hereto as Exhibit "C". A few prominent examples of these proceedings are discussed in more detail below.

35. Servier Canada and Biofarma attempted to stay this action prior to certification on the basis, *inter alia,* that the Ontario Superior Court of Justice lacked jurisdiction to entertain a national class action against them. The motion was dismissed. The application for leave to appeal was dismissed. The unusual application for leave to appeal to the Supreme Court of Canada was also dismissed.

36. When five new French corporations were added as Defendants, the same challenge was raised again. This motion was dismissed. When the Defendants sought leave to appeal the dismissal to the Ontario Court of Appeal, the motion was also dismissed, on the grounds that the identical issue in the same proceeding had already been ruled on.

37. In addition, the foreign Defendants repeatedly challenged the validity of service *ex juris.* These challenges were all dismissed.

38. As mentioned above, several motions were required to force the Defendants to provide *Rochon Genova* with meaningful access to documentary production. In addition, *Rochon Genova* was required to bring seven motions for answers to undertakings given and for answers which had been improperly refused. *Rochon Genova* was overwhelmingly successful on these motions.

(d) Determining the Defendants' Corporate Structure

39. As discussed above, a key element in seeking to establish liability in this lawsuit was identifying who was involved in the design, manufacture, distribution, drug surveillance and marketing of the Products. This information was important in

order to identify the proper Defendants and in order to obtain both documentary and oral discovery from the entities with the most relevant knowledge.

40. This was not a case of one large publicly traded pharmaceutical company which operated with numerous divisions responsible for the various roles in the manufacture and marketing of a product. In this case, we faced a multitude of privately-held corporate entities which appeared to operate in isolation from each other.

41. Because the Defendants were not forthcoming about this corporate structure, *Rochon Genova* sought an Order requiring the Defendants to produce an organizational chart identifying the various corporate entities which were involved in bringing the Products to the Canadian market.

42. The Order was granted, but the Defendants sought leave to appeal the ruling. The leave application was dismissed on May 23, 2002. When a chart was eventually produced, it was clearly inaccurate. As a result, *Rochon Genova* brought a motion for contempt. The contempt motion was not decided, but the Defendants were ordered to cure the deficiencies in the organizational chart.

43. The Defendants eventually produced an amended organizational chart that reflected several corporate entities involved in the manufacture and marketing of the Products, which were not yet Defendants in these proceedings. As a result of the information contained in this amended chart, and other discovery evidence, *Rochon Genova* moved (successfully) to add 19 new Defendants to the claim.

(e) Scientific and Medical Subject Matter

44. From the commencement of proceedings through to the end of settlement negotiations, lawyers at *Rochon Genova* reviewed the extensive medical and scientific literature related to the Products, to PPH and VHD and to the association between the Products and the development of PPH and VHD.

45. In this regard, *Rochon Genova* consulted extensively with *Lieff Cabraser* and relevant experts with a view to obtaining (and maintaining) current and accurate scientific knowledge. Part of these consultations involved identifying and retaining of the most appropriate experts in the field. This task was facilitated to a large extent by the network of contacts already known to *Lieff Cabraser.*

46. As the case progressed towards trial, Class Counsel intensified its consultations with *Lieff Cabraser* and the experts in preparation for the exchange of expert reports, which took place on November 26, 2002.

47. *Rochon Genova* submitted expert reports which included discussion and analyses of a number of topics which were relevant to questions of liability at the common issues trial. These topics included, *inter alia,*

- whether epidemiological principles supported a conclusion of causation between the use of the Products and the development of PPH and/or VHD;
- the incidence, diagnosis, treatment options and prognosis for patients suffering from PPH;
- the issue of latency in the diagnosis of PPH;
- the incidence, diagnosis, treatment options and prognosis for patients suffering from VHD;

- the issue of progression in the disease process of VHD;
- the applicable and appropriate regulatory and industry standards relating to adverse reaction reports and whether and in what ways the Defendants failed to comply with those standards;
- whether or not the Defendants adequately disclosed the known risks associated with the use of the Products;
- whether any potential benefit from use of the Products outweighed the attendant risks, or vice versa.

48. The preparation of these reports by the experts involved the extensive involvement of National Class Counsel. It was of utmost importance that these reports contain information and analyses that were specifically relevant to the questions of liability which we expected to face at the common issues trial.

49. It was equally important for the experts to have the benefit of the information obtained by *Rochon Genova* through discovery. As a result, a tremendous amount of time was spent by National Class Counsel in regular and ongoing consultations with the experts during their preparation of the reports.

50. Finally, it was critical that lawyers at *Rochon Genova* become well versed in the subject matter of all the reports (including those submitted by the Defendants) in order to appropriately conduct their trial preparations. This required a review not only of the reports, but also of the supporting medical and scientific literature which formed the basis of the opinions contained in the reports.

51. Once the proceeding moved into negotiation mode, the complexity of the medical and scientific issues intensified. The process of drafting the settlement documents

revolved largely around the appropriate diagnostic and eligibility criteria for compensation under the settlement.

52. During the lengthy process of settlement negotiations, which spanned a period of some eighteen months, National Class Counsel consulted extensively – often on a daily basis – with the experts we had retained in order to ensure that the medical and scientific criteria were sound and would not preclude the eligibility of legitimate claims under the settlement.

53. Generally speaking, the medical and scientific issues which were addressed throughout the prosecution of this case were extremely technical and many related to evolving areas of medicine. This complexity was also demonstrated by the length of time required to obtain consensus on a multitude of issues, even among the experts in the relevant fields of medicine.

Time and Expense of Litigation

54. As noted above, this litigation has been ongoing for almost six years. It has at all times involved issues of considerable legal and scientific intricacy. It has also resulted in extraordinary expenditures of time and financial resources on the part of National Class Counsel.

55. This time and expense were inevitable and necessary consequences of the duration of the proceedings, the complexity of the subject matter and the manner in which the case was defended. The assistance provided by *Lieff Cabraser*,

particularly by Paulina do Amaral, a partner at that firm, was invaluable to both Class Counsel and to the integrity and soundness of the process itself.

56. Sakie Tambakos, an associate at *Rochon Genova,* has prepared a Bill of Costs for *Rochon Genova's* time expended in prosecuting this lawsuit. I am advised by Sakie Tambakos, and believe, that the total amount of time spent on this action to September 9, 2004 by *Rochon Genova* is approximately 14,800 hours. I am further advised by Sakie Tambakos, and believe, that the disbursements incurred by *Rochon Genova* in prosecuting this case to date total $720,883.32, inclusive of G.S.T. These expenditures of both time and financial resources are reflected in *Rochon Genova's* Bill of Costs and the list of disbursements, which are attached hereto at Exhibits "D" and "E", respectively. The voluminous time sheets representing the time of *Rochon Genova* are available for inspection upon request.

57. As reflected in *Lieff Cabraser's* time sheets, the total amount of time spent on this action to September 12, 2004 by *Lieff Cabraser* is 3,661.50 hours. As reflected in *Lieff Cabraser's* case cost summaries, the disbursements incurred by *Lieff Cabraser* in prosecuting this case to September 16, 2004 total $465,926.61[3]. These expenditures in both time and financial resources are more particularly detailed in the time sheets and case cost summaries from *Lieff Cabraser* which are attached hereto at Exhibit "F".

---

[3] The disbursements incurred by *Lieff Cabraser* are $361,351.49 (USD); the Bank of Canada exchange rate at September 16, 2004 of 1.2894 is used to arrive at the equivalent Canadian funds.

58. I understand that the total amount of time logged on behalf of the British Columbia subclass by *Klein Lyons* will be described in the affidavit of Dana Graves, to be filed in support of the within motion.

59. The following sections canvass some of the activities undertaken by National Class Counsel in prosecuting this lawsuit and highlight the reasons why the time expended was both significant and necessary.

(a) Documentary Discovery

60. Throughout the incremental process of obtaining documentary discovery, I, and a number of *Rochon Genova* partners, associates and employees, spent a tremendous number of hours reviewing the documents that had been produced in both hard copy and, eventually, in the electronic database. This task was time-consuming not only because of the quantity of documents, but, as mentioned earlier, because of the way in which the documents were produced to us.

61. The process was particularly slow when we had production only in unbound, hard copy format. This required a page-by-page review of the tens of thousands of pieces of paper which, in any given box, intermingled correspondence, internal memoranda, adverse reaction reports and scientific studies related to the Products. In addition, the majority of these documents were in French and many contained very technical and specialized information. By the time the Parties reached the Agreement in Principle in February 2003, the volume of production had exceeded 300,000 documents.

62. Further, although a number of the documents appeared to be duplicates of documents we had already reviewed, some of the duplicated copies contained annotations or hand-written comments which were ultimately of considerable interest, in spite of appearing to be redundant at first instance. Thus, each document had to be scrutinized carefully.

63. I am advised by Sakie Tambakos, and believe, that the total time spent by personnel at *Rochon Genova* in reviewing the documentary productions was approximately 2,500 hours. The significant time spent by *Lieff Cabraser* on this task is more particularly detailed in the Exhibit "F" hereto.

64. From my personal involvement in this lengthy process, I am confident in stating that this time expenditure was both reasonable and necessary and, in fact, could easily have exceeded this amount of time had the case not settled.

(b) Oral Discovery

65. Concurrent with the efforts to obtain full and complete documentary disclosure, *Rochon Genova* conducted approximately 11 weeks of examinations for discovery of representatives of the Defendants in Canada, France and Belgium.

66. The delays in obtaining full documentary production from the Defendants resulted in compromises to *Rochon Genova's* ability to prepare for the examinations as fully and as efficiently as possible.

67. Another impediment to the efficiency in the oral examinations was the conduct of counsel for the Defendants at the discoveries. As noted above, there were repeated interruptions during the examinations, as well improperly refused questions which resulted in continued delay.

68. In total, *Rochon Genova* brought seven lengthy motions for undertakings and refusals in order to obtain information and documents to which it was entitled under the rules of discovery. The result of some of the answers received and refusals being overruled was the need to re-examine some witnesses to fully canvass the evidence received from the ordered answer. Had these lines of inquiry not been improperly refused at first instance, there would have been considerable savings in both time and costs.

69. Further, as noted above, the examinations were conducted through a translator, which resulted in unavoidable delay.

70. I am advised by Sakie Tambakos, and believe that the total time spent by personnel at *Rochon Genova* in preparing for and conducting examinations for discovery and in preparing for same was 2,000 hours.

(c) Pre-Trial Motions

71. From the inception of this litigation through February 2003, when the Agreement in Principle was reached, this case involved more than 35 interlocutory motions and 15 appeals and stay applications through various appellate courts including a leave application to the Supreme Court of Canada.

72. In addition to the various pre-trial proceedings, there were at least an equal number of case conferences which dealt with issues such as failures to attend at scheduled examinations for discovery, interruptions and improper refusals at examinations for discoveries, as well as issues relating to documentary productions.

73. All told, I am advised by Sakie Tambakos, and believe, that the total amount of time spent by *Rochon Genova* on pre-trial motions, case conferences, applications for leave, stay applications and appeals, including preparation time for these court proceedings was approximately 5,500 hours.

(d) Settlement Negotiations

74. After having adjourned two fixed trial dates, the trial of the common issues was set to commence on February 24, 2003. Prior to that date, the Court ordered that the Parties participate in a mediation under the supervision of Justice Winkler.

75. This initial mediation proceeded over the course of four days, beginning on Monday, January 27, 2003. In attendance at the mediation were Joel Rochon and Vincent Genova of *Rochon Genova* for the Plaintiff and the Plaintiff National Class, our colleagues, Robert Lieff and Paulina do Amaral, from *Lieff Cabraser*, lawyers for the British Columbia subclass and several counsel for the Defendants.

76. During the initial phase of the mediation process, the Parties arrived at an Agreement in Principle to resolve this action, which was executed February 21,

2003. While the agreement provided the broad parameters for settlement, other equally important specific terms remained to be negotiated.

77. It was agreed among the Parties that all such terms would be negotiated and where we were unable to achieve consensus, any such disputes would be resolved by Justice Winkler through mediation. Negotiations over the substance of the settlement agreement thereafter ensued.

78. After executing the Agreement in Principle, Class Counsel and the Defendants began drafting the settlement documents, including the settlement agreement itself, as well as exhibits to that agreement relating to the claims procedures, medical conditions lists, and compensation grids, among others.

79. After a number of attempts at drafting and exchanging completed settlement documents, it became clear that there remained significant disagreement over a number of fundamental issues. As a result of this impasse, Justice Winkler appointed Randy Bennett as Court-Appointed Monitor, in July 2003, in order to facilitate the negotiation of these contentious terms.

80. The remainder of the settlement drafting process involved numerous full-day negotiation sessions, beginning in July of 2003. In attendance at these sessions on the Plaintiff side were lawyers from *Rochon Genova* and *Lieff Cabraser*, counsel for the British Columbia subclass, counsel for the Defendants, as well as Plaintiff counsel in two parallel Quebec class actions.

81. In the fall of 2003, a drafting committee, consisting of myself and Carla Swansburg for the defence, was struck. With the assistance of the Court-Appointed Monitor, progress was made in resolving some issues and in clarifying the Parties' respective positions on the issues which continued to be unresolved. Notwithstanding this progress, several important areas of disagreement between the Parties continued to exist, particularly those relating to medical and scientific issues.

82. In order to propel the settlement process forward, a further series of negotiation sessions was convened in late March, 2004. To facilitate the progress of these sessions, National Class Counsel arranged for the attendance of our experts, Dr. John Granton and Dr. Stephen Raskin. Following these sessions, further draft settlement documents were provided to the Defendants on April 1, 2004.

83. No experts were produced by the Defendants at the March 2004 sessions, and it took over five weeks before a responding draft document was provided. Upon receipt of the Defendants' draft, it was abundantly apparent that a significant disparity remained between the positions of the Parties.

84. In order to bridge the ongoing impasse, a further round of face-to-face negotiation sessions began in the early summer of 2004. On these occasions, the negotiations frequently included the attendance and direct participation of both Plaintiff and defence experts. These sessions focused primarily on addressing the many contentious issues relating to medical diagnoses and other eligibility criteria for compensation under the settlement.

85. As noted, a substantial amount of time and energy was expended in drafting the settlement agreement and exhibits following the February 2003 Agreement in Principle. The total amount of time spent by *Rochon Genova* was approximately 1,500 hours. The significant amount of time spent by *Lieff Cabraser* in the settlement process is more particularly set out in Exhibit "F".

86. Given the multitude of issues over which the Parties fundamentally disagreed, and given the paramount importance of ensuring the soundness of the settlement framework, particularly with regard to the medical issues relating to diagnostic and eligibility criteria, I believe that this time expenditure was necessary. The following chart reflects the numerous formal negotiation sessions with all Parties up until September 9, 2004, that were required to achieve the settlement:

Date	Time[4]	Facilitator
January 27, 2003	All Day	Hon. Mr. Justice Winkler
January 28, 2003	All Day	Hon. Mr. Justice Winkler
January 29, 2003	All Day	Hon. Mr. Justice Winker
January 30, 2003	All Day	Hon. Mr. Justice Winkler
February 13, 2003	All Day	Plaintiff / Defendants Negotiations
February 17, 2003	1.5	Plaintiff / Defendants Negotiations
April 9, 2003	1.5	Plaintiff / Defendants Negotiations
May 1, 2003	All Day	Plaintiff / Defendants Negotiations
May 27, 2003	1.5	Plaintiff / Defendants Negotiations
July 25, 2003	All Day	Plaintiff / Defendants Negotiations
August 7, 2003	All Day	Randy Bennett
August 21, 2003	All Day	Randy Bennett
August 22, 2003	All Day	Randy Bennett
August 25, 2003	All Day	Randy Bennett
August 26, 2003	All Day	Randy Bennett
August 28, 2003	All Day	Randy Bennett
August 29, 2003	All Day	Randy Bennett
September 9, 2003	All Day	Randy Bennett

[4] The time listed does not include telephone conferences, preparation time for attendances, time drafting documents, plaintiff group meetings or time spent as part of the drafting committee.

Date	Time	Facilitator
September 10, 2003	All Day	Randy Bennett
December 5, 2003	3.0	Randy Bennett
March 8, 2004	1.0	Randy Bennett
March 22, 2004	4.0	Randy Bennett
March 26, 2004	All Day	Randy Bennett
June 16, 2004	All Day	Randy Bennett
June 17, 2004	All Day	Randy Bennett
June 18, 2004	3.0	Randy Bennett
July 12, 2004	2.0	Randy Bennett
July 15, 2004	4.5	Randy Bennett
July 18, 2004	All Day	Randy Bennett
July 19, 2004	1.5	Randy Bennett
July 20, 2004	1.5	Randy Bennett
July 26, 2004	All Day	Randy Bennett
July 29, 2004	4.0	Randy Bennett
August 3, 2004	5.0	Randy Bennett
August 5, 2004	4.0	Randy Bennett
August 11, 2004	4.5	Randy Bennett
August 12, 2004	5.0	Randy Bennett
August 30, 2004	All Day	Randy Bennett
August 31, 2004	All Day	Randy Bennett
September 8, 2004	3.0	Randy Bennett

(e) Future Work

87. In addition to the time reflected in the Bill of Costs, significant time has been expended since September 9, 2004 in settlement negotiations and in conducting other work necessary for the formalization of the settlement and in order to obtain Court approval of the settlement. Further work remains to be done leading up to the Approval Hearing dates on October 18 and 19, 2004.

88. Moreover, Class Counsel are required by the terms of the Settlement Agreement to remain involved in the administration of the settlement following Court approval. In particular, Class Counsel will be maintaining regular contact with

the Settlement Administrator with respect to the ongoing processing of claims, as well as issues which may arise in the future in that regard. Class Counsel are also required to bring various motions on behalf of the Class following Court approval. This work and the time which will be expended are in addition to the time and expense already incurred by Class Counsel in this matter and will likely be considerable.

(f) Other Considerations

89. The total amount of time and expense that National Class Counsel invested in the prosecution of this lawsuit was significant and totals some $6.5 million. As a counter-point, I am advised by Vincent Genova that in addition to the senior counsel at Ogilvy Renault who were lead counsel on this file, several dozen contract lawyers were retained by the Defendants. In addition, some of the French Defendants were represented by the firm of Gowlings in their failed challenge of the constitutional issue in the Court of Appeal. Finally, I am advised by Vincent Genova that some months before the Agreement in Principle was executed, the Defendants had already depleted approximately $67 million of insurance policy funds in respect of litigation involving the Products.

The Value of the Settlement Agreement

90. The Settlement Agreement provides benefits to the Class which are both monetary and intangible.

91. The monetary value of the benefits negotiated on behalf of the Class include the Settlement Fund worth $25 million, the Additional Settlement Funds worth $15 million, the payment in satisfaction of the provincial and territorial health insurers' subrogated claims, the remuneration of the Court-Appointed Monitor during the lengthy negotiation process which culminated in the settlement, the funding of two notice programmes and funding the lengthy settlement administration, for a total of well over $40 million.

92. I believe that the monetary benefits directly available to Class Members are fair and reasonable. Based on my review of the medical literature and based on my discussions with medical experts, I also believe that the diagnostic criteria and other features of the settlement agreement are fair and will provide appropriate benefits to Class Members with legitimate claims, as well as those who advance derivative claims.

93. This Settlement also provides significant intangible benefits to the Class Members. In this regard, the principal value is the closure that a settlement provides, contrasted with the uncertainties, risks and increased delay which are inherent in ongoing litigation.

94. In this case, the difficulties and risks inherent in proceeding with the common issues trial would have inevitably resulted in significant delay to the final resolution of this matter.

95. In the event of success at the common issues trial, based on the manner in which this case has been defended throughout, it is highly likely that the Defendants

would avail themselves of every possible route of appeal, potentially resulting in years of delay before the case could be resolved.

96. I have no doubt that, had the Plaintiff been successful at the common issues trial, the French Defendants would have attempted to challenge the enforcement of a judgment obtained in Canada, based on the blocking statute in France's *Civil Code*. Although these Defendants may have had a colourable argument, I am confident that such an obstacle would have been overcome. Nonetheless, even with the Plaintiff's success, the process would have produced significant additional delay and expense to the final resolution of this case for Class Members.

97. Further, following success at the common issues trial, each Class Member would have to proceed through an individual assessment process to establish causation and damages, which would no doubt be vigorously contested by the Defendants.

98. In contrast, the Settlement Agreement provides for certainty, finality, a streamlined claims process, a timely distribution of benefits and avoids these risks and delays.

99. Thus, notwithstanding the fact that settlements, by their very nature, involve compromise, I believe that the values obtained on behalf of Class Members in this settlement are considerable.

Class Counsel's Fee Application

100. The Settlement Agreement provides, in part, for payment by the Defendant, Servier Canada, to Class Counsel of $3 million representing a portion of their partial indemnity costs and $1 million for a portion of their disbursements. The Settlement Agreement further allows for payment of Class Counsel's full indemnity fees out of the Settlement Fund and Additional Settlement Funds, upon Court approval.

101. The Plaintiff was successful in the majority of the contested motions and was awarded costs on a number of occasions. The total cost contributions of the Defendants to both *Rochon Genova* and *Klein Lyons* amount to approximately $700,000, inclusive of G.S.T. and disbursements. The portion paid to *Rochon Genova* was some $626,000. Of this amount, National Class Counsel estimates that $126,000 of these costs were for reimbursement of disbursements and applicable taxes. The costs contributions represent less than 10% of the straight time (excluding G.S.T. and disbursements) of *Rochon Genova* and *Lieff Cabraser* to date, without reference to the time billed by *Klein Lyons.* Attached hereto as Exhibit "G" is a list of the costs contributions made by the Defendants during the course of the proceeding.

102. In addition to these partial indemnity costs contributions described above, Class Counsel seek payment of $10 million plus applicable taxes from the Settlement Fund. The $10 million reflects a multiplier of approximately 1.54 when applied to the docketed time of *Rochon Genova* and *Lieff Cabraser* (approximately $6.5

million); when applied against the $10 million fee plus partial indemnity costs contributions of $3.5 million (net of disbursements and taxes), the multiplier becomes approximately 2.1. Neither multiplier considers the time expended by counsel for the British Columbia subclass.

103. If additional funds appear to be available at the close of the Claim Period, Class Counsel may bring a further application for approval of payment up to a maximum of $5 million plus applicable taxes. The basis for this further application is that the $10 million fee only represents a very modest multiplier on Class Counsel's time. Given the huge time investment by Class Counsel, the very positive result achieved, the substantial risk undertaken, which are discussed in detail below, and also taking into account that considerable work remains to be done by Class Counsel following court approval, I believe the further $5 million is justified and would reflect a multiplier of up to 2.85. Again, this does not include the time incurred by counsel for the British Columbia subclass.

104. Such future application would consider factors such as the take-up rate under the settlement and the amount of benefits anticipated to be paid from the Settlement Fund and Additional Settlement Funds. In the event that the further fee application for $5 million is brought, more detailed submissions in support of the application will be made at the appropriate date.

Degree of Responsibility and Risk Assumed by Solicitor

105. As noted above, this lawsuit has been ongoing since 1998. Throughout the proceeding the Defendants mounted a vigorous defence to which National Class Counsel have responded with equal vigour for almost six years, at tremendous cost.

106. I am advised by Joel Rochon, and believe, that shortly after this action was commenced, *Rochon Genova* was formed by Joel Rochon and Vincent Genova. I am further advised by Joel Rochon, and believe, that over time, in light of the Defendants' aggressive litigation strategy, Class Counsel hired a number of associates – myself, Lindsay Lorimer, Sakie Tambakos, Martha Harrison and prior to that Ron Hatch, a summer student, and earlier, Sylvie Kuppek and Doug Lennox – in large part to mount an appropriate litigation team to respond to the rigorous Defence strategy and to prosecute this case to successful resolution.

107. In spite of this team building, *Rochon Genova* remains a small firm. Even with the assistance provided by *Lieff Cabraser*, the financial cost of litigating the case – both in terms of carrying the significant disbursements, as well as the opportunity costs associated with diverting resources away from paying files – was a huge burden on the firm.

108. In the face of the conduct of the Defendants, who had vast and virtually limitless resources at their disposal, the responsibility and risk assumed by *Rochon Genova* was clear and pronounced.

Importance to the Client

109. The Representative Plaintiff, Sheila Wilson, is 68 years old and has been ill with PPH, a life-threatening disease, for several years. Since being diagnosed with PPH in March, 1998, Mrs. Wilson has undergone numerous tests, procedures and treatments, including heart catheterization, drug response tests, echocardiograms, chest X-rays and physical examinations.

110. In terms of medication, Mrs. Wilson has taken ACE inhibitors, oral L-Argenine, Digoxin, persantin, as well as prostacycline therapy (known as Flolan) every three hours by inhalation. Although Mrs. Wilson was offered an opportunity to go on the heart/lung transplant list in 1998, she declined as the chances of surviving this operation at her age were slim. Her present therapies include the use of Bosentan and sildenafil. Mrs. Wilson is also on night-time oxygen therapy and, very recently, it has been recommended that she move to 24 hour oxygen therapy.

111. In addition, Mrs. Wilson requires the use of a walker and her ability to engage in ordinary day-to-day activities on her own and with her family has been severely compromised. It is unknown how much longer she will live. All of this because she took what she believed was a safe medication to improve her health by losing some weight.

112. Mrs. Wilson and other Class Members have been awaiting the resolution of this case for years. In the interim, Class Members have lived with diseases which

significantly impair their ability to engage in daily activities and to enjoy life. Other Class Members have died since the inception of this litigation.

113. Resolution of this matter is tremendously important to Mrs. Wilson and other Class Members. Such resolution will give them financial benefits, finality and will avoid the delay, expense and risks of a common issues trial.

114. In the absence of this class action, it would have been clearly unlikely that Mrs. Wilson, or any individual Class Member, would have been able to succeed with an individual lawsuit against the Defendants, given the great expense required to pursue this kind of proceeding.

Skill and Competence

115. It is my belief that *Rochon Genova* has demonstrated skill and competence in the manner in which the action was prosecuted. Significant time was spent in preparation for all court attendances and examinations for discovery and professionalism prevailed, even in the context of hotly contested litigation. The competence of *Rochon Genova* is also evident in the overwhelming success achieved at the great majority of the motions, stays and appeals.

116. Further, *Lieff Cabraser* provided valuable contributions throughout the proceeding. As one of the leading Plaintiff firms in the United States with extensive product liability class action experience, and given their involvement in the U.S. litigation dealing with the same medications, their skill and competence are well established.

Results Achieved / Degree of Success

117. As indicated above, the results achieved for Class Members and the provincial and territorial insurers in this settlement are considerable. The compensation benefits for injured Class Members and their families are fair and reasonable. Based on my review of the medical literature and based on my discussions with medical experts, I also believe that the diagnostic criteria and other features of the settlement agreement are fair and reasonable.

118. The results achieved must also be considered in the context of the difficulties and risks inherent in the proceeding with the common issues trial and the additional delays and expense that would have entailed, as more particularly discussed above.

Ability to Pay and Client's Expectations

119. As noted above, in November, 1998, Mrs. Wilson entered into a retainer agreement with Class Counsel. This retainer was initially with Joel Rochon's former firm of Paroian, Raphael, Courey, Cohen & Houston ("Paroian Raphael") and provided that in the event of success Class Counsel would seek to obtain court approval for a multiplier of 2.1 on their "base fee".

120. I am advised by Joel Rochon, and believe that after he and Vincent Genova left the firm of Paroian Raphael, and upon *Rochon Genova's* assumption of carriage of the case, Mrs. Wilson signed a revised retainer agreement on February 7, 2001. The revised agreement provided that *Rochon Genova* would be entitled to a legal

fee in the amount of twenty-five percent (25%) of the total value of any settlement or judgment to the class. This amount was in addition to any award of costs, disbursements and applicable taxes. I am advised by Vincent Genova that this retainer was signed before *Rochon Genova* realized the huge, unforeseen time investment that would ultimately be required to pursue this case to resolution.

121. I have been advised by Joel Rochon, and believe, that Mrs. Wilson has signed a revised retainer providing for an award of legal fees to Class Counsel in accordance with the amounts sought in this affidavit and in accordance with the notice disseminated to the public for the Approval Hearing. Specifically, under this retainer, which will be presented to the Court for approval, Class Counsel will seek approval for the amounts described in paragraphs 102 to 104 above. Copies of all three retainers are attached hereto as Exhibits "H", "I" and "J", respectively.

Compensation to Mrs. Wilson

122. National Class Counsel also claim $15,262 from the Settlement Fund as compensation to Mrs. Wilson on a *quantum meruit* basis for the time and effort she has expended in relation to this action. Based on my own direct dealings with Mrs. Wilson, as well as on information relayed to me by Joel Rochon, which I believe, Mrs. Wilson at all times played an important role in the litigation; she spent considerable time trying to locate counsel willing to take the case, and thereafter she initiated the proceeding on behalf of the Class Members. Because of her efforts, a wider group ultimately stands to benefit.

123. At all times, Mrs. Wilson took a keen interest in the proceeding and, despite suffering from a debilitating condition, with the assistance of her husband, she willingly and capably fulfilled her responsibilities as representative of the class.

124. Mrs. Wilson met and consulted with Class Counsel on regular occasions at all stages of this proceeding and directly participated in the proceeding, including at her examination for discovery, the *de bene esse* hearing, her examination by written questions, and a portion of the initial mediation, each of which also required preparatory meetings with counsel. Mrs. Wilson also assisted in the preparation of a number of affidavits sworn in support of or in response to the many motions witnessed in this proceeding. The amount of compensation being sought for Mrs. Wilson is based on some 230 hours of time spent at an hourly rate of $65.00. Attached hereto as Exhibit "K" is a summary of the Plaintiff's time and expenses.

125. It is my belief that Mrs. Wilson rendered active and necessary assistance in the preparation and presentation of the case and is deserving of compensation for her efforts on a *quantum meruit basis*, as well as reimbursement for her nominal expenses. The fact that she carried out these duties while suffering from a debilitating lung disease is another factor to consider when approving this amount.

Conclusion

126. Having regard to the factors identified above, most notably the risk assumed by Class Counsel, as well as the complexities of the proceeding and the conduct of the Defendants, it is my belief that Class Counsel fees of $10 million are fair and reasonable and should be approved by the Court at this time, with provision for a further fee application to be brought at the end of the Claim Period for a maximum of $5 million.

127. I swear this affidavit in support of a motion to approve the Revised Retainer Agreement, for approval of Class Counsel fees and for compensation to the Representative Plaintiff and for no other purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 23rd day of September, 2004.

Annelis K. Thorsen

A Commissioner for Taking Affidavits