

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

GLEN FORD, VITAPHARM CANADA LTD.,  
FLEMING FEED MILL LTD., and MARCY DAVID

Plaintiffs

- and -

F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA  
ROCHE LTD., MERCK KGaA, LONZA AG,  
ALUSUISSE-LONZA CANADA INC.,  
SUMITOMO CHEMICAL CO., LTD.,  
SUMITOMO CANADA LIMITED/LIMITEE and  
TANABE SEIYAKU CO., LTD.

Defendants

Proceeding under the *Class Proceedings Act*, 1992  
(Biotin)

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)  
) *Harvey T. Strosberg, Q.C., C. Scott Ritchie, Q.C.,*  
) *J. J. Camp Q.C., and Joe Fiorante* for the Plaintiffs  
) in all actions

) *Glenn M. Zakaib*, for the Defendant Merck KgaA

) *John Callaghan*, for Sumitomo Chemical Co. Ltd.

) *William Vanveen and François Baril*, for the  
) Defendants Hoffmann-La Roche Limited,  
) F. Hoffmann-La Roche Ltd.

) *Ariane Farrell*, for Sumitomo Canada Ltd.

) *Donald Houston*, for Lonza AG

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)  
) HEARD: March 8 and 9, 2005

COURT FILE NO.: 00-CV-200045CP

BETWEEN:

GLEN FORD, VITAPHARM CANADA LTD.,  
FLEMING FEED MILL LTD., ALIMENTS BRETON  
INC., OGER AWAD and MARY HELEN AWAD

Plaintiffs

- and -

F. HOFFMANN-LA ROCHE LTD., HOFFMANN-LA  
ROCHE LIMITED/LIMITÉE, RHÔNE-POULENC  
S.A., AVENTIS ANIMAL NUTRITION S.A.,  
RHÔNE-POULENC CANADA INC., RHÔNE-  
POULENC ANIMAL NUTRITION INC., RHÔNE-  
POULENC INC., BASF AKTIENGESellschaft,  
BASF CORPORATION, BASF CANADA INC.,

)  
)  
) *William Vanveen and François Baril*, for the  
) Defendants F. Hoffmann-La Roche Ltd. and  
) Hoffmann-La Roche Limited/Limitee

) *Glenn M. Zakaib*, for the Defendant Merck KgaA

) *Katherine L. Kay and Eliot N. Kolers*, for the  
) Defendant Eisai Co., Ltd.

) *Evangelia Kriaris*, for Takeda Pharmaceutical  
) Company Limited (formerly Takeda Chemical  
) Industries, Ltd.); Takeda Canada Vitamin and Food  
) Inc.

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) *Sandra A. Forbes*, for Aventis Animal Nutrition SA,



COURT FILE NO.: 00-CV-201723CP

**B E T W E E N:**

GLEN FORD, FLEMING FEED MILL LTD.,  
ALIMENTS BRETON INC., and KRISTI CAPP

Plaintiffs

- and -

RHÔNE-POULENC S.A., RHÔNE-POULENC  
CANADA INC., DEGUSSA-HÜLS AG, DEGUSSA  
CORPORATION, DEGUSSA CANADA INC.,  
NOVUS INTERNATIONAL, INC. and AVENTIS  
ANIMAL NUTRITION S.A.

Defendants

Proceeding under the *Class Proceedings Act*, 1992  
(Methionine)

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)  
) *Sandra A. Forbes*, for Aventis Animal Nutrition  
S.A. and the Rhone-Poulenc defendants

) *F. Paul Morrison* and *J. P. Brown*, for Degussa  
Corporation, Degussa Canada Inc. and Degussa-Huls  
A.G.

) *S. A. Dawson*, for Novus International, Inc.

COURT FILE NO.: 00-CV-200044CP

**B E T W E E N:**

VITAPHARM CANADA LTD., FLEMING FEED  
MILL LTD., ALIMENTS BRETON INC., and KRISTI  
CAPP

Plaintiffs

- and -

DEGUSSA-HÜLS AG, DEGUSSA CORPORATION,  
DEGUSSA CANADA INC., REILLY INDUSTRIES  
INC., REILLY CHEMICALS S.A., VITACHEM  
COMPANY, ALUSUISSE-LONZA CANADA INC.,  
LONZA AG, NEPERA INCORPORATED, ROGER  
NOACK and DAVID PURPI

Defendants

Proceeding under the *Class Proceedings Act*, 1992  
(Niacin)

)  
)  
) *Donald Houston*, for Lonza AG and Alusuisse-  
Lonza Canada Inc.

) *Jennifer Badley* (per D. Kent) for Reilly Industries  
Inc. and Reilly Chemicals S.A.

) *F. Paul Morrison* and *J. P. Brown*, for Degussa  
Corporation, Degussa Canada Inc. and Degussa-Huls  
AG

) *S. Vlahakis*, for Nepera Inc., Roger Noack and  
David Purpi



**CLASS PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT*, 1992**

**REASONS FOR DECISION**

**CUMMING J.**

**The Motions**

[1] These are motions for certification, and for approval of the settlements, of a group of class actions in respect of certain defendants in the proceedings under sections 32 and 33 of the *Class Proceedings Act*, S.O. 1992, c. 6 ("*CPA*").

[2] In 1999, multiple putative class actions were commenced in Ontario, British Columbia, and Quebec alleging a complex, global, multi-party, price-fixing and market-sharing conspiracy relating to the sale of vitamins in Canada. Ultimately, five separate class actions were reconstituted and pursued in Ontario, dealing with discrete Vitamins and with separate representative plaintiffs. Two additional, so-called "supplemental", class actions have also been initiated. Certain "Settling Defendants" have now entered into a proposed settlement with certain "Settling Plaintiffs" in these class actions in Ontario, culminating in what is called the "Amended Canadian Vitamins Class Actions National Settlement Agreement" ("Agreement") made as of November 1, 2004 and amended as of January 6, 2005. The proposed settlement is for the national classes contemplated in the class actions at hand, together with separate class proceedings in British Columbia and Quebec. Separate settlement approval hearings will take place before the Courts in those provinces. (The status of the several class actions, upon successful motions for certification and settlement approval, is set forth in paragraph 106 of these Reasons.)

[3] The materials filed in support of the motion at hand are voluminous, filling three bankers' boxes. The Agreement is lengthy and complex with several schedules (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of the Motion Record). These materials can be found (together with additional information) online <<http://www.vitaminsclassaction.com>>.

[4] There are also very recent, trailing, additional; separate Settlement Agreements for three Defendants (Akso Nobel Chemicals BV ("*Akso*"), UCB S.A. ("*UCB*"), and Reilly Industries Inc. ("*Reilly*")) which, for the purposes of the motion at hand, can be notionally treated as though they are part of a single overall settlement.

[5] Capitalized terms used herein are as defined in the Agreement. However, the term "Class Counsel" means the law firms known as Siskinds, Cromarty, Ivey & Dowler ("*Siskinds*"), Sutts Strosberg ("*Strosberg*"), Camp Fiorante Matthews ("*Camp*"), Desmeules, and Allen Cooper. This definition of "Class Counsel" is different from the definition of "Class Counsel" found in the Agreement. The term "Quebec Counsel" means the two Montreal firms, Sylvestre, Charbonneau, Fafard and Unterberg, Labelle, Lebeau.

[6] As well, "Class Counsel Fees", as this term is used herein, means the total fees payable to both Class Counsel and Quebec Counsel.

[7] The motion for certification and Court approval of the proposed settlement was heard on March 8, 2005 with the motion for the approval of "Class Counsel Fees" being heard separately March 9, 2005. Reasons for Decision in respect of certification and settlement approval have been given separately. The Reasons for Decision at hand deal with the discrete issue of certification and the approval of the settlement Agreement.

[8] The plaintiffs assert that:

- (a) the Defendants entered into conspiracies to fix prices with respect to the distribution and sale of Vitamins and related products in the period January 1, 1986 to February 28, 1999; and
- (b) the worldwide vitamin industry was dominated by certain groupings of the Defendants who controlled a significant percentage of the world Vitamin market for many of the main types of vitamins.

[9] Some of the Defendants pled guilty in the United States and Canada to price-fixing charges concerning Vitamins. The class actions at hand are based upon the impact of the alleged global conspiracies upon residents of Canada.

[10] Generally, Vitamins are manufactured and marketed for four primary uses: animal and fish feed supplements; direct human consumption; food and beverage additive for human consumption; and cosmetics, as more fully particularized in the chart below:

Product	Uses
Biotin (Vitamin B8, Vitamin H)	Human consumption Animal and fish feed supplement
Bulk Vitamins (Vitamin A, Vitamin B1, Vitamin B2, Vitamin B5, Vitamin B6, Vitamin B9, Vitamin B12, Vitamin C, Vitamin E, Beta Carotene, Canthaxanthin, Premix)	Human consumption Food and beverage additive for human consumption Cosmetics Animal and fish feed supplement
Choline Chloride (Vitamin B4)	Food and beverage additive for human consumption Animal and fish feed supplement
Methionine	Human consumption Animal and fish feed supplement
Niacin, Niacinamide (Vitamin B3)	Human consumption Food and beverage additive for human consumption Animal and fish feed supplement

[11] There is a broad spectrum of plaintiffs because of the different users, namely, Direct Purchasers, Intermediate Purchasers and Consumers.

[12] The plaintiffs pursued this litigation, using a two-stage model. At stage one, on behalf of all purchasers of Vitamins, the plaintiffs sought to hold the alleged conspirators accountable for the aggregate overcharge on all sales of Vitamins in Canada by recovering aggregate damages. Then, at stage two, Class Counsel developed a distribution model for the aggregate damages to be paid to or for the benefit of Direct Purchasers, Intermediate Purchasers and Consumers, all of whom comprise the distribution chain.

[13] Class Counsel submits this two-stage approach is novel in that it avoids the fragmented approach in the United States to price-fixing conspiracy claims. Under U.S. Federal anti-trust laws, only direct purchasers are entitled to claim damages, notwithstanding that some of the overcharge may have been passed through the distribution chain: *Sherman Act*, 26 Stat. 209, 15 U.S.C. §1. Over 20 states have responded to this Federal law by passing state laws that permit indirect purchasers, harmed by a conspiracy, to claim damages in state courts.

#### **The Motions for Certification**

[14] The *CPA* is a procedural statute. Section 5 of the *CPA* sets out the test for certification. The word “*shall*” in s. 5(1) is mandatory: the court must certify an action as a class proceeding if all of the five criteria of s. 5(1) of the *CPA* are met and if there is no other reason to refuse to make the order. *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734 at 744 (Gen. Div.); *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at para. 13.

[15] To certify an action as a class proceeding under s. 5, the plaintiff requires a “minimum evidential[ry] basis for a certification order.” It is necessary that the plaintiff “show some basis in fact for each of the certification requirements,” other than the requirement in s. 5(1)(a). The “adequacy of the record will vary in the circumstances of each case.” *Hollick v. The City of Toronto*, [2001] S.C.J. 67 at para. 25.

[16] On these certification motions, there is before the court a substantial evidentiary base touching on all the requirements of s. 5(1). While the motions for certification vary in terms of the parties and Vitamins involved, the motions can conveniently be discussed as a single motion.

[17] The following principles apply to the issue as to whether the pleadings disclose a cause of action under s. 5(1)(a) of the *CPA*:

- (a) no evidence is admissible for the purposes of determining the s. 5(1)(a) criterion;
- (b) all allegations of fact pleaded, unless patently ridiculous or incapable of proof, must be accepted as proved and thus assumed to be true;
- (c) the pleading will be struck out only if it is plain, obvious and beyond doubt that the plaintiff cannot succeed and only if the action is certain to fail because it contains a radical defect;
- (d) the novelty of the cause of action will not militate against the plaintiff;

- (e) matters of law not fully settled in the jurisprudence must be permitted to proceed; and
- (f) the statement of claim must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 990-991; *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at 679; *Hollick, supra*, at para. 25; *M.C.C. v. Canada (A.G.)*, [2004] O.J. No. 4924 (C.A.) at para. 41.

[18] The plaintiffs allege the following causes of action:

- (a) the Defendants contravened s. 45(1) of Part VI of the *Competition Act*, R.S.C. 1985 c.C-34, giving rise to a right of damages under ss. 36(1) and 45(1);
- (b) the Defendants are liable for tortious conspiracy and intentional interference with economic interests; and
- (c) the Defendants are liable for punitive damages.

[19] The plaintiffs submit that it is not "plain and obvious" and beyond doubt that they could not succeed in the causes of action pleaded.

[20] Class definition is critical because it identifies the persons who are entitled to notice, entitled to relief, if relief is awarded, and bound by the judgment. A class definition must be "defined...by reference to objective criteria." A class definition dependent upon a determination of an issue in the action is unacceptable because the merits are not to be decided at the certification stage. *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, at para. 38.

[21] A class definition must bear a rational relationship to the common issues. *Canadian Shopping Centres, supra*, at para. 38; *Hollick, supra*, at para. 17; *M.C.C. v. Canada, supra*, at para. 45.

[22] The proposed class definition for each of the Ontario Actions can be stated as follows:

All persons in Canada who purchased the relevant Class Vitamin(s) in Canada in the relevant Purchase Period(s) except the Excluded Persons and persons who are included in the corresponding British Columbia and Quebec Actions.

[23] The proposed class definitions embody all levels of purchasers, including those who purchased Vitamins in raw form and those who purchased a product of which Vitamins were a component part. As the court recognized in *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977) at paras. 737-38, in the absence of a bar respecting the use of the passing-on defence, the class necessarily has to include all levels of plaintiffs, from direct purchasers to intermediate

purchasers to ultimate consumers. All groups of class members must be present to ensure that the wrongdoers do not retain any of the fruits of their wrongdoing and to protect the rights of the class members to make a claim against a common fund to address their losses.

[24] The case of *Hanover Shoe v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) serves as a starting point for the background of American price-fixing case law. Heard by the U.S. Supreme court in 1968, *Hanover Shoe* involved allegations by the plaintiffs that the defendants had monopolized the shoe machinery industry in violation of the *Sherman Act, supra*, resulting in an overcharge. The defendants argued that the plaintiff class had passed on some or all of the overcharge and therefore, was not entitled to recover such damages. The court rejected this defence, holding that the passing-on defence was not available to the defendants. In making its decision, the court determined that if the passing-on defence was permitted treble-damages actions would become too complicated, and the alleged co-conspirators "would retain the fruits of their illegality" because indirect purchasers, having only modest claims, would be unlikely to sue.

[25] The above decision was affirmed in 1977 in *Illinois Brick, supra*, another U.S. Supreme Court decision. The State of Illinois brought an action against manufacturers and distributors of concrete block in the Greater Chicago area. The State alleged that the defendants' illegal overcharges had been passed on through various levels of contractors to the plaintiff consumers, or indirect purchasers, causing them to suffer a loss. The court held that the passing-on theory must be applied uniformly for plaintiffs and defendants alike. Therefore, the plaintiffs could not use the passing-on theory offensively in light of the court's prior ruling that it could not be used defensively. The court further stated that only overcharged direct purchasers, and not others in the chain of manufacture or distributors, are considered parties "injured in his business or property" within the meaning of the *Clayton Act*, 38 Stat. 731, 15 U.S.C. §15: *Illinois Brick*.

[26] The result of *Illinois Brick* is arguably to create a windfall for a direct purchaser that passes on an overcharge in whole or in part to an indirect purchaser. The indirect purchaser, who suffers a loss as a result of the conspiracy, would be barred from any recovery.

[27] The decision of the U.S. Supreme Court in *Illinois Brick* was criticized in many quarters. The reasoning of its critics is largely contained within the dissent written by Mr. Justice Brennan at 749, joined by Mr. Justice Marshall and Mr. Justice Blackmun:

Today's decision flouts Congress' purpose and undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement. For in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers and direct purchasers who act as middlemen have little incentive to sue suppliers so long as