

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)

)  
)  
) *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

)  
)  
)  
)  
) 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 AKTIENGESSELLSCHAFT,  
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)

)  
)  
)  
) *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

COURT FILE NO.: 40610

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

FLEMING FEED MILL LTD., ALIMENTS BRETON  
INC., GLEN FORD and MARCY DAVID

Plaintiffs

- and -

UCB S.A. and UCB CHEMICALS CORPORATION

Defendants

Proceedings under the *class Proceedings Act*, 1992  
(Supplemental Choline Chloride)

*Donald Houston*, for UCB S.A. and UCB Chemicals  
Corporation

COURT FILE NO.: 42267CP

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

GLEN FORD

Plaintiff

- and -

NOVUS INTERNATIONAL (CANADA) INC.

Defendant

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

*Donald Houston*, for Wippon Soda Co. Ltd.

*Pauline W. Wong* for Defendant, Mitsui & Co., Ltd.

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

**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

they may pass on the bulk of the illegal overcharges to the ultimate consumers.

[28] Since the Supreme Court's decision in *Illinois Brick*, more than twenty states have enacted statutes which authorize indirect purchaser lawsuits. These statutes serve to ensure that the *Illinois Brick* decision does not bar state residents from potential recoveries against alleged conspirators. The United States Supreme Court has ruled that such statutes are not pre-empted by the court's decision in *Illinois Brick*. See *California v. ARC America Corp.*, 109 S. Ct. 1661 (1989) at 1665.

[29] A national class which includes class members in all provinces and territories except Quebec (Consumers only) and British Columbia is appropriate. The subject matter of the class actions has a real and substantial connection to the province of Ontario. As stated by this Court in its decision dismissing the Defendants jurisdictional challenge:

[i]n my view, if the alleged conspiracy in each of the class actions is proven, there is a real and substantial connection with Ontario in respect of the subject matter of the actions in tort.

[30] I continued on to say:

[t]he centre of gravity for each of the class actions, initially on behalf of putative plaintiff 'national classes', is Ontario. *Vitapharm Canada Ltd. v. F. Hoffmann-LaRoche Ltd.*, [2002] O.J. No. 298 (S.C.J.) at paras. 100-101.

[31] National classes have been certified by the Ontario court in many class actions. *Wilson v. Servier Canada Inc.*, (2000), 50 O.R. (3d) 219 at 228 (Sup. Ct.), leave to appeal denied (2000), 52 O.R. (3d) 20, leave to appeal to S.C.C. denied September 6, 2001. Recently, Sharpe J.A. said that "there are strong policy reasons favouring the fair and efficient resolution of interprovincial and international class action litigation." *Currie v. McDonald's Restaurants of Canada Ltd.*, [2005] O.J. No. 506 (C.A.) at para. 15; *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79 (S.C.J.) at para. 2.

[32] The plaintiffs propose the following common issue for each of the Ontario Actions:

Did the Settling Defendant(s) and its/their Affiliated Defendants(s) in the relevant Ontario Action agree to fix, raise, maintain or stabilize the prices of, or allocate markets and customers for, the relevant Vitamins(s) in Canada in the relevant Purchase Period?

[33] The definition of "common issues" in section 1 of the CPA "represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high." The common issues need only to "advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of a particular legal claim...is not required." This requirement has been described by the Court of Appeal "as a low bar." The Supreme Court of

Canada has held that in framing the common issues, the guiding question should be “whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis.” The common issues question should be approached purposively. *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at 248-249; *M.C.C. v. Canada, supra*, at para. 52; *Western Canadian Shopping Centres, supra*, at para. 39; *Rumley v. British Columbia*, [2001] S.C.J. No. 39 at para. 29.

[34] Price-fixing conspiracy cases by their nature, deal with common legal and factual questions about the existence, scope and effect of an alleged conspiracy. Putative class members have a common interest in any proof of a concerted action, conspiracy and of agreement with the aim and result of restricting trade. *In Re Sugar Industry Antitrust Litigation* 73 F.R.D. 322 (E.D. Pa. 1976) at 335.

[35] In the United States, it is widely accepted that:

[An] allegation of price-fixing...will be viewed as a central or single overriding issue or a common nucleus of operative fact and will establish a common question. Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*, 3d. ed. (Colorado: Sheppards/McGraw-Hill, 1992) at 18-15 to 18-21.

[36] If each class member in the subject class actions proceeded individually against the Defendants, each would have to prove the existence and impact of the identical conspiracy to fix prices and allocate markets. Therefore, in each of these actions the common issue satisfies the test of advancing the proceeding and avoiding duplication of the fact-finding and legal analysis. *Rumley, supra*, at para. 29.

[37] “[T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members.” The only litigation alternatives to these class actions are a plethora of individual actions or no individual actions. These are not realistic alternatives to a class action. *M.C.C. v. Canada, supra*, at para. 73.

[38] One goal of the CPA is “litigation efficiency” or “judicial economy ... to enable the court system to deal efficiently with a large number of claims [arising] from the same event.” Another goal is to encourage access by victims to the court system. Thus, it is said, the CPA is “anchored in the principles of access to justice and judicial economy.” The assessment of the s. 5(1)(d) requirement of the CPA “should be conducted through the lens of the three principles of advantages of class actions – judicial economy, access to justice, and behavioural modification.” *Carom, supra*, at 238-239; *Hollick, supra*, at para. 27.

[39] It is necessary “to assess the litigation as a whole” and “to adopt a practical cost-benefit approach to” the s. 5(1)(d) requirement. It is “essential to assess the importance of the common issues in relation to the claim as a whole.” *Hollick, supra*, at para. 29; *M.C.C. v. Canada, supra*, at para. 76.

[40] These class actions are the preferable procedure because they present a fair and manageable process. Moreover, for class members there are no "alternative avenues of redress apart from individual actions." Further, "individual actions would be less practical and less efficient than a class proceeding." Thus, certification would increase access to justice. *Hollick, supra*, at para. 31; *Rumley, supra*, at paras. 37-38.

[41] A class proceeding is the preferable procedure because it provides a fair, efficient and manageable method of determining the common issues and because it will advance the actions in accordance with the goals of judicial economy, access to justice and behaviour modification. In the absence of these class actions, it is unlikely that the majority of claims would be advanced at all. This accords with the preferability test as enunciated by the Supreme Court of Canada in *Rumley* and in *Hollick*, namely, whether or not the class proceeding would be a fair, efficient and manageable method of advancing the claim, and whether a class proceeding is preferable, in the sense of preferable to other procedures. *Rumley, supra*, at para. 35; *Hollick, supra*, at paras. 28-31.

[42] Any notion of judicial economy would be destroyed if each class member was required to proceed individually against the Defendants and to prove the existence and impact of the identical conspiracy to fix prices. *Re Catfish Antitrust Litigation*, 826 F. Supp. 1019 (N.D. Miss. 1993) at 1034.

[43] Each of the proposed representative plaintiffs is a Direct Purchaser, Intermediate Purchaser, or Consumer, and each is a class member within the proposed relevant Settlement Class definition. Each of the plaintiffs would fairly and adequately represent the interests of the Settlement Classes.

[44] The plaintiffs do not have on the common issue any interest in conflict with the interests of other class members. In conspiracy claims, every buyer and seller in the class has a common interest in proving the existence of the conspiracy and in maximizing the aggregate amount of class-wide damages. *Re NASDAQ Market-Makers Antitrust Litigation*, 169 F.R.D. 493 (S.D.N.Y. 1996) at 513.

[45] The plaintiffs have produced a plan through the Agreement which sets out a workable method of resolving the litigation on behalf of the Settlement Classes and of notifying class members.

[46] The motion for certification is, of course, a necessary prerequisite to obtaining approval of the proposed settlement. The Settling Defendants will only settle if the plaintiff class members are to be bound by the settlement, subject to the right to opt out. The consent of the Settling Defendants is only for the purpose of giving effect to the settlement and is conditional upon the Court's approval of the settlement.

[47] In my view, and I so find, the prerequisite criteria required by the *CPA* for certification are met. Subject to the issue of the motions for settlement approval being determined favourably, orders shall issue certifying the Ontario class actions under consideration as requested in the motion records in respect of the Settling Defendants. (See paragraph 106 of these Reasons for a summary.) I turn now to a consideration of the proposed settlements.

### The Proposed Settlements

[48] The proposed class action settlements at hand total, by far, the largest amount recovered in a class action relating to price-fixing in Canada. The settlements are based on a total damage assessment of about \$140 million, including interest, expenses and costs and would result in an anticipated recovery of about \$100 million after the deduction of Settlement Credits.

[49] Direct Purchasers will receive up to 12% of the value of their Vitamin purchases. The benefits available to Intermediate Purchasers and Consumers will be paid *cy-près* to carefully selected and well-recognized consumer and industry organizations. Each *cy-près* recipient has prepared a detailed proposal for the expenditure of its share of the settlement monies. Each recipient will be held accountable for the monies it receives through compliance with strict governing rules.

[50] During the settlement negotiations, Class Counsel sought damages for the class as a whole. As a result of these negotiations, the Settlement Amount reflected in the Agreement was \$132,450,000 plus Pre-Deposit Interest. Since then:

- (a) Akzo, a defendant in the Ontario Choline Chloride Action, has agreed to pay \$250,000 to settle the claims against it. (Akzo did not sell choline chloride in Canada);
- (b) UCB, a defendant in the Supplemental Ontario Choline Chloride Action, has agreed to pay \$250,000 to settle the claims against it. (UCB did not sell choline chloride in Canada); and
- (c) Reilly, a defendant in the Ontario Niacin Action, has agreed to settle the claims against it for \$32,728.80, based on 16.5% of its sales of \$184,154.50, plus interest of \$2,323.30 from March 1, 2003.

[51] In April 2002, the plaintiffs reached an agreement in principle with three of the Settling Defendants to resolve all of the actions for the amount of \$144,000,000 plus post-agreement interest, assuming that all other Defendants agreed to participate.

[52] In November 2002, after the first mediation before Mr. Justice Winkler, a memorandum of understanding was signed with some of the Defendants reflecting a Settlement Amount of \$148,500,000, being \$144,000,000 plus capitalized interest of \$4,500,000.

[53] By February 2003, some of the Defendants who sold methionine advised that they would not participate in the proposed settlement. Thus, an adjustment was required. After negotiations and as a result of a second mediation, the amount of \$148,500,000 was reduced to \$133,200,000.

[54] In the fall of 2004 and January, 2005, there were further adjustments to the Settlement Amount to bring it to \$132,450,000.

[55] The \$132,450,000 includes some capitalized interest (in an amount less than \$4,500,000) and is treated as damages.

[56] The proposed settlements are based on a total of \$140,676,928, as of the Deposit Date, calculated as follows:

Item	Amount
Aggregate damages per Amended Settlement Agreement (Settlement Amount \$132,450,000 less expenses of \$10,000,000)	\$122,450,000
Plus: Akzo, UCB, Reilly settlement amounts totaling	\$532,728
<b>Subtotal of aggregate damages</b>	<b>\$122,982,728</b>
Plus: expenses per Amended Settlement Agreement	\$10,000,000
<b>Subtotal including expenses</b>	<b>\$132,982,728</b>
Plus: Pre-Deposit Interest per Amended Settlement Agreement	\$7,694,200
<b>Total</b>	<b>\$140,676,928</b>

[57] Sales of Vitamins in Canada which were subject to the alleged conspiracies totaled about \$950,000,000. This amount includes about \$43,000,000 of methionine sales by a Settling Defendant and estimated methionine sales of about \$80,000,000 by the Defendants who have not settled. Therefore, the settlements are based upon Vitamins sales in Canada totaling about \$870,000,000 (\$950,000,000 minus \$80,000,000).

[58] Dr. Thomas Ross, the plaintiffs' expert, concludes in his affidavit that the "best 'point' estimate corresponds to overcharges on the order of 16%." He also states, "absent the conspiracy, the quantity of vitamins purchased would have cost buyers only \$749 million rather than \$870 million, implying an aggregate damage number (overcharge) of \$121 million."

[59] Dr. Ross also states:

In summary, I suggest that a range of \$103 million to \$138 million provides a very good estimate of the damage arising from the price-fixing conspiracy considered in this affidavit. The "best estimate" or "point estimate" is approximately \$121 million and the associated price overcharge is 16.2%. This percentage price overcharge is similar to that estimated by Beyer for the United States.

[60] The settlements contemplate aggregate damages of \$122,982,728 which compares favourably with Dr. Ross' "estimate of the damage arising" in the "range of \$103 million to \$138 million."

[61] In his affidavit on settlement approval in the U.S. direct purchaser vitamins class action, economist Dr. John Beyer opined that the weighted average overcharge based on his regression

analysis (using U.S. data) was 13.5%. This estimate can be compared to Dr. Ross' regression analysis of a 16.2% overcharge (using Canadian data). The settlement in the U.S. Federal Court was in the range of 18% to 20% of gross sales in an environment of treble damages and large jury verdicts.

**Direct Purchasers**

[62] The aggregate damages of \$122,982,728 includes the sales to the Direct Purchasers who commenced actions or made claims against some Settling Defendants and who have settled their claims directly with them.

[63] Prior to the first mediation on October 7, 2002, and in the context of claims and/or ongoing litigation and at arm's length, three Settling Defendants paid, in total, \$24,100,000 to settle individual claims of Direct Purchasers who had purchased a total of \$200,500,000 of Vitamins from them. This equates to an average overcharge of 12% of sales.

[64] Each Direct Purchaser who settled with a Settling Defendant is excluded from the settlements as an "Excluded Customer" because it has already been paid and no longer has a claim. The Settling Defendants are entitled to a deduction from the aggregate damages, reflecting the payments they made to such Excluded Customers who are not class members because they no longer have a claim.

[65] Each Settling Defendant who settled with a Direct Purchaser is entitled to a Settlement Credit calculated as 12% of the Purchase Price. The Settlement Credits particularized in the Agreement total \$42,436,670. These Settlement Credits represent settlements made by the Settling Defendants with Direct Purchasers who purchased approximately \$353,639,000 of Vitamins, calculated as:

$$\frac{\$42,436,670}{12\%} \times 100\%$$

[66] By the time of the signing of the Agreement, the aforementioned three Settling Defendants had paid, on average, 11.5% of the Purchase Price to the Direct Purchasers with whom they settled.

[67] After taking into account Settlement Credits, the Settling Defendants have agreed to pay to the Administrator approximately \$98,240,258 as calculated in the following chart:

Item	Amount
Aggregate damages as per Amended Settlement Agreement	\$122,450,000
Plus: Akzo Settlement Amount	250,000
Plus: UCB Settlement Amount	250,000
Plus: Reilly Settlement Amount	32,728
<b>Subtotal of aggregate damages</b>	<b>122,982,728</b>

Item	Amount
Plus: expenses as per Amended Settlement Agreement	10,000,000
<b>Subtotal of aggregate damages plus expenses</b>	<b>132,982,728</b>
Plus: Pre-Deposit Interest as per Amended Settlement Agreement	7,694,200
<b>Subtotal of aggregate damages, expenses and Pre-Deposit Interest</b>	<b>140,676,928</b>
Less: Settlement Credits per the Amended Settlement Agreement	(42,436,670)
<b>Total payable to Administrator</b>	<b>\$98,240,258</b>

[68] The monies paid to the Administrator will earn interest in the Administrator's hands before being paid out. The additional interest to be earned will total about \$2,000,000. Thus, the total recovered through the settlement of the class actions is estimated to be in excess of \$100,000,000 (\$98,240,258 + \$2,000,000).

[69] Five Funds are established by s. 6.1(1) of the Agreement. The estimated amount allocated to each Fund is set forth in the following chart:

Fund	Allocation by Amended Settlement Agreement	Settlement Credits	Interest % allocation	Pre-Deposit Interest	Akzo, UCB and Reilly Settlements	Amount Allocated to Each Fund
Direct Purchaser	94,450,000	(42,436,670)	.578	4,447,247	250,000	56,710,577
Intermediate Purchaser	11,000,000	n/a	.122	938,693	141,364	12,080,057
Consumer	11,000,000	n/a	.122	938,693	141,364	12,080,057
Methionine	6,000,000	n/a	.067	515,511	n/a	6,515,511
Expense	10,000,000	n/a	.111	854,056	n/a	10,854,056
<b>Total</b>	<b>132,450,000</b>	<b>(42,436,670)</b>		<b>7,694,200</b>	<b>532,728</b>	<b>\$98,240,258</b>

[70] The recognition of Settlement Credits at 12% and the entitlement of each Direct Purchaser to receive up to 12% of the Purchase Price are inter-related and flow from the same relevant statistical information obtained by Class Counsel from some of the Defendants during the course of settlement negotiations.

[71] As a result of the first mediation, Class Counsel agreed that it was reasonable for each Direct Purchaser to be paid up to 12% of its Purchase Price.

[72] Together, the Direct Purchaser Fund and the Methionine Fund are allocated \$105,662,758 with Pre-Deposit Interest (but before Settlement Credits), calculated as follows:

Item	Amount
Direct Purchaser Fund: Amended Settlement Agreement	94,450,000
Methionine Fund: Amended Settlement Agreement	6,000,000
Subtotal	100,450,000
Pre-Deposit Interest on Direct Purchaser Fund	4,447,247
Pre-Deposit Interest on Methionine Fund	515,511
Akzo Settlement Agreement contribution to the Direct Purchaser Fund	250,000
<b>Total</b>	<b>\$105,662,758</b>

[73] The allocation of \$105,662,758 to the Direct Purchaser Fund and the Methionine Fund was made in contemplation of payments to Direct Purchasers of \$104,400,000, being 12% of the total Vitamin sales of \$870,000,000. Class counsel submits that this allocation to the Direct Purchaser Fund gives Direct Purchasers added assurance that they will be paid 12% of the Purchase Price and will motivate them to participate in the settlements rather than opt out.

[74] Direct Purchasers must decide whether or not to participate before the precise percentage payout of the Purchase Price to each Direct Purchaser is known. It is critical to the implementation of the settlements that Direct Purchasers do not opt out of the settlements. If Direct Purchasers with sales in excess of the Opt Out Threshold opt out, then the Settling Defendants, at their option, may declare the Agreement null and void pursuant to s. 14.4 thereof.

[75] The Methionine Fund will not be distributed to Direct Purchasers of methionine at this time. It will be held pending a further order of the Court.

[76] However, if the requested \$18,075,000 for Administration Expenses and Class Counsel Fees were to become payable, approximately \$300,000 would be paid out of the Methionine Fund towards these costs.

[77] The proposed method of payments by the Administrator is user friendly for Direct Purchasers. The Administrator will write to virtually all Direct Purchasers to advise of their right to claim and, for many, will provide the precise amount due to the Direct Purchaser based on 12% of their Purchase Price as disclosed by the Settling Defendants to the Administrator.

[78] If the Direct Purchaser agrees with the amount calculated by the Administrator, the Direct Purchaser need not produce any Purchase Price information. If the Direct Purchaser disagrees with the Administrator's calculation or the Administrator has no Purchase Price data for a particular Direct Purchaser, then the Direct Purchaser must prove the Purchase Price to the satisfaction of the Administrator by producing invoices or other records.

[79] There are tens of thousands of Intermediate Purchasers and millions of Consumers in the classes.

[80] There are substantial difficulties associated with the determination of the actual damage (taking into account pass through) suffered by each Intermediate Purchaser and Consumer.

Moreover, the complexity and administrative costs associated with any direct distribution to each Intermediate Purchaser and Consumer would be prohibitive. Thus, the settlements contemplate *cy-près* distributions to these two groups of class members.

[81] After the allocation to Direct Purchasers and to expenses, the balance of the settlement monies is to be divided equally between the Intermediate Purchasers and Consumers so that each Fund initially would receive \$11,000,000 plus Pre-Deposit Interest. Class Counsel submit this to be reasonable given the complexities associated with a precise calculation of the damages of these class members.

### **Intermediate Purchasers**

[82] The Intermediate Purchaser Fund will be distributed *cy-près* to industry organizations for the benefit of Intermediate Purchasers.

[83] Intermediate Purchasers can generally be classified into one of three categories: agricultural producers, grocer/wholesalers, and drugstores/pharmacies. The Intermediate Purchaser Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule F. It allocates 70% percent of the fund to agricultural producers, 15% to grocer/wholesalers and 15% to drugstores/pharmacies.

[84] The Intermediate Purchaser Fund Distribution Protocol is intended to provide benefits to Intermediate Purchasers by funding industry organizations. Class Counsel identified potential recipient organizations by internet research and discussions with various industry organizations. Each potential recipient was evaluated against the following criteria:

- (a) the organization's membership base;
- (b) whether the organization was national in scope;
- (c) the organization's ability to deliver benefits to a particular group of Intermediate Purchasers; and
- (d) the organization's financial stability.

[85] Proposed recipients have agreed to comply with the rules governing *cy-près* distributions which were developed with the assistance of the Administrator, Deloitte & Touche LLP, and are found at s. 1.3 of Schedule F. These rules seek to ensure that all recipient organizations account to the Courts for the settlement funds they receive.

[86] Each proposed recipient:

- (a) prepared a detailed proposal which is before the Court;
- (b) delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirmed it would comply with the procedures governing distribution; and

- (c) has agreed to use the funds in a manner that will deliver an identifiable benefit to its respective membership.

[87] The Canadian Cervid Council was to receive 0.112% of the money available to Intermediate Purchasers. However, it is now defunct. Thus, funds otherwise to have been allocated to the Canadian Cervid Council will be distributed to the remaining participating organizations as provided in Schedule F.

[88] The Canadian Goat Society is to receive 0.098% of the Intermediate Purchaser Fund. The Canadian Goat Society seeks approval to share its portion of the settlement funds with the Canadian Boer Goat Association, a group that also represents Canadian goat producers. This is accepted as a request. Therefore, upon Court approval, each of these two organizations will receive 50% of the funds earmarked for the Canadian Goat Society.

[89] Schedule F provides that two industry organizations representing grocers and grocer/wholesalers in Canada, the Federation of Independent Grocers and the Canadian Council of Grocery Distributors, are to receive 4.5% and 10.5% respectively of the available monies. Combined, the membership in these two organizations accounts for virtually all grocer/wholesalers in Canada.

[90] Schedule F also provides that the Canadian Association of Chain Drugstores, an industry organization that represents the interests of over 70% of all retail drugstores and pharmacies in Canada, is to receive 15% of the available monies on behalf of drugstore/pharmacies.

[91] Assuming a distribution of \$11,400,000, the following chart lists the proposed *cy-près* recipients on behalf of Intermediate Purchasers, the initial percentage they were to receive, their percentage taking into account the adjustment because of the demise of the Canadian Cervid Council, and the amount each is actually to receive:

Proposed Recipients	Initial %	Adjusted %	Adjusted Allocation
<b>Agricultural Producers - 70%</b>			
Canadian Pork Council	22.12	22.123	2,522,022
Canadian Cattlemen's Association	18.795	18.799	2,143,086
Dairy Farmers of Canada	10.927	10.934	1,246,476
Chicken Farmers of Canada	7.469	7.476	852,264
Canadian Egg Marketing Agency	3.22	3.227	367,878
Canadian Aquaculture Industry Alliance	2.884	2.891	329,574
Canadian Turkey Marketing Agency	1.463	1.47	167,580
Equine Canada	1.162	1.169	133,266
Poultry Research Council	0.784	0.791	90,174
Canadian Broiler Hatching Egg Marketing Agency	0.525	0.532	60,648

<b>Proposed Recipients</b>	<b>Initial %</b>	<b>Adjusted %</b>	<b>Adjusted Allocation</b>
Canadian Sheep Federation	0.266	0.273	31,122
Canadian Bison Association	0.175	0.182	20,748
Canadian Cervid Council (now defunct)	0.112	0	0
Canadian Goat Society	0.098	0.056	6,384
Canadian Boer Goat Association	0	0.056	6,384
<b>Grocer Wholesalers - 15%</b>			
Canadian Council of Grocery Distributors	10.5	10.507	1,197,798
Canadian Federation of Independent Grocers	4.5	4.507	513,798
<b>Drugstores/Pharmacies - 15%</b>			
Canadian Association of Chain Drugstores	15.0	15.007	1,710,798
<b>Total</b>	<b>100.0</b>	<b>100.0</b>	<b>11,400,000</b>

### Consumers

[92] The initial corpus of the Consumer Fund will be distributed to consumer organizations for activities related to Vitamin Products, such as food and nutritional research, education and food programs, consumer services, or consumer protection activities for the indirect benefit of Consumers of all ages.

[93] The Consumer Fund Distribution Protocol, a negotiated term of the Agreement, is found at Schedule G. It allocates 30% of the initial monies in the Consumer Fund to research/advocacy groups for the benefit of all Consumers across Canada. The remaining 70% will be divided, based on population, between Quebec (16.5%) and the rest of Canada (53.5%) and allocated to service delivery groups. (Quebec Counsel independently have assumed responsibility for allocating the portion of the Consumer Fund earmarked for Quebec Consumers. This distribution is set out in s. 1.2(4) of Schedule G.) (The Quebec Court is to receive full particulars of these organizations and their plans.)

[94] Proposed recipients were identified through internet research, discussions with various consumer organizations and through consultation among Class Counsel. Additionally, Class Counsel consulted with Mr. Gordon Wolfe, a person employed in the non-profit sector with knowledge of charitable and non-profit organizations.

[95] Class Counsel recognized that selecting regional or provincial organizations would make equal treatment across Canada difficult, so they concentrated on selecting Canadian-wide organizations that had a presence in most, if not all, provinces and territories.

[96] Each potential recipient was evaluated against the following criteria:

- (a) the organization's ability to deliver benefits in each province and territory;
- (b) the organization's ability to reach one or more of the target age groups, being children, youth, adults, or the elderly;
- (c) whether the organization was non-denominational;
- (d) whether the organization had a charitable or non-profit designation;
- (e) the organization's financial stability and budget; and
- (f) the organization's history of advocacy, service delivery, research, or education relevant to Vitamin Products.

[97] Financial information was obtained from each potential recipient. The size of an organization's budget was a consideration in determining what proportion of the Consumer Fund, if any, a particular organization should receive.

[98] Each proposed recipient prepared a detailed proposal which is before the Court. Each proposed recipient also delivered a resolution from its Board of Directors or governing body authorizing the submission of a proposal for funding and confirming that it will comply with the rules governing *cy-près* distributions found at Schedule G. Class Counsel have reviewed all of the proposals and state their belief that, if the distribution is made as proposed, the funds will provide a tangible benefit to Consumers.

[99] Assuming an initial distribution of \$11,400,000, the following chart lists the proposed *cy-près* recipients on behalf of Consumers and the amount each is to receive:

Proposed Recipients	%	Allocation
<b>Allocation to National Organizations - 30%</b>		
Food Safety Network	29.0	991,800
Option Consommateurs (Canada)	29.0	991,800
Canadian Foundation for Dietetic Research	12.5	427,500
The Centre for Research in Women's Health	10.5	359,100
The Centre for Science in the Public Interest	10.5	359,100
Canadian Institute of Food and Nutrition	8.5	290,700
<b>Allocation to all provinces and territories except Québec - 53.5%</b>		
Victoria Order of Nurses	35.0	2,134,650
Canadian Association of Food Banks	25.0	1,524,750
Boys and Girls Clubs of Canada	20.0	1,219,800
Breakfast for Learning	15.0	914,850
Canadian Feed the Children	5.0	304,950
<b>Allocation to Québec - 16.5%</b>		
Centraide pour tout le Québec	46.0	865,260

<b>Proposed Recipients</b>	<b>%</b>	<b>Allocation</b>
Fonds d'aide au recours collectif	19.0	357,390
Campagne de prévention à l'endettement des 40 associations de consommateurs du Québec	10.0	188,100
Projet Petits prêts (en collaboration avec la Fiducie Desjardins et la Coalition des associations des consommateurs du Québec)	9.0	169,290
Fondation Claude Masse	8.0	150,480
Option Consommateurs	8.0	150,480
<b>Total</b>		<b>\$11,400,000</b>

[100] The Agreement also provides in s. 6.2(7) that any remaining "balance in the Direct Purchaser Fund...shall be transferred to and become part of the Consumer Fund." Based on experience and the statistics from other price-fixing class actions, class counsel are of the view that it is probable that the "take-up rate" by Direct Purchasers will be less than 100% and that substantial monies will trickle down to the Consumer Fund.

[101] Section 1.3 of the Consumer Fund Distribution Protocol creates an alternative method to distribute monies which are subsequently allocated to the Consumer Fund as a result of trickle down from the Direct Purchaser Fund.

[102] Although within the Consumer Fund Distribution Protocol, the intent of this alternative method of distribution is to benefit both Consumers and Intermediate Purchasers. This is accomplished by paying the vast majority of the trickle down monies to universities and colleges.

[103] For example, the allocation to the Ontario Veterinary College at the University of Guelph seeks in part to benefit Intermediate Purchasers, many of whom are in the agricultural business.

[104] The following chart lists the proposed recipients of the monies which could subsequently be allocated to the Consumer Fund and the amounts each would receive, assuming an amount of \$10,000,000 trickles down:

	<b>%</b>	<b>Allocation</b>
<b>Northwestern Region - 30.3%</b>		
University of British Columbia	45	1,363,500
University of Alberta	33	999,900
University of Manitoba	12	363,600
Western College of Veterinary Medicine, University of Saskatchewan	10	303,000
<b>Eastern Region - 7.6%</b>		
Memorial University	50	380,000
Dalhousie University	50	380,000
<b>Ontario - 38.4%</b>		

	%	Allocation
University of Toronto	25	960,000
University of Guelph	25	960,000
Ontario Veterinary College, University of Guelph	25	960,000
Ontario Agri-Food Education	25	960,000
<b>Québec - 23.7%</b>		
Université Laval	27	639,900
McGill University	26	616,200
Faculté de médecine vétérinaire, Université of Montréal	27	639,900
Option Consommateurs [to a maximum of \$1 million]	20	474,000
<b>Total</b>	<b>100</b>	<b>\$ 10,000,000</b>

[105] Option Consommateurs is to receive \$1,142,280 of the initial Consumer *cy-près* distribution and 20%, to a maximum of \$1,000,000, of the trickle down distribution. Option Consommateurs is not only a *cy-près* recipient but also a representative plaintiff in Quebec. In Quebec, Option Consommateurs has a unique status and has the capacity to sue on behalf of Consumers. As representative plaintiff, Option Consommateurs has been the recipient on behalf of Quebec Consumers of a portion of settlement funds in eight settled actions.

#### The status of the Ontario class actions upon settlement approval

[106] The following chart lists the outstanding class actions in Ontario and the status of each action if the Court approves the proposed settlements and they become effective.

Proceeding	Settling Defendants	Non-Settling Defendants
<b>Ontario Biotin Action</b> Glen Ford v. F. Hoffmann-La Roche Ltd.	F. Hoffmann-La Roche Ltd., Merck KGaA, Lonza AG, Sumitomo Chemical Co., Ltd., Tanabe Seiyaku Co., Ltd.	none
<b>Ontario Bulk Vitamins Action</b> Glen Ford v. F. Hoffmann-La Roche Ltd.	F. Hoffmann-La Roche Ltd., Aventis Animal Nutrition S.A., Eisai Co., Ltd., Takeda Pharmaceutical Company Limited (formerly Takeda Chemical Industries, Ltd.), Merck KGaA, Daiichi Pharmaceutical Company, Ltd.	none
<b>Ontario Choline Chloride</b>	Chinook Group Limited	DCV, Inc.

<b>Proceeding</b>	<b>Settling Defendants</b>	<b>Non-Settling Defendants</b>
<b>Action Fleming Feed Mill Ltd. v. BASF Atkiengesellschaft</b>	(incorrectly named Chinook Group, Ltd.) BASF Aktiengesellschaft Bioproducts, Incorporated (incorrectly named Bioproducts, Inc.) Akzo Nobel Chemicals BV	DuCoa, L.P.
<b>Supplemental Ontario Choline Chloride Action Fleming Feed Mill Ltd. v. UCB S.A.</b>	UCB S.A. UCB Chemicals Corporation UCB, Inc.	none
<b>Ontario Niacin Action VitaPharm Canada Ltd. v. Degussa-Hüls AG</b>	Degussa Canada Inc. Lonza AG Nepera, Inc. (incorrectly named Nepera, Incorporated) Reilly Industries Inc.	none
<b>Ontario Methionine Action Glen Ford v. Rhône-Poulenc S.A.</b>	Aventis Animal Nutrition S.A.	Degussa-Hüls AG Degussa Corporation Degussa Canada Inc. Novus International, Inc.
<b>Supplemental Ontario Methionine Action Glen Ford v. Novus International (Canada) Inc.</b>	none	Novus International (Canada) Inc. Nippon Soda Co. Ltd. Mitsui & Co. Ltd.

[107] If the proposed settlements are approved, Class Counsel will continue to prosecute the Ontario Methionine Action and the Supplemental Ontario Methionine Action.

[108] The only other outstanding action will be the Ontario Choline Chloride Action against DCV Inc. and DuCoa L.P. These companies represent that they are insolvent. Class Counsel will seek the Court's direction about whether or not to continue this action against these Defendants.

[109] The following chart sets out an estimate of the timeline for the implementation of the settlement if the Courts in the three provinces give their approval :

<b>Ontario approval hearing</b>	March 8, 9, 2005
<b>Decision – Ontario</b>	By March 24, 2005
<b>British Columbia and Quebec approval hearings</b>	April 6 and 21, 2005
<b>Ontario judgment final</b>	By April 24, 2005
<b>British Columbia and Quebec judgments final</b>	By May 6, 2005

Implementation of Notice Program	By June 5, 2005
Opt-Out period expires and claim period for Direct Purchasers begins	By August 5, 2005
Assume Opt Out Threshold is not exceeded, Administrator will report to the Courts and the Courts declare that settlements are operative and binding (s.16.1 Amended Settlement Agreement)	By September 9, 2005
Payout of Intermediate <i>cy-près</i> and initial Consumer <i>cy-près</i> no earlier than	September 9, 2005
Claim period expires	By November 5, 2005
Payout to Direct Purchasers no earlier than	December 1, 2005
Calculation of trickle down and payout no earlier than	January 6, 2006
Final reports to Courts no earlier than	February 1, 2006

### The Law

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

[111] The resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy. As observed in *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (2000), 200 D.L.R. (4th) 667 at 677 (Alta. C.A.):

In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice.

[112] Similar sentiments have been expressed by Cronk, J.A., in *J.M. v. W.B.*, [2004] O.J. No. 2312 at para. 65 (C.A.):

Finally, there is an additional, and powerful, reason to support the implementation of the Agreements in this case: the overriding public interest in encouraging the pre-trial settlement of civil cases. This laudatory objective has long been recognized by Canadian courts as fundamental to the proper administration of civil justice...Furthermore, the promotion of settlement is especially salutary in complex, costly, multi-party litigation.

[113] There is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval. *Manual for Complex Litigation*, Third §30.42 (1995). See *Cotton v. Hinton*, 559 F.2d 1326 (5th Cir. 1977) at 1330; *Dabbs* (Gen. Div.), *supra*, at 440.

[114] To reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes. *Dabbs* (Gen. Div.), *supra*, at 440.

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

...all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation. *Dabbs* (Gen. Div.), *supra*, 440; *Newberg*, *supra*, at 11-104.

[116] A similar standard has been applied in non-class action proceedings in Ontario. The courts recognize that settlements are by their very nature compromises, which need not, and usually do not, satisfy every single concern of every stakeholder. Acceptable settlements may fall within a broad range of upper and lower limits:

In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court to simply rubber-stamp the proposal. *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230 (H.C.J.).

[117] In determining whether to approve a settlement, a court takes into account factors such as:

- (a) the likelihood of recovery or likelihood of success;
- (b) the amount and nature of discovery, evidence or investigation;
- (c) the proposed settlement terms and conditions;
- (d) the recommendation and experience of counsel;
- (e) the future expense and likely duration of litigation;
- (f) the recommendation of neutral parties, if any;
- (g) the number of objectors and nature of objections;
- (h) the presence of arms-length bargaining and the absence of collusion;
- (i) the information conveying to the court the dynamics of, and the positions taken by
- (j) the parties during the negotiations; and
- (k) the degree and nature of communications by counsel and the representative
- (l) plaintiff with class members during the litigation.

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

[118] These factors constitute a guide in the process. It is not necessary that all factors receive the same consideration. In any particular case, certain of the listed factors will have greater significance than others, and weight should be attributed accordingly. *Parsons, supra*, at para. 73.

[119] When the subject class actions were commenced, this type of litigation was novel in Canada and the approach taken by Class Counsel was significantly different from that which had been seen in the United States Federal Court. Class Counsel advanced the actions on the theory that:

(1) the Defendants should pay the total overcharge for Vitamins sold in Canada; and

(2) the actions would be pursued in a two-phased approach: first, damages for the entire Canadian Vitamins marketplace would be measured by the total overcharge for Vitamins sold in Canada during the Purchase Periods; and second, an appropriate distribution protocol would be determined or negotiated.

[120] The plaintiffs faced litigation risks. The novel nature of the actions and the theory pursued by Class Counsel created the risk that the actions, or some of them, would not be certified, and the risk that if certified, the Court would not assess damages in the aggregate. Quite probably, the Defendants would have argued that the decision of the Ontario Court of Appeal in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), aff'g (2001), 54 O.R. (3d) 520 (Div. Ct.) (certification denied), rev'g (1999), 45 O.R. (3d) 29 (Gen. Div.) (certification granted), leave to appeal to S.C.C. denied, ought as precedent to preclude certification in the actions at hand.

[121] The plaintiffs also faced risks specific to some of the Defendants and actions. For example, until October 2002, there were no guilty pleas relating to Niacin. Certain Bulk Vitamins were not the subject of criminal convictions. Moreover, certain pleas refer to conspiracy periods which are considerably shorter than those pleaded in the actions. Therefore, Class Counsel faced the significant hurdle of having much less information to work with to prove overcharge rates for these Bulk Vitamins.

[122] If the Defendants, or some of them, were successful in establishing any of the general defences, such as pass through, or the product specific defences, such as no sales in Canada or no conspiracy, then the plaintiffs would not succeed, at least in the entirety, at a trial of the common issues and there would be limited recovery. While these defences were arguably problematical, at the very least their number and complexity would lengthen a trial of the common issues.

[123] A court “need not possess evidence to decide the merits of the issue, because the compromise is proposed in order to avoid further litigation. At minimum, a court must possess sufficient information to raise its decision above mere conjecture.” The parties proposing the settlement have an obligation to provide sufficient information to permit the court to exercise its function of independent approval. *Newberg, supra*, at 11-100 & 11-101; *Dabbs v. Sun Life Assurance Co. of Canada, supra*, O.J. No. 1598, at para. 15.

[124] While the court requires sufficient evidence to be able to exercise an objective, impartial and independent assessment of the fairness of the settlement in all of the circumstances, it is not necessary that formal discovery have occurred at the time of settlement. It is clear that settlements reached at an early stage of proceedings are appropriate. *Dabbs v. Sun Life Assurance Co. of Canada, supra*, O.J. No. 1598 at paras. 15 and 24.

[125] Class Counsel had significant information about the case and a good understanding of liability and damages issues before embarking on the negotiation process. Class Counsel’s grasp of these issues continued to increase throughout the negotiation process as a result of, among other things:

- (a) interaction with U.S. counsel who had been litigating extensively against these Defendants and were able to assist in devising strategy and highlighting some of the strengths and weaknesses of the case;
- (b) independent analysis of class member records including transaction data from Agro-Pacific, Statistics Canada data, and industry data;
- (c) affidavit evidence and cross-examinations on affidavits conducted in the context of the motions by some Defendants challenging the jurisdiction of the Ontario Court;
- (d) information obtained through, and as the result of, settlements with Lindel Hilling and Merck KGaA;
- (e) the Agreed Statements of Fact that supported the guilty pleas; and
- (f) the input from expert economists, Dr. Thomas Ross and Dr. John Beyer.

[126] There is sufficient evidence before the court to allow it to exercise an objective and independent assessment of the fairness of the proposed settlement agreements.

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

[128] In reviewing the terms of a settlement, a court must be assured that the settlement secures an adequate advantage for the class in return for the compromise of litigation rights; *Newberg, supra*, at 11-46.

[129] The proposed settlement under consideration contemplates aggregate damages of \$122,982,728, or \$132,982,728 including expenses and costs of \$10,000,000, or a total of \$140,676,928 with Pre-Deposit Interest. The \$122,982,728 compares favourably with Dr. Ross' estimate of the actual damages being in the "range of \$103 million to \$138 million."

[130] The settlement reasonably allocates \$56,710,577 of the settlement monies to the Direct Purchaser Fund. Any unclaimed portion will flow down to the Consumer Fund to be predominately used by universities for the benefit of Intermediate Purchasers and Consumers. Class Counsel expect that substantial amounts will flow down because the take-up rate by Direct Purchasers will not be 100%.

[131] The distribution to Intermediate Purchasers and Consumers is through two *cy-près* distribution plans, the Intermediate Purchaser Fund Distribution Protocol and the Consumer Fund Distribution Protocol to recognized industry and consumer organizations and universities. Class Counsel identified the recipient organizations through diligent research and consultation. All recipient organizations will be accountable for settlement monies received by them.

[132] Section 24 of the *CPA* permits damages to be assessed in the aggregate. Section 26 permits the court to direct the distribution of settlement monies by any means it considers appropriate whether or not such a distribution would benefit persons who are not class members or persons who otherwise might receive monetary compensation as a result of the proceeding. In other words, the *CPA* permits *cy-près* distributions of the type contemplated in Schedules F and G of the Agreement.

[133] *Cy-près* distributions of the type outlined in Schedules F and G have been accepted by the Ontario Court. In *Hoechst, supra*, at paras. 15-16, a price-fixing case involving food additives, this Court held:

There are significant problems in identifying possible claimants below the manufacturer level. Hence, the monies allocated to intermediaries such as wholesalers and consumers are to be paid by a *cy-près* distribution to specified not-for-profit entities, in effect as surrogates for these categories of claimants, for the general, indirect benefit of such class members. The *CPA* provides flexibility for this approach: see ss. 24 and 26.

Such a settlement and payments largely serve the important policy objective of general and specific deterrence of wrongful conduct through price-fixing. That is, the private class action litigation bar functions as a regulator in the public interest for public policy objectives.

[134] This reasoning was adopted by the Court in *Sutherland v. Boots Pharmaceutical PLC*, [2002] O.J. No. 1361 (S.C.J.). The Court approved a settlement which distributed all of the

settlement benefits *cy-près* to various consumer groups for the indirect benefit of class members. The Court held:

[w]here in all the circumstances an aggregate settlement recovery cannot be economically distributed to individual class members the court will approve a *cy-près* distribution to recognized organizations or institutions which will benefit class members.

[135] Class Counsel are seeking an order barring any future claim for contribution or indemnity against the Settling Defendants (and UCB in the additional, trailer settlement achieved with it). Once it became clear in the course of negotiations some Defendants would not participate in a global settlement, a bar order was critical in the negotiation of the Agreement. Class Counsel submits that the form of the bar order is fair and properly balances the competing interests of the classes, the Settling Defendants, UCB and the Non-Settling Defendants. No bar order is sought by Akzo or Reilly.

[136] Bar orders have their origin in the United States and are frequently used to achieve settlement in complex tort and securities litigation, including class proceedings. In the California case of *Nelson v. Bennett*, 662 F.Supp. 1324 (E.D. Cal. 1987) at 1335, District Court Judge Ramirez traced the history of the development of such orders and commented that they arose to counteract the inhibiting effect of claims for contribution on settlement. From a policy perspective, Ramirez J. concluded that ruling in favour of a bar order would "accommodate both the interests of settlement and of fairness and deterrence". He further stated that a "no bar" rule would give "exclusive weight to fairness and deterrence at the complete expense of settlement."

[137] In the case *Re Nucorp Energy Securities Litigation*, 661 F.Supp. 1403 (S.D. Cal. 1987) at 1408, District Court Judge Irving went so far as to say that without some sort of settlement bar, partial settlement of any federal securities case before trial is, "as a practical matter, impossible". Any single defendant who refuses to settle, would force all other defendants to trial.

[138] Ontario courts favour settlement wherever possible and have found that the underlying principles of American bar orders may be applied in Canada. For example, in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 at 141, a settlement agreement preventing non-settling defendants from making claims for contribution or indemnity was approved. Winkler J. considered many American authorities in support of the proposed bar order and concluded that while the U.S. cases were not dispositive of the issue, the underlying principles were applicable and, in the Ontario context, sections 12 and 13 of the *CPA* provided a mechanism for supporting these principles:

I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the *Class Proceedings Act* provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate". This broad discretion is

buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

[139] Following the *Ontario New Home Warranty* decision, bar orders have been approved in the class actions context in order to facilitate partial settlements in mass tort claims that benefit the plaintiffs and achieve the goals of the class proceeding legislation. See *Millard v. North George Capital Management Ltd.*, [2000] O.J. No. 1535 (S.C.J.); *Sawatzky v. Societe Chirurgicale Instrumentarium Inc.*, [1999] B.C.J. No. 1814 (S.C.); *Killough v. Canadian Red Cross Society*, [2001] B.C.J. No. 1481 (S.C.); *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 2474 (S.C.J.); and *Gariepy v. Shell Oil Company* (16 April 2004), Toronto 30781/99 (Ont. Sup. Ct.) at para. 16. Most recently, in a price-fixing case, the court approved a bar order. *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.*, [2004] O.J. No. 908.

[140] In my view, the requested bar order is fair and reasonable.

[141] The burden of proving that a settlement ought to be approved rests with the proponents, however, the recommendation of capable counsel is significant. The recommendation of class counsel is clearly not dispositive as class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputations for integrity and diligent effort on behalf of their clients is also at stake. *Dabbs* (Gen. Div.), *supra*, at 440.

[142] In the absence of evidence to the contrary, the recommendation of experienced counsel should be accorded considerable weight, as stated in *Manual for Complex Litigation, supra*, at §30.42:

[T]he judge should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms length negotiations between experienced, capable counsel after meaningful discovery.

[143] In the normal course, once a court is satisfied that a settlement is the product of arm's length bargaining by experienced counsel, the settlement will be approved:

As a practical matter, the overwhelming majority of proposed settlements are approved when the Court is satisfied that arms-length bargaining took place during settlement negotiations and experienced class counsel has recommended approval of the settlement. *Newberg, supra*, at 11-42.

[144] Class Counsel and defence counsel have a unique ability to assess the potential risks and rewards of litigation. Class Counsel recommend approval of the proposed settlement. They have extensive experience in class action litigation and price-fixing litigation. In the absence of

evidence to the contrary, the recommendation of these experienced counsel should be given considerable weight.

[145] The proposed settlement achieves the legislative goals of the *CPA* and affords significant judicial efficiency and economy, while allowing access to justice through an efficient and cost effective distribution mechanism. To the extent that civil damages are paid to or for the benefit of the class over and above the criminal fines and penalties which have been paid by some Settling Defendants, there will be an incentive for these Settling Defendants, and others, to refrain from engaging in the type of behaviour complained of in the future.

[146] Class members will receive fair and reasonable benefits in return for the compromise of their litigation rights against the Settling Defendants, and Akzo, UCB and Reilly.

[147] If there were to be a trial of the common issues, the litigation process to determine liability would be complicated and protracted, and no class member would be paid until the litigation process ended. The practical value of an expedited recovery is a significant factor for consideration. In addition to the legal and factual risks, a practical concern favouring settlement includes the potential that a case such as this one would take considerable expense and many more years to reach trial and exhaust all appeals. *Dabbs* (Gen. Div.), *supra* at 441.

[148] The Court acknowledges a range of acceptable settlements, thereby recognizing, "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Dabbs v. Sun Life Assurance Co. of Canada*, *supra*, O.J. No. 1598 at para. 12 (Gen. Div.).

[149] The settlements at hand were, in part, as a result of two mediations conducted by Winkler J. Also, the Children's Lawyer and the Public Trustee were aware of the ongoing negotiations and having been given notice of this approval hearing have indicated they do not wish to make submissions.

[150] In appropriate circumstances, objectors to a class action settlement may be granted leave to participate in the settlement approval hearing. Objectors who are granted leave are not parties to the proceeding, and accordingly do not have the rights of a party. *Dabbs* (C.A.), *supra*, at 100.

[151] Even in the presence of objectors, the settlement approval process is non-adversarial in nature:

It is important that the Court itself remain firmly in control of the process and that the matter not be treated as if it were a dispute to be resolved between the proponents of the settlement on the one side and the objectors on the other. *Dabbs v. Sun Life Assurance Co. of Canada*, *supra*, O.J. No. 1598 at para. 21.

[152] An objector who suggests that Class Counsel ought to have structured the settlement differently essentially seeks to substitute the personal judgment of such objector for the judgment of Class Counsel.

[153] It is not within the jurisdiction of the Court to consider an objection based upon extra-legal concerns. The approval process does not include an assessment of the proposed settlement from a social or political context:

The parties have chosen to settle the issue on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the class as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra legal and outside the ambit of the court's review of the settlement. *Parsons, supra*, at para. 77.

[154] The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular class member. Further, when a settlement is reached prior to the expiry of the opt out period, class members have a further element of control:

The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The *CPA* mandates that class members retain for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the class. *Parsons, supra*, at para. 79; *Dabbs v. Sun Life Assurance Co. of Canada, supra*, O.J. No. 1598 at para. 11.

### The Objections

[155] As of February 15, 2005, the original deadline for written objections, Mr. William Dermody, the appointed friend of the Ontario Court in this settlement approval process, had received only three written objections in respect of the proposed settlement.

[156] These were on behalf of two organizations, the International Society for Orthomolecular Medicine and the Health Action Network Society.

[157] The third objection is by Dr. A. Hoffer, a retired psychiatrist and former Director of Psychiatric Research, Department of Public Health, for the province of Saskatchewan and a founder of the developing branch of medicine known as "orthomolecular medicine and psychiatry." His letter seeks consideration for patients who receive treatment of "optimum doses