

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STEPHEN ALAN HEAD

PLAINTIFF

AND:

**MIRALEX HEALTH CARE INC. AND
HUESON PHARMACEUTICAL CORP.**

DEFENDANTS

BROUGHT PURSUANT TO THE CLASS PROCEEDINGS ACT R.S.B.C. 1996, c.50

AFFIDAVIT OF JAMES H. MACMASTER

I, James H. MacMaster of 1210-777 Hornby Street, Vancouver, B.C., lawyer, MAKE OATH AND SAY THAT:

1. I am counsel for the Plaintiff, and have personal knowledge of the matters in this affidavit unless otherwise specified.
2. This affidavit is sworn in support of an application to approve a class action settlement.

VALUE AND DISTRIBUTION OF THE SETTLEMENT

3. The value of the settlement is \$1.4 million. This amount is currently being held in an interest bearing trust account at Guild Yule.

4. Upon approval of the settlement this amount less the fees and disbursements payable will be delivered to the appointed claims administrator (the "Claims Administrator").
5. The amount paid to the Claims Administrator will be held in an interest bearing trust account by the Claims Administrator. All of the amount held by the Claims Administrator (the "Settlement Fund") will be paid out to class members or to the fees and expenses of the Claims Administrator. The Defendant does not retain any right to the Settlement Fund.
6. It is proposed that the Settlement Fund be distributed on the basis set out in Exhibit "A", the Settlement Agreement.

CLAIMS ADMINISTRATION

7. It is proposed that the accounting firm Arthur Andersen LLP ("Andersen") will be appointed to manage the claims. Resumes for the individuals responsible for the claims administration are attached as Exhibit "B". Andersen's role will be to total the point score and distribute cheques according to the final point tally. Andersen will have the right to conduct an audit of the claim forms by accessing available data on usage from the Defendants' data, and to confirm that the medical doctor statements are in fact completed by the physicians. Andersen's determination of the number of points for each class member will be final. Andersen will be at liberty to apply to the court for direction in the event that any problem develops in the claims administration.
8. Andersen will be entitled to deduct their fees and expenses from the funds paid to it. Attached as Exhibit "C" is a letter from Andersen dated February 27, 2002 estimating that the fees and expenses will be approximately \$25,000.00. If their expenses are greater than

\$35,000.00, they will be required to apply to court for approval of their account.

Andersen will provide a final report on the distribution of the Settlement Fund to class counsel and the court.

NOTICE

9. The cover letter attached as Exhibit “D” and the claim form attached as Appendix A to Exhibit “A” will be delivered to the available mailing addresses for all class members by class counsel. Further, a notice in the form attached as Exhibit “E” will be published in each of the Vancouver Sun and Province within 10 days of the order approving the settlement. Exhibits “A” and “D” will also be posted on Branch MacMaster’s website.

EXPECTED NUMBER OF CLAIMANTS

10. Notice has already been issued in this matter when the case was certified. The campaign included direct mail to all class members of whom the Defendants had knowledge and newspaper advertising across the country. The Plaintiffs also followed up directly with a number of class members from outside the jurisdiction to ensure that they understood their need to opt in to be entitled to access any recovery within the action.
11. A total of 351 class members contacted Plaintiff’s counsel as a result of this notice campaign.
12. Given the structure of the *Class Proceedings Act*, the size of the extraprovincial class is known and is fixed at 256. No other extraprovincial class members will be entitled to opt in. There were approximately 1,235 persons eligible to opt in, so the percentage response rate was approximately 20%.

13. The number of class members from B.C. who have contacted class counsel is 99.
According to the affidavit filed in this litigation by Dr. Hughes, the total number of class members in B.C. who purchased at least 4 ounces of Miralex Cream is approximately 900. While it is possible that these remaining 800 class members from B.C. who did not contact class counsel will now seek to participate in the settlement, it is expected that this number will in fact be relatively small for the following reasons.
14. First, the notice specifically encouraged class members from B.C. to contact class counsel even though they did not formally need to do so in order to be part of the class.
15. Second, assuming that B.C. residents had been required to opt in, the extraprovincial experience suggests that only about 20% would have done so, or approximately 190. Since 99 have contacted Plaintiffs counsel to date, the number of interested but unknown B.C. class members may be in the range of 91.
16. Third, Class counsel delivered a questionnaire to the 351 known class members in advance of the mediation asking them to provide details as to the nature of their physical injuries. Only 181 responded (or 51%). Only approximately 162 of these were alleging a clear physical injury.
17. Given that the requirements for seeking payment under the settlement are more rigorous than the steps required to complete the voluntary questionnaire, it can be assumed that no more than 162 of the 351 known class members will come forward to advance claims.
18. In relation to the unknown B.C. class members, it is projected that fewer than 50% of the estimated 91 will come forward with personal injury claims. This yields a global estimate

of approximately 200.

MEDICAL EVIDENCE

19. The Plaintiffs were advised in this litigation by two noted physicians, Dr. Stuart Maddin and Dr. Neil Shear. Attached as Exhibits 'F'-'I' are the reports prepared by Dr. Maddin and Dr. Shear that are not yet part of the court record.
20. I am advised by Dr. Stuart Maddin and Dr. Neil Shear that the most common side effect that would be seen within this group would be a flare after the cessation of use of the Miralex Cream. This is consistent with the responses received to the questionnaires delivered to the known class members. I am advised by Dr. Maddin and Dr. Shear that a majority of cases of flare up should resolve within two months. A significant further percentage will resolve within 6 months. A smaller percentage may continue beyond that point. The persistent acne and redness would be most common in those who applied it in the most sensitive areas, such as the face or genitals. Stretch marks, thinning, or bruising may accompany the flare up, but not in all cases.
21. I have been advised by Dr. Maddin and Dr. Shear that it is unlikely for anyone to have experienced a significant side effect when applying less than 4 ounces of the Miralex Cream. The defendants' experts argue that injury is very unlikely even at much higher levels of use. As such, in order to ensure that persons who are legitimately injured by the product receive the benefit of the settlement, only those class members who used more than 4 ounces will be eligible to recover.
22. I have been advised by Dr. Maddin and Dr. Shear that the side effects for which we propose to give compensation are by far the most common side effects that would be seen

in these circumstances. Further, those that have any of the more unusual side effects are likely to have sustained some of the more common side effects as well, and will be entitled to compensation in that way.

23. The defendants' physicians' dispute that either the compensated side effects or the more unusual side effects could have occurred in these circumstances, or with any real frequency.

DISTRIBUTION

24. The disbursements (including taxes) incurred by the two law firms to date are in the range of \$79,494.44: \$44,541.27 by Branch MacMaster (as of March 15, 2002), and \$34,953.17 by Hanson Wirsig Matheos (as of March 7, 2002). In addition, there is a further \$600 account from Dr. Shear dated March 8, 2002. Details of these disbursements are set out in Exhibit "J". In addition, attached as Exhibit "K" is a quotation for the cost of the newspaper notice of the settlement-approval hearing. There may be a few minor additional disbursements incurred prior to that hearing. This paragraph will be updated with a further affidavit closer to the time of the hearing.
25. The contingency fee contract in place with Mr. Head provides for a fee of 30%, plus applicable taxes. Attached as Exhibit "L" is a copy of the contingency fee agreement. The firms' proposed fee is calculated on the total settlement amount of \$1.4 million net of the payment of the legal disbursements, or approximately \$394,678 plus \$55,255 in provincial and federal taxes.
26. These fees and disbursements of class counsel will be paid by Guild Yule upon approval of the settlement. The balance of approximately \$865,660 will be paid over to the Claims

Administrator for distribution to class members and payment of the Claims
Administration costs.

27. As set out above, Andersen estimates that its fees and expenses will be \$25,000.00 plus G.S.T.
28. As such, the estimated amount available for distribution to class members is approximately \$840,660 plus any interest earned during the interim period before the funds are distributed.

AVERAGE RECOVERY

29. Assuming 200 claims are advanced, the average recovery for each class member will be in the range of \$4000, net of all legal fees, disbursements, taxes, disbursements, and claims administration costs. For a more accurate comparison to the amount that might have been payable had the matter gone to trial, a gross average prior to the deductions, would be \$7000.00. However, in fact the amounts will be distributed around the average based on the number of points received by each class member

ESTIMATE OF VALUE OF POINTS

30. Assuming:
 - a. 200 class members advance claims;
 - b. the percentage who purchased solely from Hueson and are therefore entitled to only 1 point will mirror that set out in the Defendants' mediation brief (20% or an estimated 40 of the 200);

- c. the distribution of the remaining 160 class members' usage will mirror that set out at page 1 of Exhibit "J" of Dr. Hughes' August 31,2000 affidavit;
- d. the remaining 160 class members will report the side effects in the following percentage of cases:
- | | |
|---------------------------|-----|
| Stretch Marks | 10% |
| Skin Thinning | 10% |
| Easy Bruising | 10% |
| Permanent Acne or Redness | 10% |
| Flare-up < 2 month | 60% |
| Flare-up 2-12 months | 40% |
- e. ½ will secure supporting statements from physicians, thereby doubling their side effect point totals

then the value per point would be approximately \$900. If 400 class members come forward, but all other assumptions remain equal, then the value per point would be approximately \$450.¹

31. Running a few scenarios based on these assumptions yields the following estimates of the net amount payable to class members after payment of legal fees, disbursements and all other expenses:
- a. Purchaser of at least 4 ounces from the uninsured company, Hueson Pharmaceutical Corp, no physician support required: \$450-\$900;

¹ A breakdown of this basis for this estimate is as follows:

Usage points: 40 Hueson + 247.4 Miralex

Stretch points: 10% of 160 claimants claiming 1 point each yield 16+8 extra doctor points=24 points

Thinning points 10% of 160 claimants claiming 1 point each yield 16+8 extra doctor points=24 points

Bruising points 10% of 160 claimants claiming 1 point each yield 16+8 extra doctor points=24 points

Redness points 10% of 160 claimants claiming 1 point each yield 16+8 extra doctor points=24 points

Flare <2 months: 60% of 160 claimants claiming 1 point each yields 96+48 extra doctor points=144

Flare 2-12 (assume average of 7 months) 40% of 160 claimants claiming 4 points each yields 256+128 extra doctor points=384

Total Points: 911.4

- b. Purchaser from Miralex Health Care Inc. after January 1, 1999 of 1 four ounce bottle, who suffered a 2 week flare up in their condition, and who does not bother to obtain physician support: \$900-\$1800;
- c. Purchaser from Miralex Health Care Inc. after January 1, 1999 of 3 four ounce bottles, who suffered a 6 month flare up in their condition and no other side effects, and who obtains support from his or her physician: \$4050-\$9100;
- d. Purchaser from Miralex Health Care Inc. after January 1, 1999 of 8 four ounce bottles who suffered a 12 month flare up in their condition as well as skin thinning, and who obtains support from his or her physician: \$9,450-\$18,900

32. Given:

- a. that no defences will be advanced by the defendants to limit recovery of any class members;
- b. the claims process is extremely simple and does not require personal attendance before a court or claims administrator;
- c. the estimated recoveries are net of deductions for legal fees, disbursements and taxes;
- d. the risks on liability; and
- e. the risks on recoverability;

it is my opinion that the Settlement Agreement is reasonable. The risks are discussed in greater detail below.

THE HUESON PROBLEM

33. The Defendants have stated that Hueson Pharmaceutical Corp. (“Hueson”) distributed the Miralex Cream prior to January 1, 1999. This is consistent with Mr. Head’s invoices.

34. The fundamental problem with the case against Hueson is that the company has no assets nor did it purchase any insurance.
35. There is very little basis on which to argue that exclusive Hueson purchasers are entitled to claim under the Miralex insurance policy. It was not at all clear whether any valid argument could be made that Miralex assumed Hueson's liabilities. We were assured by defence counsel for Miralex and by coverage counsel for the insurer of Miralex that there was no written agreement between Hueson and Miralex. Although we knew that Miralex succeeded Hueson as the distributor of this product, it is not known whether any agreement could be established between Miralex and Hueson on the basis of words or conduct or, if there was, whether it was reasonable that a term of any such agreement could be implied that Miralex would assume all of the liabilities of Hueson. While it was certainly a possibility that Miralex impliedly assumed the liabilities of Hueson, it was clear that there was substantial risk in establishing these facts and that the coverage position would be aggressively contested by the insurer.
36. Given the serious difficulties in establishing any right to recover for purchasers from Hueson, their point allocation has been capped at one point.

INSURANCE RISK

37. Miralex's insurance policy contained a very unfortunate feature. The limits of the liability insurance which was initially \$5 million declined as defence costs were incurred.
38. At the time of the mediation when the settlement was achieved, our best estimate was that the defendants had expended more than \$1 million defending the case. This was prior to any discoveries having been conducted, and prior to the argument of any motions.

39. At that pace, there was real concern that the original \$5 million in insurance would be even more significantly reduced before the end of the common issues trial. Furthermore, the insurance may well have been exhausted before the completion of all the multiple individual issues trials that would have had to follow along thereafter in order to establish each individual's entitlement.
40. This unfortunate feature also diminished the bargaining leverage held by the class against the insurer, in that it made it more difficult to argue that they should pay now in order to avoid incurring defence costs above and beyond their limits (which is the usual structure). The insurer had little incentive to settle given that fighting the case reduced their global obligation rather than increasing it.
41. There were also other serious insurance coverage issues.
42. There was a risk that Miralex may have misrepresented the nature of the cream when it applied for insurance.
43. If it was established in the litigation that the steroid had been placed in the cream intentionally, or with wilful blindness, coverage could have been denied based on the "intentional act" exclusion.
44. There was an argument regarding the appropriate trigger theory under the policy. The insurer could have sought to argue an "occurrence trigger" whereby the policy was only triggered on the placement of the steroid in the cream, which may have occurred prior to the inception of the policy in 1999. On the other hand, if the policy was interpreted to have an "injury in fact" trigger, the insurer may have sought to deny the claim for all

persons whose damage occurred before January 1, 1999.

45. The insurer may have also argued that for those class members who also purchased from Hueson, their damage occurred prior to the inception of the policy.
46. The insurer may have been able to argue that the deductibles applied to each class member, rather than to the case as a whole, which could have greatly reduced if not negated each individual's recovery.
47. Another problem with the insurance coverage is that it only covers personal injury claims rather than claims for economic loss. As such, there was no ability to recover the cost of purchasing the cream. The Settlement Agreement does not contemplate any recovery of the cost of the cream as a result.
48. Attached as Exhibit "M" is the letter from William Clark, coverage counsel for Miralex's insurers, setting out the coverage issues in greater detail.

LIABILITY RISK

49. There was no admission of liability by the Defendants.
50. The Defendants intended to argue that the cream was not present in every jar. It is possible that individuals may not have met the burden of establishing that the product was in the jar they applied.
51. The Plaintiffs did not join the foreign manufacturer of Miralex Cream, Manon Cosmetic Laboratory Ltd. ("Manon"), as a party to the litigation because of difficulties associated

with service, and obtaining and enforcing judgment. Enforcement of the judgment was of particular concern given the information from the defendants regarding the manufacturer's lack of assets. Nevertheless, as the Settlement Agreement expressly permits class members to pursue the manufacturer for any allocation of fault that may be attributed to it, class member's rights against Manon are not prejudiced by the settlement.

CAUSATION RISK

52. The Defendants were clearly committed to vigorously defending causation in every case, and requiring each class member to attend at a full trial to establish this issue. They intended to advance the following types of arguments, depending on the case:

Pre-existing conditions: most if not all of these individuals would have had pre-existing conditions, and there would have been a serious legal issue as to whether their condition was actually made worse from using Miralex;

Mitigation: the defendants intended to argue that it was possible to safely wean yourself off the steroid, and that persons who failed to seek medical attention upon receiving the notice failed to mitigate their damages or were contributorily negligent;

Confounding factors: A number of class members were taking other medication at the same time. The Defendants would have argued that some of the side effects were more likely to have been caused by the other medication;

Prior Use: A number of class members took steroid medication previously. The Defendants would have argued that if they did not "flare" upon cessation of that earlier

use, then it is unlikely that any current “flare” was properly attributed to the Miralex Cream.

DAMAGES RISK

53. Assuming the assumptions above are correct, I believe that the amount that will actually be awarded to the class members is a fair reflection of the amount that could reasonably have been expected to have been received by class members for non-pecuniary damages after full trials, without having to incur all of the expense, time and risks of a full trial.
54. On the other hand, the Defendants’ intended to argue that the appropriate damages figures were between \$250 and \$3000 dollars.
55. It was decided not to include any pecuniary losses in the calculation of damages given the very few class members who appeared to have suffered this kind of loss and the complexity involved in its calculation. Further, the higher damage awards can properly be viewed as including some pecuniary element.

REASONABLENESS OF THE FEE

56. The contingency fee agreement provides for recovery of 30% if the matter is settled more than 90 days prior to trial. The 30% was set out in the initial court approved notice, yet no class member came forward to object to the contingency fee agreement.
57. Unlike other cases, there was no simultaneous negotiation of the proposed fee and the award for the class. Nor is there any direct payment of class counsel fees by the

defendants. As such, the ethical issues that sometimes arise in such cases do not exist here.

58. Furthermore, the defendants do not retain any reversionary interest in the value of the fund. As such, all of the benefit of the fund net of expenses accrues to the class. Therefore, it is proper to apply the contingency fee to the entire award, without concern that the actual amount paid out to class members will fall below the amount committed by the Defendants, as occurs in some cases.
59. In determining whether the agreed fee is reasonable in the circumstances, the following factors are reviewed.

Time Expended

60. To March 13, 2002, the hours expended by Branch MacMaster in the prosecution of this matter were as follows:

	Hours	Normal Rate	Total at Normal Rates
To March 13			
Jim MacMaster	161.5	275	44,413
Ward Branch	331.4	250	82,850
Don Lebens	40.1	180	7,218
John Kleefeld	5.0	160	800
John Boccabella	21.6	100	2,160
Cathy Barzo	38.0	95	3,610
 Branch MacMaster Total			 141,051

61. I estimate that there will be another 50 hours spent by our firm on this matter, in terms of dealing with class members before and after settlement approval, and in preparing and presenting the settlement approval motion. At an average hourly rate of \$235/hour, this yields a further amount at regular hourly rates of \$11,750.
62. The hours expended by the Hanson Wirsig Matheos firm are set out in separate affidavits sworn by James Hanson.
63. The fee derived from the contingency fee arrangement represents a multiplier of less than 1.2 over the value of the time to date and projected time at regular hourly rates. In my opinion, given the result achieved, this is a very fair fee.
64. This was an extremely difficult case to manage. The action was vigorously defended. No stone was left unturned by the defence in opposing the validity and value in the claims. At different stages it was necessary for all counsel to play an active role in aspects of the case, including the managing of class members, interacting with defence counsel or coverage counsel, drafting and proposing various settlement structures, preparing for mediation, and advancing the action.
65. While certification was eventually agreed to, that agreement only came together in the days leading up to the scheduled certification hearing. As such, full pre-certification preparation was required.
66. Once the plaintiffs convinced the defendants to come to the table, it was a struggle to obtain even the most basic information, particularly given the insurance coverage issues which made defence counsel's efforts to seek instructions very difficult. Both coverage

counsel and defence counsel continually made reference to the difficulties they were facing in managing the complexities of the case.

67. There were multiple layers of insurance, causing plaintiff's counsel to have to attend one failed mediation effort with the first level before we were able to convince the insurers that the second level of insurance over \$1 million was engaged.
68. The defendants sought every procedural protection possible in relation to the mediation and all other steps, which resulted in multiple adjournments of the mediation. The difficulties became so great that the plaintiffs deemed it necessary to set the matter down for trial so that the defendants were faced with a clear end point which could not be avoided.
69. The defendants provided extensive expert reports to support every point, including delivering multiple reply reports.
70. I have been retained as counsel in several class actions on both the plaintiff's and the defendant's side. As a result of the multiple complications, this was one of the most difficult cases I have managed. Similar sentiments were expressed by many of the counsel involved in the case for the plaintiffs, the defence and for the insurers.

MEDIATORS OPINION

71. This matter was mediated over a period of 4 days before Mr. W.J. Wallace, Q.C. Mr. Wallace has provided a letter setting out his support for the proposed settlement, which is attached as Exhibit "N".

SWORN BEFORE ME at Vancouver, British Columbia on March _____, 2002.)

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A Commissioner for taking Affidavits for British Columbia

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JAMES H. MACMASTER