

Court Administration

DEC 14 2018

Halifax, N.S.

2009

Hfx. No. 315567

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

ALBERT CARL SWEETLAND and BARBARA FONTAINE

Plaintiffs

- and -

GLAXOSMITHKLINE INC. and GLAXOSMITHKLINE LLC

Defendants

Proceeding under the *Class Proceedings Act*, S.N.S 2007, c. 28

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PLAINTIFFS' BRIEF RE:

MOTION FOR APPROVAL OF CLASS COUNSEL LEGAL FEES

HEARING DATE – JANUARY 29, 2019

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Filed: December 14, 2018

I.	OVERVIEW .....	2
II.	BACKGROUND .....	3
	A.    Procedural History.....	3
	B.    The Settlement Agreement.....	3
	C.    Fee Agreements.....	4
	D.    Fee Sought.....	5
	E.    Time Expended and Disbursements Incurred .....	6
	F.    Response by Class Members.....	7
	G.    Risks Undertaken .....	7
III.	ISSUE.....	9
IV.	LAW AND ANALYSIS.....	9
	A.    Fees in Class Proceedings .....	9
	B.    Contingency Fee Agreements .....	11
	i.    Presumptive Validity of Contingency Fee Agreements .....	12
	ii.   Guidance from Precedent .....	13
	C.    The Multifactorial Approach Supports the Fee as Fair and Reasonable.....	14
	i.    Time Expenditure by Class Counsel .....	15
	ii.   Complexity of the Issues .....	17
	iii.  Responsibility Assumed by Class Counsel .....	17
	iv.   Monetary Value of the Matters at Issue.....	18
	v.    Skill, Competence, Counsel's Contribution, and Results Achieved.....	18
	vi.   Importance to the Client, Client Expectations and Ability to Pay.....	19
	D.    Disbursements are Fair and Reasonable.....	20
	E.    Honorarium .....	20
V.	RELIEF REQUESTED .....	23

## I. OVERVIEW

1. This is a motion for approval of legal fees and disbursements to be paid with respect to the Settlement Agreement<sup>1</sup> entered into by the parties to resolve the certified Avandia class proceeding commenced in the Supreme Court of Nova Scotia under Halifax Court File No. 315567 (the “Nova Scotia Proceeding”), as well as the related Avandia litigation listed in Exhibit “B” to the Settlement Agreement.
2. Under the *Class Proceedings Act* (the “Act”),<sup>2</sup> the Court is charged with the responsibility of approving contingency fee agreements and approving the class counsel fee in the settlement of a class action. The legal test for approval of fees is whether the fees sought by Class Counsel are fair and reasonable.<sup>3</sup>
3. In addition, Class Counsel is requesting approval of an honorarium in the amount of \$25,000.00, to be divided by the Representative Plaintiffs and plaintiffs in the Canadian Avandia litigation to acknowledge their efforts in reaching a national resolution. If approved, this will be paid from either the Settlement Payment or Class Counsel Legal Fees, at the direction of the Court.
4. Further, Class Counsel is requesting that this Court order a cap of fifteen percent of any individual award on the legal fee to be paid by a Class Member who optionally retains a lawyer to assist him or her in submitting a claim under this Settlement Agreement.

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<sup>1</sup> Affidavit of Madeleine Carter, affirmed December 14, 2018 (“Settlement Approval Affidavit”), Exhibit “E”. The Settlement Approval Affidavit was filed with the Court on December 14, 2018 in support of the motion seeking approval of the Settlement Agreement.

<sup>2</sup> S.N.S. 2007, c. 28, s. 41 [*Act*] (Plaintiffs’ Authorities, Tab 24).

<sup>3</sup> *Gagne v. Silcorp Ltd.* (1998), 167 D.L.R. (4th) 325 (Ont. C.A.) [*Gagne*] (Plaintiffs’ Authorities, Tab 8).

5. The parallel motion to approve the Settlement Agreement is not contingent on the outcome of this motion.

## **II. BACKGROUND**

### A. Procedural History

6. The procedural history of this action and the other proposed Avandia class actions is detailed in the Plaintiffs' Settlement Approval Brief.

### B. The Settlement Agreement

7. The terms of the Settlement Agreement are detailed in the Plaintiffs' Settlement Approval Brief.
8. Class Counsel have successfully negotiated a Minimum Settlement Amount of CAD \$4,116,666.67 and up to a Maximum Settlement Amount of CAD \$6,750,000.00 to resolve the within action.<sup>4</sup>
9. The Settlement Agreement provides a national resolution. In addition to the certified Nova Scotia Proceeding, the Settlement Agreement will also resolve the claims of plaintiffs and proposed class members in other Avandia related litigation across Canada. Under the Settlement Agreement, the parties are required to obtain orders that grant approval, recognition, dismissal and/or discontinuance, as the case may be, of the actions listed in Exhibit "B" to the Settlement Agreement, to conclude related litigation and give effect to this Settlement Agreement across Canada.<sup>5</sup>

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<sup>4</sup> S. 5.1, Settlement Agreement.

<sup>5</sup> S. 3.3 and Exhibit "B", Settlement Agreement.

10. Class Counsel and Related Counsel Firms will support the Defendants in seeking the necessary Dismissal Orders.<sup>6</sup>

### C. Fee Agreements

11. The Representative Plaintiffs, Mr. Albert Carl Sweetland and Ms. Barbara Fontaine, entered into substantially identical contingency fee agreements (“CFAs”) and indemnity agreements with Class Counsel. The terms of the CFA and indemnity agreement were explained by counsel prior to the agreements being executed.<sup>7</sup>

12. According to the CFAs, fees and disbursements are payable to Class Counsel only in the event the proceeding is successful, which includes a settlement benefitting one or more class members.<sup>8</sup>

13. The CFAs provide for legal fees of 25% of the first \$10 million, or on any part thereof, of the total value of any settlement or judgment.<sup>9</sup> The CFAs also provide that in addition to any legal fee, Class Counsel is entitled to recover from any settlement all disbursements incurred along with interest accrued on such disbursements.<sup>10</sup>

14. In addition, the Settlement Agreement provides that if a Class Member chooses to retain Class Counsel to submit his or her claim for compensation under the Settlement

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<sup>6</sup> S. 3.4, Settlement Agreement.

<sup>7</sup> Affidavit of Madeleine Carter, affirmed December 14, 2018 (“Fee Approval Affidavit”) at paras. 18-22, Exhibits “A” and “B”.

<sup>8</sup> *Ibid.* at para. 21, Exhibits “A” and “B”.

<sup>9</sup> *Ibid.* at para. 22.

<sup>10</sup> *Ibid.*, Exhibit “A” at para. 5; Exhibit “B” at para. 5.

Agreement, Class Counsel will cap their legal fees at fifteen percent of the amount awarded to the Class Member.<sup>11</sup>

15. To ensure fairness amongst Class Members, and pursuant to section 13.6 of the Settlement Agreement, Class Counsel requests that if this Court approves Class Counsel Fees, the Order provide that the legal fee payable by Class Members who retain non-Class Counsel lawyers to assist them in making their individual claims for compensation pursuant to the Settlement Agreement, including lawyers in Related Counsel Firms, be capped at fifteen percent of the amount awarded to that Class Member.

#### D. Fee Sought and Time Expended

16. The fee for which Class Counsel seek the approval of the Court equals 25% of the Minimum Settlement Amount, plus applicable taxes, and 25% of any additional settlement payment made pursuant to paragraph 5.1(b) of the Settlement Agreement,<sup>12</sup> plus applicable taxes, in accordance with the terms of the CFA. Accordingly, Class Counsel seeks approval of legal fees of \$1,183,541.67 (\$1,029,166.67 + HST of \$154,375) (25% of the Minimum Settlement Amount, plus taxes),<sup>13</sup> and up to an additional \$757,083.33 (up to \$658,333.33, plus HST of up to \$98,749.99).<sup>14</sup>
17. Since the commencement of this action and up to and including December 6, 2018, Class Counsel have docketed time of \$1,538,686.50 (excluding taxes).<sup>15</sup>

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<sup>11</sup> Section 13.5, Settlement Agreement.

<sup>12</sup> Section 5.1(b) of the Settlement Agreement contemplates an additional payment of up to CAD\$2,633,333.33. Any additional payment will be calculated after the total number of Approved Claimants is determined by the Claims Administrator.

<sup>13</sup> Fee Approval Affidavit, para. 24(a).

<sup>14</sup> Fee Approval Affidavit, para. 24(b).

<sup>15</sup> Fee Approval Affidavit, para. 27.

18. Additional time and disbursements will be required to bring this matter to a conclusion. The above does not capture future efforts of Class Counsel in preparing for the upcoming approval motions on January 29, 2019, future efforts to obtain the Dismissal Orders if the Settlement Agreement is approved, future communications with Class Members and counsel for the Defendants during the claims period, or Siskinds' docketed time of \$161,374.00 working up individual claims, which ultimately assisted to facilitate the National Settlement Agreement.<sup>16</sup>

E. Disbursements Incurred

19. Class Counsel also seek approval of disbursements in the amount of \$131,289.39 (\$118,584.03 + tax of \$12,705.36).<sup>17</sup> The final amount for which approval will be requested, up to a maximum total of \$400,000, will be determined in advance of the motion to be heard on January 29, 2019.

20. The total of \$131,289.39 includes disbursements incurred by Class Counsel and Related Counsel Firms. Class Counsel is requesting that the Court also approve the disbursements incurred by Related Counsel Firms.<sup>18</sup>

21. McPhadden Samac Tuovi LLP has incurred \$23,536.61 in disbursements (including applicable tax).<sup>19</sup>

22. Clint Docken has incurred \$1,553.83 in disbursements (including applicable tax).<sup>20</sup>

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<sup>16</sup> Fee Approval Affidavit, para. 28.

<sup>17</sup> Fee Approval Affidavit, paras. 25, 30-36.

<sup>18</sup> Fee Approval Affidavit, para. 32.

<sup>19</sup> Fee Approval Affidavit, para. 33.

<sup>20</sup> Fee Approval Affidavit, para. 34.

23. Consumer Law Group has incurred \$3,420.51 in disbursements (including applicable tax).<sup>21</sup>

F. Response by Class Members

24. Class Members were provided with Notice of Certification and Settlement Approval Hearing. The Notice of Certification and Settlement Approval Hearing informed Class Members that Class Counsel would be seeking approval of legal fees of 25% of the Settlement Amount (plus taxes) and up to a maximum of \$400,000.00 for disbursements, subject to Court approval.<sup>22</sup>

25. The objection deadline is January 15, 2019. As of today's date, no objections have been submitted by Class Members in relation to Class Counsel Legal Fees.<sup>23</sup>

G. Risks Undertaken

26. Class Counsel agreed to pursue this action on a contingency fee basis. The CFA confirms this understanding, providing that Class Counsel will pay all expenses and would only be paid in the event of success. Class Counsel was not indemnified or protected by any third party funder from potential adverse cost awards. Class Counsel indemnified the Representative Plaintiffs from any adverse cost award, in the form of an indemnity agreement.<sup>24</sup>

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<sup>21</sup> Fee Approval Affidavit, para. 35.

<sup>22</sup> Fee Approval Affidavit, para. 44.

<sup>23</sup> Fee Approval Affidavit, para. 46.

<sup>24</sup> Fee Approval Affidavit, para. 39.

27. Assessing litigation risks is an ongoing process. Class Counsel assess the risks at the time the litigation is commenced and as the litigation continues. In undertaking this litigation, Class Counsel were cognizant of various litigation risks, including the risk that:
- (a) The scientific research and/or regulatory steps taken in relation to the connection between Avandia and cardiovascular harm may evolve in favour of the Defendants;
  - (b) The Court would not certify the action;
  - (c) The Court of Appeal may overturn certification;
  - (d) The Court would decide the common issues trial in favour of the Defendants;
  - (e) Even if the common issues trial was decided in favour of the Class, on individual assessments of specific causation and harm, some or all of the Class Members may not succeed in being awarded any damages; and
  - (f) A finding of any of the common issues in favour of the Class could be appealed by the Defendants.<sup>25</sup>
28. Many of these risks were avoided through the careful approach of Class Counsel to litigation and settlement strategy, including coordination with the Representative Plaintiffs, Class Members, Canadian and US defence counsel, and at times counsel for related actions in other provinces.<sup>26</sup>

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<sup>25</sup> Fee Approval Affidavit, para. 40.

<sup>26</sup> Fee Approval Affidavit, para. 41.

29. As noted above, Class Counsel have invested significant time and have performed substantial legal work advancing the claims of Class Members, with no compensation to date.<sup>27</sup>

30. Class Counsel have incurred significant disbursements (at their own risk) to advance the claims without reimbursement to date.<sup>28</sup>

### **III. ISSUE**

31. The issue for the Court's consideration in this motion for which approval is sought is whether the fees and disbursements are fair and reasonable.

### **IV. LAW AND ANALYSIS**

#### **A. Fees in Class Proceedings**

32. The fixing of fees in a class proceeding is governed by section 41 of the Act, under which the Court may, amongst other things, approve an agreement respecting fees and disbursements, or otherwise determine the fees.

33. In the context of a class proceeding, a premium on fees is typically awarded to class counsel for taking on meritorious but complex and risky matters. Courts have recognized that the objectives of the Act are dependent in part upon rewarding counsel for taking on the risk inherent in litigating class proceedings.<sup>29</sup>

34. Class counsel fees received comment by Justice Winkler (as he then was) in *Parsons v. Canadian Red Cross Society*:

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<sup>27</sup> Fee Approval Affidavit, para. 42.

<sup>28</sup> Fee Approval Affidavit, para. 43.

<sup>29</sup> *Parsons v. Canadian Red Cross*, [2000] O.J. No. 2374 at para. 13 [*Parsons*] (Plaintiffs' Authorities, Tab 16).

The legislature has not seen fit to limit the amount of fees awarded in a class proceeding by incorporating a restrictive provision in the CPA. On the contrary, the policy of the CPA, as stated in *Gagne*, is to provide an incentive to counsel to pursue class proceedings where absent such incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding.<sup>30</sup>

35. In the recent settlement and fee approval decision of *Shah v. LG Chem, Ltd.*,<sup>31</sup> Justice Perell of the Ontario Superior Court of Justice succinctly outlined the principles applicable to assessment and approval of fees. At paras 45 to 47 he states:

[45] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.

[46] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[47] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.

36. The general test asks the Court to consider whether the fees sought by class counsel are “fair and reasonable”. The analysis is not one of determining in the abstract what would be a fair and reasonable fee, but rather whether the actual fee sought is fair and reasonable.<sup>32</sup>

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<sup>30</sup> *Ibid.* at para. 56.

<sup>31</sup> 2018 ONSC 6101 (Plaintiffs’ Authorities, Tab 20).

<sup>32</sup> *Elwin v. Nova Scotia Home for Colored Children*, 2014 NSSC 375 at para. 62 [*Elwin*] (Plaintiffs’ Authorities, Tab 5).

## B. Contingency Fee Agreements

37. The Act gives proposed representative plaintiffs the right to enter into percentage-based fee arrangements with putative class counsel.<sup>33</sup> Such arrangements are not enforceable until they have received court approval.<sup>34</sup> Specifically, the relevant provision reads:

41 (1) An agreement respecting fees and disbursements between a solicitor and a representative party must be in writing and shall

(a) state the terms or conditions under which fees and disbursements are to be paid;

(b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding;

(c) where interest is payable on fees or disbursements referred to in clause (a), state the manner in which the interest will be calculated; and

(d) state the method by which payment is to be made, whether by lump sum or otherwise.

38. The CFAs entered into between Class Counsel and the Representative Plaintiffs comply with the requirements of s. 41 of the Act and ought to be approved by the Court. They set out the terms under which fees and disbursements are payable and provide for a contingent fee dependent upon the amount obtained in resolution.<sup>35</sup>

39. The trend in Canada is to award fees based on a percentage basis. This places emphasis on the quality of representation and the benefit conferred on the class, rather than on an accumulation of time without regard to productivity. Justice Winkler (as he then was)

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<sup>33</sup> Act, s. 41(1).

<sup>34</sup> *Ibid.*, s. 41(2).

<sup>35</sup> Fee Approval Affidavit, Exhibits “A” and “B”.

addressed the benefits of a percentage-based approach in *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*:<sup>36</sup>

A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted a seven to ten day trial. Fee arrangements which reward efficiency and results should not be discouraged.

i. Presumptive Validity of Contingency Fee Agreements

40. Courts have been prepared to accord presumptive validity to a properly executed, fully understood fee arrangement.<sup>37</sup> This is seen as providing a measure of predictability to the approval of class counsel fees, and a recognition that other approaches place too great an emphasis on “arguably irrelevant or immeasurable metrics such as docketed time (irrelevant) or risks (immeasurable).”<sup>38</sup> As Justice Belobaba wrote in *Cannon v. Funds for Canada Foundation*:<sup>39</sup>

Why should it matter how much actual time was spent by Class Counsel? What if the settlement was achieved as a result of "one imaginative, brilliant hour" rather than "one thousand plodding hours"? If the settlement is in the best interests of the class and the retainer agreement provided for, say, a one-third contingency fee, and was fully understood and agreed to by the representative plaintiff, why should the court be concerned about the time that was actually docketed?

[...]

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<sup>36</sup> [1998] O.J. No. 1891 at para. 11 (Plaintiffs’ Authorities, Tab 4); also see *Endean v. Canadian Red Cross*, [2000] B.C.J. No. 1254 at para. 74 [*Endean*] (Plaintiffs’ Authorities, Tab 6).

<sup>37</sup> *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 at para. 4 [*Cannon*] (Plaintiffs’ Authorities, Tab 3); *Middlemiss v. Penn West Petroleum Ltd.*, 2016 ONSC 3537 at para. 19 [*Middlemiss*] (Plaintiffs’ Authorities, Tab 14); *O’Brien v. Bard Canada Inc.*, 2016 ONSC 3076 at para 16 (Plaintiffs’ Authorities, Tab 15).

<sup>38</sup> *Cannon*, *supra* at para. 4.

<sup>39</sup> *Ibid.* at paras. 5 – 8.

In my view, it would make more sense to identify a percentage-based legal fee that would be judicially accepted as presumptively valid. This would provide a much-needed measure of predictability in the approval of Class Counsel's legal fees and would avoid all of the mind-numbing bluster about the time-value of work done or the risks incurred.

What I suggest is this: contingency fee arrangements that are fully understood and accepted by the representative plaintiffs should be presumptively valid and enforceable, whatever the amounts involved. Judicial approval will, of course, be required but the presumption of validity should only be rebutted in clear cases based on principled reasons.

41. A robust contingency compensation system has been found to appropriately reward class counsel for the wins and losses over many files and many years of litigation, and furthers the viability of class actions as a meaningful vehicle for access to justice.<sup>40</sup>

ii. Guidance from Precedent

42. The Maximum Settlement Payment is \$6,750,000, and the CFAs provide for the recovery by Class Counsel of 25% of that amount, or such lesser amount paid by the Defendants, plus disbursements and applicable HST. The requested fee percentage falls within the range of reasonableness established by the jurisprudence.<sup>41</sup>

43. In *Baker Estate v. Sony BMG Music (Canada) Inc.*, Justice Strathy stated that “a contingent fee retainer in the range of 20% to 30% is very common in class proceedings.”<sup>42</sup>

44. In *Helm v. Toronto Hydro-Electric System Ltd.*,<sup>43</sup> the Ontario Superior Court of Justice approved a percentage-based fee of 25% of the recovery, plus disbursements and taxes,

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<sup>40</sup> *Sheridan Chevrolet v. Hitachi, Ltd.*, 2017 ONSC 2803 at para. 16 (Plaintiffs’ Authorities, Tab 21); *Middlemiss*, *supra* at para 19.

<sup>41</sup> Ward Branch, *Class Actions in Canada* (Toronto: Canada Law Book, 2015) at para. 7.175 [footnote 35e contains a summary of the percentage-based fees approved in other class proceedings] (Plaintiffs’ Authorities, Tab 25).

<sup>42</sup> 2011 ONSC 7105 (Ont. S.C.J.) at para. 63 (Plaintiffs’ Authorities, Tab 1), also cited in *Elwin*, at para. 21.

finding this to be “a reasonably standard fee agreement in class proceedings litigation”. Though the amount sought constituted “a significant premium over what the fee would be based on time multiplied by standard hourly rates”, in approving the fee, Justice Strathy (as he then was) commented that class counsel “are serious, responsible, committed and effective” and would “likely take on some cases that they will lose, with significant financial consequences. They will take on other cases where they will not be paid for years. To my mind, they should be generously compensated when they produce excellent and timely results, as they have done here.”<sup>44</sup>

45. In *Elwin v. Nova Scotia Home for Colored Children*, Justice LeBlanc, citing Justice Barnes in *Manuge v. R.*,<sup>45</sup> noted that cases that generate a recovery of a few million dollars – as is the case here – may well justify a 25% to 30% costs award.<sup>46</sup>

46. A 25% fee falls within the range of what is fair and reasonable.

### C. The Multifactorial Approach Supports the Fee as Fair and Reasonable

47. In assessing whether the contingent fee is fair and reasonable, the jurisprudence is clear: the Court is to adopt a multifactorial approach. The factors considered in making this determination are as follows:

- (a) time expended by the solicitor;
- (b) the legal complexity of the matters;
- (c) the degree of responsibility and risk assumed by the solicitor;
- (d) the monetary value of the matters at issue;

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<sup>43</sup> 2012 ONSC 2602 [*Helm*] (Plaintiffs’ Authorities, Tab 9).

<sup>44</sup> *Ibid.* at paras. 22, 25-26, also cited in *Elwin*, *supra* at para. 21.

<sup>45</sup> 2013 FC 341 [*Manuge*] (Plaintiffs’ Authorities, Tab 12).

<sup>46</sup> *Elwin*, *supra* at para. 26.

- (e) the importance of the matter to the client;
- (f) the degree of skill and competence demonstrated by the solicitor;
- (g) the results achieved and the contribution of counsel to the result;
- (h) the ability of the client to pay; and
- (i) the client's expectations as to the amount of the fees.<sup>47</sup>

i. Time Expenditure by Class Counsel

- 48. Class Counsel has been actively litigating the claims of the Class Members for over 9 years. The time was expended on a contingent basis, without assurance of payment.
- 49. Class Counsel have docketed time of \$1,538,686.50 exclusive of taxes on the file to date. This excludes future efforts of Class Counsel in preparing for the upcoming approval motions on January 29, 2019, future efforts to obtain the Dismissal Orders if the Settlement Agreement is approved, future communications with Class Members and counsel for the Defendants during the claims period, or Siskinds' docketed time of \$161,374.00 working up individual claims, which ultimately assisted to facilitate the National Settlement Agreement.
- 50. Though time expenditure by counsel is a factor to be considered in evaluating the reasonableness of fees sought to be approved, it is merely one factor; in *Elwin, supra*, Justice LeBlanc found that specific records of time actually spent on the file are of no

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<sup>47</sup> *Ibid.* at para. 18, citing *Sparvier v. Canada (Attorney General)*, 2006 SKQB 533 at para 44 (Sask. Q.B.), affirmed at 2007 SKCA 37 (Sask. C.A.) (Plaintiffs' Authorities, Tab 23). Also see *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at para. 80 (Plaintiffs' Authorities, Tab 22).

more than “marginal interest” in assessing the reasonableness of a contingency fee agreement.<sup>48</sup>

51. A different approach - the “multiplier” approach - has also been used to justify flat or contingent fees in the class action context.<sup>49</sup>
52. In *Elwin*, Justice LeBlanc favoured the approach to assessing reasonableness of fees advocated by Justice Barnes of the Federal Court, in *Manuge v. R*. In that case, Justice Barnes observed that applying a multiplier of 1.5 to 3.5 was “overly simplistic and largely insensitive to the factors favouring a premium recovery. The efficiency of counsel in getting to an excellent result is something to be rewarded and not discouraged by the rigid application of a multiplier to the time expended.”<sup>50</sup>
53. A reasonable fee should bear an appropriate relationship to the amount recovered.<sup>51</sup> Again as was stated by Justice Barnes, and subsequently cited by Justice Leblanc in *Elwin*, “[c]ases that generate a recovery of a few million dollars may well justify a 25% to 30% costs award.”<sup>52</sup>
54. The Settlement Payment is not to exceed \$6,750,000 and provides for a Minimum Payment Amount of \$4,116,666.67. The CFAs contracted between Class Counsel and the Representative Plaintiffs provide for 25% of any settlement value recovered as legal fees. The maximum amount of legal fees that Class Counsel may recover, depending on claims

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<sup>48</sup> *Elwin*, *supra* at paras. 51, 52.

<sup>49</sup> *Endean*, *supra* at paras. 74 – 76.

<sup>50</sup> *Elwin*, *supra* at para. 26, citing *Manuge*, *supra* at para. 49.

<sup>51</sup> *Endean*, *supra* at para. 80.

<sup>52</sup> *Elwin*, *supra* at para. 26, citing *Manuge*, *supra* at para. 50.

filed, of \$1,687,500 plus HST bears a reasonable relationship to the amount recovered, the risks undertaken, and time expended by Class Counsel in this litigation.

ii. Complexity of the Issues

55. A pharmaceutical class action is complex litigation at all stages of the action.
56. The challenges faced by the Plaintiffs at certification have been articulated in the Defendants' opposition to certification, and in their appeal of the Certification Order.
57. Had the Defendants' appeal of certification been dismissed, and the matter proceeded to trial, the Court would have been asked to resolve the certified common issues, which are again complex and involve competing expert opinions relating to causation of three types of cardiovascular harm.
58. The "legal complexity of the matter" factor weighs in favour of the fairness and reasonableness of the fees being sought.

iii. Responsibility Assumed by Class Counsel

59. Class Counsel assumed all responsibility for the proceeding, funding all disbursements and working on a contingency fee basis.
60. Counsel also signed an indemnity agreement with the Representative Plaintiffs, indemnifying them against any award of costs in the event of an unsuccessful outcome. Class counsel did not seek cost protection from a third-party funder.<sup>53</sup> While favourable in avoiding financial exposure to the Class, it exposed Class Counsel to considerable risk.

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<sup>53</sup> Fee Approval Affidavit, para. 40.

Thus, not only did Class Counsel take on the risk of a fee contingent on success, but it also risked exposure to adverse costs.

61. This factor supports the fairness and reasonableness of the fees being sought.

iv. Monetary Value of the Matters at Issue

62. The Settlement Payment of up to \$6,750,000 provides monetary value for the Class that would otherwise not have been achieved without Class Counsel's advancement of the action over nine years, and their assumption of the inherent and significant risks associated with litigation.

v. Skill, Competence, Counsel's Contribution, and Results Achieved

63. Class Counsel skillfully navigated this class proceeding, involving certain novel points of law and strong opposition from the Defendant (particularly, at certification, relating to conflicting expert opinions on causation and the state of the science concerning the causal link), through to a successful settlement, with a prospect that the Defendants' appeal of certification could succeed, or the common issues trial be resolved in the Defendants' favour.

64. In *Elwin*, Justice LeBlanc cited as a relevant part of the background to the eventual settlement the comments made in *Endean*, wherein the Supreme Court of British Columbia stated "it is necessary, in considering the reasonableness of the fee in relation to the results achieved, to consider the causal relationship between the efforts of class counsel and the benefits conferred on the class claimants by the resulting recovery."<sup>54</sup>

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<sup>54</sup> *Elwin*, *supra* at para. 61, citing *Endean*, *supra* at para. 41.

65. Class Counsel was essential to achieving a result favourable to the Class. Without the efforts of Counsel, the Class would not have gained the benefits conferred by the Settlement.
66. Class Counsel is experienced and advanced the claims with diligence and at a substantial risk.<sup>55</sup>
67. Class Counsel incurred costly disbursements and carried a financial burden in moving this case forward.<sup>56</sup>
68. These factors weigh in favour of the fee being held as fair and reasonable.
- vi. Importance to the Client, Client Expectations and Ability to Pay
69. The nature of this action is such that the expense and risk of bringing the claim for any individual plaintiff would considerably outweigh any potential award. The Class had no other access to justice through the Courts, were it not for Class Counsel's willingness – or the willingness of other counsel – to fund the litigation and expend significant hours with no assurance of being paid.
70. The fee is 25% of the value of the settlement – a “reasonably standard fee agreement in class proceedings litigation.”<sup>57</sup> As to the clients' expectations of the fee amount, the Representative Plaintiffs were clearly aware of the contents of the contingency fee agreement.<sup>58</sup>
71. In sum, the factors reviewed above suggest that the fee is fair and reasonable.

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<sup>55</sup> Fee Approval Affidavit, para. 43.

#### D. Disbursements are Fair and Reasonable

72. Class Counsel have incurred \$102,778.44 in disbursements (including applicable tax) pursuing this action.<sup>59</sup>
73. Since the National Settlement Agreement was negotiated to also resolve the proposed Avandia Class actions listed in Exhibit “B” to the Settlement Agreement, Class Counsel is requesting that the Court approve disbursements incurred by Related Counsel.<sup>60</sup>
74. Related Counsel have incurred \$28,510.95 in disbursements (including applicable taxes) pursuing this litigation.<sup>61</sup>
75. The disbursements incurred are fair and reasonable sums that were necessary to further the litigation and achieve a national resolution for Class Members.

#### E. Honorarium

76. Representative plaintiffs are properly awarded honoraria when they have carried out their responsibilities in a diligent and responsible manner. Honoraria recognize the disproportionate burden borne by the representative plaintiffs and acknowledge that “the representative plaintiffs meaningfully contributed to the class members’ pursuit of access to justice.”<sup>62</sup>

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<sup>56</sup> Fee Approval Affidavit, para. 43.

<sup>57</sup> *Helm, supra* at para 25.

<sup>58</sup> *Elwin, supra* at para. 62; Fee Approval Affidavit, paras. 18-19.

<sup>59</sup> Fee Approval Affidavit, para. 30.

<sup>60</sup> Fee Approval Affidavit, para. 32.

<sup>61</sup> Fee Approval Affidavit, paras. 33-35.

<sup>62</sup> *Farkas v. Sunnybrook & Women’s College Health Sciences Centre* (2009), 82 C.P.C. (6th) 222, 2009 CarswellOnt 4962 (Sup. Ct.) at paras. 69-70 (Plaintiffs’ Authorities, Tab 7); *Johnston v. Sheila Morrison Schools*, 2013 ONSC 1528 at para. 43 (Plaintiffs’ Authorities, Tab 10).

77. While some courts have indicated that honoraria are for cases where the representative plaintiff “has made an exceptional contribution that has resulted in success for the class,” this view is not shared by all. Other courts have commented that honoraria encourage representative plaintiffs to be involved in litigation in a meaningful way. It is observed that reported decisions awarding honoraria frequently hold that honoraria of \$2,500-\$10,000 are fair and reasonable in the context of lengthy class actions.<sup>63</sup>
78. Factors that might be appropriate for consideration in determining whether to allow an honorarium include:
- (a) active involvement in the initiation of the litigation and retainer of counsel;
  - (b) exposure to a real risk of costs;
  - (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation;
  - (d) time spent and activities undertaken in advancing the litigation;
  - (e) communication and interaction with other class members; and
  - (f) participation at various stages of the litigation, including discovery, settlement negotiations and trial.<sup>64</sup>

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<sup>63</sup> See for example: *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 at paras. 25-27 (Plaintiffs’ Authorities, Tab 19); *Barwin v. IKO*, 2017 ONSC 3520 at para. 61 (Plaintiffs’ Authorities, Tab 2); *Lang v. Bayer Inc.*, (26 May 2016), London 60411 (Ont. Sup. Ct.) at page 3 (Plaintiffs’ Authorities, Tab 11); *Marchand v. Ford Motor Company*, 2018 ONSC 685 at paras. 50-51 (Plaintiffs’ Authorities, Tab 13).

<sup>64</sup> *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at para. 43 (Plaintiffs’ Authorities, Tab 18).

79. Class Counsel proposes that an honorarium of \$25,000.00 be paid to the plaintiffs in the Canadian Avandia proceedings, to be divided in accordance with a tiered distribution scheme that reflects the relative time expended by and the involvement of each plaintiff, including affidavits filed, participation in motions, and instructions sought and received, among other things. This distribution approach was implemented in the recently settled Volkswagen class proceedings.<sup>65</sup>
80. There are 25 plaintiffs (Mr. Sweetland, Ms. Fontaine plus the plaintiffs in the Avandia related proceedings listed in Exhibit “B” to the Settlement Agreement) each of whom was engaged throughout the litigation and therefore contributed to advancing the action to the point of a national settlement.
81. The proposed distribution scheme reflects the level of engagement among the group and the different degrees of time spent and personal information shared to advance this case through to its conclusion on behalf of the Class. The total amount to be awarded any individual is appropriate and well in line with other cases in which honoraria have been granted.
82. Class Counsel requests the direction of the Court as to whether the honorarium is to be paid from the Settlement Payment or Class Counsel Legal Fees.

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<sup>65</sup> *Quenneville v. Volkswagen*, 2017 ONSC 2448 at para. 31 (Plaintiffs’ Authorities, Tab 17).

**V. RELIEF REQUESTED**

83. This motion seeks an order approving the payment of Class Counsel Legal Fees from the Settlement Payment, in accordance with the CFA.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 14<sup>th</sup> day of December, 2018.



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23. *Sparvier v. Canada (Attorney General)*, 2006 SKQB 533(Sask. Q.B.), affirmed at 2007 SKCA 37 (Sask. C.A.)

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### Secondary Sources

24. Ward Branch, *Class Actions in Canada* (Toronto: Canada Law Book, 2015) [excerpt: para. 7.175, footnote 35e]

### Legislation

25. *Class Proceedings Act*, S.N.S. 2007, c. 28