

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

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

B E T W E E N:

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.

EISAI CO., LTD., TAKEDA CHEMICAL INDUSTRIES, LTD., TAKEDA CANADA VITAMIN AND FOOD INC., MERCK KgaA, DAIICHI PHARMACEUTICAL COMPANY, LTD., REINHARD STEINMETZ, DIETER SUTER, HUGO STROTMANN, ANDREAS HAURI, KUNO SOMMER and ROLAND BRÖNNIMANN

Defendants

Proceeding Under the *Class Proceedings Act*, 1992
(Bulk Vitamins)

) *Sandra A. Forbes*, for Aventis Animal Nutrition SA,
) the Rhone-Poulenc defendants and Daiichi
) Pharmaceutical Company, Ltd.

) *David W. Kent*, for BASF Aktiengesellschaft, BASF
) Corporation and BASF Canada Inc.

COURT FILE NO.: 00-CV-198647CP

BETWEEN:

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

Plaintiffs

- and -

BASF AKTIENGESELLSCHAFT, BASF CORPORATION, BASF CANADA INC., CHINOOK GROUP, LTD., CHINOOK GROUP, INC., DCV, INC., DUCOA L.P. AKZO NOBEL NV, AKZO NOBEL CHEMICALS BV, BIOPRODUCTS, INC., RUSSELL COSBURN, JOHN KENNEDY, ROBERT SAMUELSON, LINDELL HILLING, JOHN I. ("PETE") FISCHER and ANTONIO FELIX

Defendants

Proceeding under the *Class Proceedings Act*, 1992
(Choline Chloride)

) *David W. Kent*, for BASF Aktiengesellschaft, BASF
) Corporation and BASF Canada Inc.

) *Andrew J. Roman*, for Akzo Nobel N.V. and Akzo
) Nobel Chemicals B.V.

) *George D. Hunter*, for DCV Inc. and Ducoa L.P.

) *James Doris*, for Bioproducts, Inc.

) *Tycho Manson*, for Chinook Group, Ltd.

COURT FILE NO.: 00-CV-201723CP

BETWEEN:

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

- 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.

Plaintiffs

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

BETWEEN:

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

- 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

Plaintiffs

Defendants

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

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)
)
) *Donald Houston*, for Lonza AG (acting previously
discontinued agent) for 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

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

- and -

UCB S.A. and UCB CHEMICALS CORPORATION

Defendants

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

COURT FILE NO.: 42267CP

B E T W E E N:

GLEN FORD

Plaintiff

Donald Houston, for Wippon Soda Co. Ltd.

- and -

NOVUS INTERNATIONAL (CANADA) INC.

Defendant

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

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

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

CLASS PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

REASONS FOR DECISION

CUMMING J.

The Motion

[1] This is a motion for approval of class counsel fees in respect of a group of class actions 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, following upon the successful motions for certification and settlement approval, is set forth in paragraph 106 of the separate Reasons for Decision in respect of the certification motions and for settlement approval released contemporaneously with these Reasons for Decision.)

[3] The Agreement is lengthy and complex with several schedules and can be found (together with additional information), online: <<http://www.vitaminsclassaction.com>>. (See Exhibit D to Affidavit of Charles M. Wright in Volume 1 of 9 of Motion Record). 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.

[4] The alleged conspiracies remain simply that, i.e. “alleged” conspiracies, although it is to be noted that many of the Settling Defendants have pleaded guilty to charges of conspiracy in separate criminal proceedings with consequential fines.

[5] 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 fees for class counsel.

[6] 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.

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

[8] Class Counsel decided at an early stage that the litigation would be pursued in Ontario ahead of the actions in British Columbia and Quebec. Lawyers J.J. Camp and Joe Fiorante of the British Columbia bar both obtained a special call in Ontario to assist in the Ontario litigation.

[9] Alleging distinct conspiracies, Class Counsel devised a theory which had not previously been postulated. Simply put, in separate actions (collectively called the "Vitamins class actions"), they alleged damage on behalf of all persons in Canada injured as a result of each alleged conspiracy. The class members have been divided into three groups, namely, Direct Purchasers, Intermediate Purchasers and Consumers. Class Counsel have sought to assess damages for them on a global basis. This theory has been pleaded in subsequent price-fixing actions and, indeed, approved by this Court in *Alfresh Beverages Canada Corp. v. Hoechst AG*, [2002] O.J. No. 79.

[10] Several pre-certification motions have been heard. Class Counsel brought a carriage motion to defeat a challenge by other counsel in Ontario seeking to prosecute class actions on behalf of only Consumers (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594). Then, some Defendants unsuccessfully challenged the Ontario Court's jurisdiction (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] O.J. No. 298). Some Defendants challenged the plaintiffs' right to obtain evidence in the U.S. (*Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 237). This issue was argued in the District of Columbia and, ultimately, in the Ontario Court of Appeal where the plaintiffs prevailed ([2003] O.J. No. 868 (C.A.)).

[11] The settlement Agreement, now approved by this Court (and if approved by the British Columbia and Quebec Courts), seeks to compensate all class members across Canada. As discussed in the Reasons for Decision relating to the settlement approval, the *cy-près* mechanism is employed to some extent in giving effect to the distribution of the settlement funds.

[12] The settlement compares favourably to the results achieved in U.S. litigation even though in the U.S. there is a regime of statutory treble damages and a jury culture. As well, the settlement falls within the range of damages estimated by the plaintiffs' expert economist, Dr. Thomas Ross.

[13] The proposed overall class action settlement totals by far the largest amount recovered in class actions relating to price-fixing in Canada. The settlement is based on a total damage assessment in excess of \$140,000,000 including interest, expenses and costs and results in an

expected payment by the Settling Defendants to the Administrator of about \$100,000,000 after the deduction of "Settlement Credits" (being credits against the overall Canadian assessment of damages by excluded customers, that is, Direct Purchasers or Distributors who have already settled their individual claims with Settling Defendants separate and apart from the Agreement at hand).

[14] Class Counsel in Ontario agreed with the representative plaintiffs to be paid counsel fees equal to 15% of the settlement funds or monetary award plus applicable taxes plus recovered costs, plus their unrecovered disbursements and applicable taxes.

[15] Section 18.1 of the Agreement deals with "Class Counsel Fees and Disbursements and Administration Expenses." Paragraph 13 of the factum of Class Counsel sets forth the expected calculations under that provision:

Amount for Administration Expenses and Class Counsel Fees	\$18,000,000
Plus Fees on Additional Settlements	\$75,000
Plus estimated Costs and Interest recovery from Mr. Borden and/or his clients	\$70,000
Subtotal	\$18,145,000
Less Administration Expenses (actual and estimated)	(\$1,390,709)
Less Quebec Counsel's Disbursements and GST (estimated)	(\$40,000)
Less Class Counsel Disbursements (paid and payable)	(\$1,552,392)
Less interest authorized by CPA s. 33(7)(c)	Not calculated
Less GST on Class Counsel Disbursements where applicable	(\$94,667)
Subtotal	\$15,067,232
Less GST on Class Counsel Fees and Quebec Counsel Fees	(\$985,707)
Maximum amount available for Class Counsel Fees and Quebec Counsel Fees	\$14,081,525
Percentage for Class Counsel Fees and Quebec Counsel Fees based on \$100,000,000 recovery	14.08%
Less Quebec Counsel Fees (estimated) net of GST and disbursements	(\$2,000,000)
Maximum amount available for Class Counsel Fees	\$12,081,525
Multiplier inherent in Class Counsel Fees	2.28

[16] An "Expense Fund" of \$10,000,000 was negotiated by Class Counsel as part of the Agreement. This is often seen in the practice in Ontario in class action and general litigation. For example, in a personal injury action involving a minor or a person under a disability, plaintiff's counsel will negotiate a fixed amount for "costs" as part of a settlement which is tendered to the court for approval.

[17] There are problematic aspects to a discrete amount being labeled in a settlement agreement as being a contribution for class counsel fees. On the one hand, as the class is going to be required in all events to pay class counsel their fees, this factor is a necessary consideration in looking to the overall quantum of the funds being sought by the class in negotiating a settlement.

[18] On the other hand, the structure for any sum isolated and labeled in any settlement agreement as going toward counsel fees requires careful scrutiny to ensure that the determination of class counsel fees is ultimately fair and reasonable.

[19] A Court must be cognizant that any amount so labeled in a class action as being "on account of Class Counsel Fees" does not imply the minimum starting point in a determination of the quantum of fair and reasonable legal fees. The isolated amount, if such there is, should properly be seen as simply an indistinguishable part of the total global recovery for the class with fair and reasonable fees then being determined by looking to the global recovery along with all other appropriate factors.

[20] I turn now to the Agreement at hand. Section 6.1(1) of the Agreement "notionally" allocates the "Settlement Amount" (defined in s. 1.1(65) as being "\$132.45 million, including an amount of \$10 million on account of Class Counsel Fees and Administration Expenses," plus interest) into five funds, including an "Expense Fund of \$10 million."

[21] Section 18.1(1) then proceeds to state, "The \$10 million allocated to the Expense Fund is a payment by the Settling Defendants on account of Class Counsel Fees and Administration Expenses." Section 18.1(2) then provides that "The maximum amount the Courts shall allocate for Class Counsel Fees and Administration Expenses is \$18 million." Section 18.1(10) states that as a result of this \$18 million cap the Settling Defendants agree not to oppose the approval of Class Counsel Fees and Administrative Expenses.

[22] Further elaboration on the regime for Class Counsel Fees and Administration Expenses is set forth in the remaining subsections of s. 18.1.

[23] Class Counsel in their Factum emphasize that they "agreed to an \$18,000,000 cap on Administration Expenses and Class Counsel Fees during the negotiations of the Amended Settlement Agreement knowing that this could result in a payment to them of less than Class Counsel agreed to and expected as a result of their fee agreements with each plaintiff." Presumably this was because the calculation as shown in the above chart would result in Class Counsel Fees of only 14.08% whereas the contingency fee agreements provide for a 15% fee of the recovered amount.

[24] The written agreement between each plaintiff in the Ontario Actions and Strosberg or Siskinds states:

Solicitor's Fees

4. Whether or not Success is achieved in the Action, the CLIENTS agree that the SOLICITOR shall be paid and shall receive all recovered party and party costs in the Action irrespective of the scale upon which the party and party

costs are awarded, applicable taxes and any interest accruing on account of party and party costs.

5. In addition to any fees recovered as party and party costs paid to the SOLICITOR pursuant to the provisions of paragraph 4 above, in the event of Success in the Action the CLIENTS agree that the SOLICITOR shall be paid and shall receive the aggregate of the following:

(a) to the extent that any disbursements are not received and recovered as party and party costs, an amount equivalent to the cost of the unrecovered disbursements plus applicable taxes; and

(b) *15% of the settlement funds or monetary award plus applicable taxes.*

Disbursements

6. The CLIENTS agree that disbursements to be paid to the SOLICITOR shall include all amounts incurred or which may be incurred by the SOLICITOR and his firm and the Associate Counsel in connection with the representation of the CLIENTS and the Class in relation to the trial of the Common Issues and/or settlement, including but not limited to expenses incurred for investigation, court fees, duplication, travel, lodging, long distance telephone calls, the cost of a toll-free telephone line, the cost of specialized computer equipment and management systems software, the cost of a website, courier, postage, telecopier, imaging, and all services provided to the SOLICITOR by consultants, experts and agents. [Emphasis added]

[25] Class Counsel take the position that the written agreement between each plaintiff in the B.C. Actions and Camp provides for Camp to be compensated on the same basis except that there is no provision for costs because no costs may be awarded in favour of or against a plaintiff in a B.C. class action. (It is noted the B.C. action retainer agreements apparently provide for legal fees that vary, depending on the stage of litigation, from 15% to 25% of all benefits obtained for class members, plus disbursements and applicable taxes.)

[26] The representative plaintiffs each signed the Settlement Agreement and thereby agreed to \$18,000,000 for Administration Expenses and Class Counsel Fees. However, it is noted that the expectations of the Ontario class action representative plaintiffs in doing so are that there is about \$100 million in actual settlement benefits and that the legal fees being requested are consistent with the retainer agreements' stipulation of legal fees being in the amount of 15% of all benefits obtained for class members, plus disbursements and applicable taxes. See for example the affidavit of Ms. Kristi Cappa, a representative plaintiff in the Ontario Methionine Action and the Ontario Niacin Action. Indeed, the affidavit of Ms. Heather Rumble Peterson of the lead plaintiff counsel firm, Strosberg, reiterates this intent and expectation.

[27] Section 18.1(3) limits the maximum amount of fees for Quebec Counsel at \$2.18 million, inclusive of taxes and disbursements.

[28] Section 18.1(4) states that Class Counsel Fees and Administration Expenses "shall first be paid from the Expense Fund." Section 18.1(5) goes on to state that if there is Court approval to greater fees and expenses that the excess shall be paid from the four funds in given