Court File No. 98-CV-158832

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SHEILA WILSON

Plaintiff

- and -

SERVIER CANADA INC., LES LABORATORIES 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 DEVELOPMENT ET DE RECHERCHE SERVIER, ORIL INDUSTRIE, BIO RECHERCE SERVIER, INSTITUO DI RICERCA, INDUX, BIOPHARMA ARTEM, SCIENCE UNION S.A.R.L., LABORATOIRES SERVIER INDUSTRIE, I.R.I.S., ET CIE DEVELOPMENT, 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

Brought under the *Class Proceedings Act, 1992*

AFFIDAVIT OF DANA GRAVES

I, Dana Graves, Solicitor, of the City of Kelowna, in the Province of British Columbia, MAKE OATH AND SAY:

1. I am lawyer with the firm of Klein, Lyons, court appointed counsel for the British Columbia plaintiff subclass, and as such have knowledge of the facts to which I hereinafter depose except where stated to be based on information and belief, and where so stated I believe those facts are true.

PART I: History of Our Work in Diet Pill Litigation

2. Klein Lyons has been working on diet pill litigation for nearly 8 years. We began our work in October 1996, when we were retained by our first client, Joan Matthews, a Vancouver resident. Ms. Matthews was one of the first reported cases in North America of a patient allegedly developing Primary Pulmonary Hypertension ("PPH") following diet pill ingestion, and to our knowledge, the first such case ever reported to Health Canada.

3. At the time that we began work for Ms. Matthews, Servier Canada's diet drug, Ponderal, was still widely marketed in Canada, and Servier Canada was in the process of launching a new diet pill onto the Canadian market known as Redux. A study associating an increased odds ratio of developing PPH with the use of anorexigens had only just been published in the *New England Journal of Medicine* on August 29, 1996. To my knowledge, no lawsuits had yet been filed anywhere in the world regarding the products at the time we began work on Ms. Matthews case. I will refer to Ponderal and Redux as "the products."

4. On June 4, 1997, we issued a proposed class action on behalf of Ms. Matthews. This was the first diet pill lawsuit issued anywhere in Canada, and among the first lawsuits involving the products commenced anywhere in the world.

5. The products ultimately were withdrawn from North American markets about three months later, on September 15, 1997.

6. Over time, and because of our work on behalf of Ms. Matthews, we were retained by many other clients suffering from injuries allegedly related to the products. For some of these clients, it was necessary to commence actions. In total, we commenced the following 12 actions on behalf of our clients in British Columbia and the Yukon:

(a) *Matthews v. Servier Canada, Inc.* S.C.B.C. No. C973178;

(b) *Greenlees v. Servier Canada, Inc. et al.* SCBC Action No. C994587;

(c) *Armstrong* v. *Servier Canada, Inc.* et al., SCBC No. C990365;

(d) *Banico* v. *Servier Canada, Inc.* et al., SCBC No. C980198;

(e) *Barber, et al.* v. *Servier Canada, Inc.* et al., SCBC No. C994586;

(f) *Braham* v. *Servier Canada, Inc.* et al., SCBC No. S001638;

(g) *Davis* v. *Servier Canada, Inc. et al.*, SCBC No. S001862;

(h) *Lamont* v. *Servier Canada, Inc. et al.*, SCBC No. C980248;

(i) *Neetz* v. *Servier Canada, Inc. et al.*, SCBC No. C985190;

(j) *Ryder* v. *Servier Canada, Inc. et al.*, SCBC No. C985191;

(k) *Shaw* v. *Servier Canada, Inc. et al.*, SCYT No. 99-A0032;

(l) *Sieloff* v. *Servier Canada, Inc. et al.*, SCBC No. S005903;

7. Both the *Matthews* action and the *Greenlees* action were issued as proposed class actions, and the others were issued as individual actions. Due to her failing health, Ms. Matthews subsequently decided to pursue her case only as an individual action, at which point the *Greenlees* action was issued as a proposed class action, in substitution for Ms. Matthews' action.

8. The proposed class definitions in the *Greenlees* and *Matthews* actions were both potentially "national" in scope, and proposed to include all persons resident in Canada who had ingested the products, with the exception of Quebec residents.

9. On June 12, 2000, our firm was first contacted by Mrs. Wilson's counsel. We had not previously been aware of any effort to pursue litigation related to the products in Ontario. We were advised that counsel were part-way through a class certification hearing before Mr. Justice Cumming of the Ontario Superior Court of Justice in the case of *Wilson* v. *Servier Canada Inc.*, that the issue of the permissibility of "national" class actions was presently being argued before the court, and that Mr. Justice Cumming had suggested that Mrs. Wilson's counsel might canvass plaintiff counsel pursuing class actions related to the products in British Columbia and Quebec as to their position on national class certification based in Ontario. Counsel for Mrs. Wilson thereupon invited our firm, and a firm in Quebec, to participate in the *Wilson* action. The Quebec firm declined this invitation.

10. Our firm decided that it was in the best interests of our clients, and the proposed class advanced by Ms. Greenlees, to participate in the *Wilson* action, and to work actively to support this litigation, and to ensure its success. We sent one of our lawyers, Janet Pierce, to attend the balance of the certification hearing before Mr. Justice Cumming in *Wilson* in order to support the motion for class certification. In certifying *Wilson*, Mr. Justice Cumming noted as follows:

"There are other actions concerning Servier Canada: in Quebec, *Hotte* v. *Servier Canada*, [1999] J.Q. No. 4371 (C.A.) (QL); and in British Columbia, *Matthews* v. *Servier Canada*, 2000 CarswellBC 892 ("*Matthews*"). Counsel for the plaintiff have been in communication with Quebec and British Columbia counsel. These two actions have not yet been certified. The proposed class in the Quebec action is limited to the residents of Quebec. The decision has been made in the class proceeding at hand to exclude Quebec residents from the proposed national class.

In British Columbia, the BCCPA provides a different procedure for non-residents. It contemplates the creation of a subclass for persons who are not resident in British Columbia and who wish to opt into the class. Counsel for the representative plaintiff in *Matthews, supra*, has advised that, if the action at hand is certified in Ontario, then the British Columbia representative plaintiff will not opt out, but rather seek to have the class members in British Columbia constituted as a subclass in the instant action.

The CPA contemplates the decertification of a class in whole or in part, as circumstances in a given case may change. If, ultimately, the Matthews case in British Columbia becomes certified, then the class members for that province can be deleted from the national class in the case at hand."

11. Thereafter, our client, Ms. Greenlees, held off on pursuing her pending certification motion in British Columbia, whether on behalf of a provincial or national class based in that province, and instead sought court appointment in the *Wilson* action as the representative plaintiff for class members resident in British Columbia. On May 1, 2001, Mr. Justice Cumming granted this motion, appointed Ms. Greenlees as the representative plaintiff for the British Columbia sub-class and appointed our firm as class counsel for British Columbia class members. Mr. Justice Cumming wrote:

"...this claim is very complex. Klein, Lyons is an experienced firm in class proceedings. There is an advantage to the national class generally to have the participation of additional counsel in this proceeding.

Fourth, Ms. Greenlees seeks to participate as a representative plaintiff for the B.C. subclass and the appointment of Klein, Lyons as B.C. subclass counsel. The expectation of all parties at the class proceeding was that Ms. Greenlees would make this request if the plaintiff Miss Wilson was successful in having the

> certification of a national class. As I have already stated, there was no objection raised in respect of this issue by defendants prior to certification.
>
> Fifth, in my view there is no prejudice to the defendants in granting this motion.
>
> Finally, with a national class in a complex proceeding involving many putative claimants there are inherent complexities and difficulties in communication and administration. It facilitates access to justice and judicial efficiency to pursue the determination of issues through a single, national class action. It assists in achieving these objectives in the case at hand to grant the motion."

12. On October 5, 2000, Mr. Justice Cumming granted a temporary stay of the *Wilson* action on the issue of notice, pending the resolution of the Defendant's motion for leave to appeal the certification order to the Divisional Court, but otherwise established a case management schedule for the action, with the delivery of Statements of Defence by December 1, 2000, and Affidavits of Documents from the Defendants by April 1, 2001.

13. Court approved notice of certification issued in December 2000, with the deadline for opting-out expiring on April 30, 2001. The notice expressly listed Klein Lyons as the contact for class members from British Columbia. Only thirteen class members opted out. Eleven of the opts-outs were our clients. This was necessary because these clients had already issued and pursued individual actions, and a number of these individual actions included allegations and parties which were not found in the *Wilson* action, including allegations of medical malpractice against prescribing physicians.

14. The trial of this action was scheduled to commence in February 2003. A mediation was held before Mr. Justice Winkler in January 2003. Our client, Ms. Beverley Greenless, attended the mediation, together with David Klein, Gary Smith and myself.

15. There were hard-fought, arms-length negotiations between the parties. Both parties demonstrated a resolve to take this matter through to trial.

16. The mediation was ultimately successful producing an Agreement in Principle which provided the basic outline for a settlement, but left the details and administration of that settlement to be negotiated later.

17. To put this Agreement in Principle into practice however, it was necessary to negotiate a more comprehensive formal settlement agreement. When direct negotiations between the parties failed to advance this process, a special court monitor, Randy Bennett, was appointed by order of Mr. Justice Winkler in mid-2003 to facilitate this process.

18. The negotiations to reach a formal settlement agreement have taken more than 18 months of determined negotiations to bring to a conclusion. Our firm retained several experts, including Dr. Robert Levy (a Vancouver physician who specializes in the treatment of pulmonary disorders and has treated most of the British Columbia class members who suffer from pulmonary arterial hypertension as a consequence of using diet drugs), Dr. Frank Mizgala (a Vancouver cardiologist and cardiac surgeon who specializes in the area of heart valve pathology) and Dr. John Limbert (a physician who specializes in medical-legal research and consulting) to act as consultants in our trial preparation and

strategy, and to subsequently advise us with respect to settlement negotiations and the definitions of the medical conditions used in the settlement .

19. Additional information on our firm's participation in this litigation will be set out in greater detail in the materials we will be filing in support of the application for approval of the class counsel fees.

PART II: The Settlement is in the Best Interests of the Class

20. I believe that the settlement is fair and reasonable and in the best interests of the class for the reasons set out below.

(a) Likelihood of recovery, or likelihood of success

21. There were significant risks that the plaintiffs would not succeed at the common issues trial, or that if they did succeed, they would not be able to enforce a judgment for jurisdictional reasons.

22. The Defendants had filed over a dozen expert reports which outlined the expert evidence they intended to call at the common issues trial. Defences potentially available to the Defendants at the common issues trial included the following, the success of any of which could have been fatal to the plaintiffs' claims:

(a) generic causation cannot be proved on a balance of probabilities; the products did not cause PPH or Valvular Heart Disease in humans; the etiology of these conditions is unknown,

(b) the Defendants acted responsibly; they warned of all known risks in timely fashion and did not breach any duty of care,

(c) the drugs were medically efficacious; their risks were justified by their effectiveness in treating obesity,

(d) the Defendants complied with all applicable Health Canada regulations, and nothing more should be expected of a reasonable drug manufacturer, or

(e) the action is not properly maintainable as a class action, notwithstanding prior certification orders, and that the evidence developed at trial would support a decertification order.

23. Even if the plaintiffs had won the common issues trial, this would not result in any individual plaintiff being entitled to receive any monetary judgment. Hearings would be required to establish individual class member's damages. Defences potentially available to the Defendants at these hearings, the success of any one of which could be fatal to that individual's claim, include the following:

(a) individual causation cannot be proved for that claimant; the claimant does not have PPH or VHD, or their PPH or VHD is related to some other cause,

(b) the claimant was adequately warned of the risks of the products, or would still have taken them if adequately warned, or

(c) the claimant's physician was adequately warned of the risks of the products, or would still have prescribed them if adequately warned.

24. Even if an individual class member was successful in obtaining a judgment, there remained the over-riding question of whether a judgment against these Defendants would be enforceable. Servier Canada Inc. appears to have only limited assets in the country. The other Defendants are resident outside of Canada and, there may be issues as to whether the judgment of a Canadian court would ultimately be enforceable against these assets. The foreign Defendants further maintained that they had no responsibility for the sale of the products in Canada, and there was a risk that a Canadian court would not attach any liability to the foreign corporations.

25. The settlement obtained in this case represents a substantial recovery for the class, even in the face of these risks. One measure of the success of this lawsuit is that, to my knowledge, this is the only lawsuit related to the products, anywhere in the world, which these Defendants have settled. Lawsuits were commenced against Les Laboratoires Servier in the United States, but to my knowledge have not been pursued to trial. A class action was commenced in Australia against a Servier company there, but was eventually dropped.

26. I am aware of an individual action that was pursued to trial against Les Laboratoires Servier in France. My understanding is that this case resulted in a judgment for that individual plaintiff in December 2000 in the equivalent amount of approximately $100,000 Canadian. I am informed by counsel for Servier Canada and believe that judgment is presently under appeal. Of course, this case filed in France did not face the same jurisdictional problem as the *Wilson* action.

27. Another measure of the success of this litigation is comparing the total settlement amounts obtained, with the total assets of Servier Canada Inc. The total value of this settlement is up to $44 million. Servier Canada's insurance policy was for only $15 million, subject to reduction for defence costs and any policy defences. It appears therefore that the plaintiff class was successful in obtaining compensation from these Defendants above and beyond the insurance coverage available to Servier Canada, this insurance policy potentially being Servier Canada's only exigible asset.

28. The settlement negotiated provides injured class members with a fair and efficient means of determining their individual claims, permitting them to obtain levels of individual compensation appropriate to Canadian law, without the need for class members to go to the time and expense of individual trials. The defendants bear the reasonable costs of administration of the settlement.

29. Our firm has been contacted by approximately 1,000 people who expressed an interest in participating in this class action. Many wanted information only or did not

report suffering from valvular heart disease or pulmonary arterial hypertension. We are still in the process of obtaining and reviewing medical records of class members who report injuries that may be compensable under the settlement agreement. So far, there appear to be 29 class members among this group who suffer from pulmonary arterial hypertension (15 primary and 14 secondary to VHD), and 86 class members who have VHD (including the 14 who appear to have PAH) as defined in the just completed Medical Conditions List. Of the 86 class members who appear to have VHD, it appears that 45 have FDA Positive levels as defined in the Medical Conditions List and the rest have Matrix level conditions as defined in the Medical Conditions List. At this point, it is not possible for us to estimate the total settlement value of those claims.

(b) Amount and nature of discovery evidence

30. Unlike many proposed class action settlements in Canada, which are often settled before a contested certification motion and subsequent discoveries, there were extensive discoveries in this case. The plaintiffs received volumes of documents from the Defendants. There were approximately 11 weeks of discoveries conducted by the plaintiffs involving 7 defence deponents. There were also discoveries of a non-party, Health Canada. There were more than 20 expert reports exchanged. The case settled on the eve of trial.

(c) Settlement terms and conditions

31. The terms of the settlement are contained in the agreement and its exhibits thereto. In sum, the proposed settlement provides that the Defendants may pay up to $40 million

to qualified claimants, and creates an administrative system for fairly and efficiently distributing these monies to injured class members and provincial health authorities.

(d) Recommendation and experience of counsel

32. Our firm recommends this settlement. Our managing partner, David Klein, has successfully negotiated settlements in many class actions, and has been successfully representing plaintiffs in class proceedings from their very start in Ontario and British Columbia. Indeed, our firm was counsel in the very first class action certified in British Columbia, *Harrington* v. *Dow Corning*, and our representation of British Columbia residents in Ontario class proceedings extends back to one of the first class actions certified in this province, *Nantais* v. *Telectronics*.

33. David Klein is a member of the bars of Ontario (1980), British Columbia (1992), and Washington State (1995). In 1998-99, he served as president of the Trial Lawyers Association of British Columbia. David Klein is one of Canada's leading class action lawyers. He has acted as plaintiffs' counsel in over 20 class proceedings in British Columbia, Ontario, Alberta, Saskatchewan, Manitoba and Newfoundland. Mr. Klein has successfully negotiated numerous class action settlements including *Killough* v. *Canadian Red Cross Society et al.* (hepatitis C tainted blood), *Harrington* v. *Dow Corning Corporation et al.* (silicone breast implants), *Sawatzky* v. *Instrumentarium et al.* (defective jaw implants), *Knudsen* v. *Consolidated Food Brands Ltd.* (food related E-coli. outbreak), *Dalhuisen* v. *Maxim's Bakery Ltd.* (salmonella outbreak), *Pausche* v. *B.C. Hydro et al.* (hydro dam flood), *Fisher* v. *Delgratia Corporation et al.* (shareholder class

action), *Delf* v. *Merit Energy Ltd. et al.* (securities misrepresentation), and *Young* v. *Shell Canada Inc.* (defective automotive fuel). In other Ontario proceedings, the Courts have appointed Mr. Klein to represent the interests of British Columbians: *Nantais v. Telectronics Ltd.* (defective pacemaker class action), and *In Re Canadian Red Cross Society* CCAA proceedings (hepatitis C tainted blood claims). Over the past eight years, Mr. Klein has served as a speaker or panel member at approximately 25 conferences and seminars on class actions for organizations that include the Canadian Bar Association, the Canadian Trial Lawyers Association, the Association of Trial Lawyers of America, the Continuing Legal Education Society of British Columbia, the Trial Lawyers Association of British Columbia, the University of British Columbia Faculty of Law, the Saskatchewan Trial Lawyers Association, Queen's University Faculty of Law, the Quebec Bar Association, Insight Seminars, the Canadian Institute, and Mealey's Conferences.

34. Mr. Klein has played a central role in the negotiation of this settlement. In my opinion his extensive class action experience has been of great benefit to the class.

(e) Future expense and likely duration of litigation

35. Absent a settlement, this litigation might have continued for years. Assuming that the common issues trial had commenced in February 2003, I estimate it likely would have run until at least the fall of 2003. Assuming that the trial judge took matters under reserve, I would not have expected a trial judgment until the winter of 2004. Assuming a plaintiff victory, the Defendants would likely have appealed to the Ontario Court of

Appeal. I would expect such an appeal process to consume about a year. Assuming again a plaintiff victory, I would expect the Defendants to seek leave to appeal to the Supreme Court of Canada. This process would likely take between 6 months and 2 years depending on whether leave was granted. Assuming the Defendants exhausted their appeals from the common issue trial, it could take until 2007 for this process to play out. Assuming the plaintiffs were successful to that point, they would then need to start a process of conducting individual damage assessments. As of the time that this matter settled, a litigation plan had not been finalized for the conduct of such proceedings. Our experience with damage assessments in other class proceedings suggests that this process might take several more years to complete, and could be the subject of further appeals. Only at this stage then, would individual plaintiffs begin to have monetary judgments against these Defendants. At this point however, the question of whether these monetary judgments could even be enforced against the Defendants could arise. Enforcement proceedings could well last several more years, involving Canadian and foreign courts. In short, absent a settlement it is foreseeable that litigation in this case could continue beyond 2010. All of this continued litigation would be costly, and would serve to deplete any recoveries finally obtained by class members.

36. The plaintiff class is composed of persons alleging serious personal injuries. We do not believe that continued, protracted litigation is in their best interests. Such a delay would be a significant intangible cost for class members, for which no money could properly compensate.

(f) Recommendation of neutral parties

37. Mr. Justice Winkler, as mediator, and Randy Bennett, as the court appointed special monitor in this case, are neutral parties who played an important role in shaping the settlement in this case.

(g) Number of objectors and nature of objections

38. I am not presently aware of any objectors. There were only a handful of people who opted out of this class action, following certification, to pursue individual actions, and all of these persons have subsequently opted back in as part of this settlement.

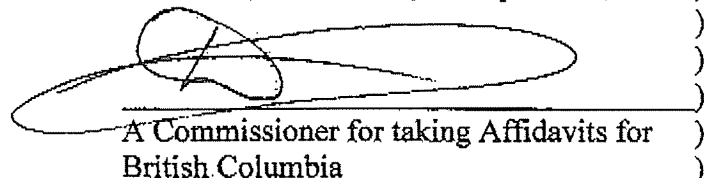
(h) The presence of good faith and the absence of collusion

39. This action was hard-fought at every stage, and was litigated to the brink of trial. The settlement was negotiated at arms-length, with the assistance of Mr. Justice Winkler and the court appointed special monitor, Randy Bennett. This settlement was negotiated in good faith and there was no collusion.

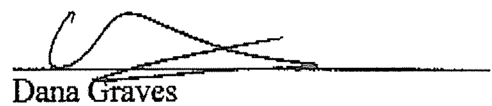
CONCLUSION

40. In my opinion, the settlement is fair and reasonable and in the best interests of the class. I make this affidavit in support of the motion for approval of the settlement and for no improper purpose.

SWORN BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 21st day of September, 2004



A Commissioner for taking Affidavits for British Columbia



Dana Graves

DOUGLAS M. FRANKS
Notary Public
212 - 1980 Cooper Road
KELOWNA, B.C. V1Y 8K5
Tel: (604) 868-8268

Permanent commission

NO ADVICE REQUESTED NOR GIVEN
ATTESTED ONLY BUT NOT DRAWN