

No. S000294  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**BETWEEN:**

**STEPHEN ALAN HEAD**

**PLAINTIFF**

**AND:**

**MIRALEX HEALTH CARE INC.  
HUESON PHARMACEUTICALS CORP.**

**DEFENDANTS**

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**SETTLEMENT APPROVAL HEARING  
BRIEF**

## Introduction

1. Settlement Approval by the court is required under s. 35 of the *Class Proceedings Act* for protection of the interests of the absent class members in the face of a settlement being undertaken on their behalf.

*Class Proceedings Act*, R.S.B.C. 1996, c. 50 (“*Class Proceedings Act*”)

2. The legal test for settlement approval in a class action context covers a range of issues. Justice Maczko, in *Class Proceedings Act, Annotated*, has enumerated 16 factors for consideration in the approval of a class action settlement agreement:

Factors in Approval of Settlements:

- a. Is the settlement fair and reasonable? If it is not, should the court consider whether a new representative plaintiff should be found?
- b. Are the plaintiffs better served by the settlement than a trial, which includes future expense and additional litigation?
- c. What is the likelihood of success?
- d. Are the named plaintiffs or the representative getting a larger share of the settlement?
- e. Are particular segments of the class being treated and, if so, why?
- f. Is the settlement value below the amount claimed and, if so, why?
- g. Have major claims been omitted?
- h. Will the settlement affect any claimants who are not members of the class?
- i. What are the recommendations and experience of counsel?
- j. Do many class members object to the settlement and, if so, why do they object?
- k. Have cogent objections to the settlement been raised?
- l. What are the recommendations and experience of counsel?
- m. Are there conflicts of interest in the representative or counsel? Was there indirect bargaining?
- n. Were counsel fees negotiated in the settlement? How big a factor were they? Should an independent review of the fees be ordered?
- o. What is the amount and nature of discovery, other evidence, or investigation? Should further discovery be ordered or expert opinions be obtained to be sure that the settlement is fair and reasonable (for example, an actuary to value the settlement or a review of legal fees.)
- p. Have the absent class members received adequate notice of the settlement and its consequences?

Maczko, Frank. Class Proceedings Act, Annotated. (2000) Continuing Legal Education Society: Vancouver. (“Class Proceedings Act–Annotated”), p. 82.

3. The existing body of case law notes other factors which, although they overlap with many of the factors listed above, are worthy of distinct consideration given the circumstances of this case:
  - a. recommendations of neutral parties;
  - b. degree and nature of communications by counsel and the representative plaintiff with class members during the litigation,
  - c. information conveying to the court the dynamics of, and positions taken by the parties during negotiation.

*Dabbs v. Sun Life*, [1998] O.J. 1598, O.S.C. (“*Dabbs*”), para. 13.  
*Haney Iron Works Ltd. v. Manulife Financial*, [1998] B.C.J. No. 2936, B.C.S.C. (“*Haney*”), para. 23.

4. It should be noted that such factors have been described as a “guide in the process” only. Some may be attributed greater significance while others may be disregarded or amalgamated depending on the nature of the facts in each case.

*Parsons v. Canadian Red Cross Society* [1999] O.J. No. 3572 (O.S.C.), para. 73.

## **Consideration of Factors for Analysis**

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### **1. Is the settlement fair and reasonable? If it is not, should the court consider whether a new representative plaintiff should be found?**

5. In approving a settlement agreement the court must find “the settlement is fair, reasonable and in the best interests of those affected by it.”

*Dabbs*, para. 9.  
*Haney*, para. 27.

6. A settlement must fall within a range of reasonableness. This range of reasonableness has been described by the court:

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 interest of those affected by it when compared to the alternative of the risks and costs of litigation.

*Dabbs v. Sun Life*, (1998) O.R.(3d) 429 (O.S.C.) ("*Dabbs 2*"), pg. 8.  
*Sawatzky .v Societe Chirurgicale Intrumentarium Inc.* [1999] B.C.J. No. 1814 (B.C.S.C.) ("*Sawatzky*"), para. 21.

7. Class counsel submits that, given the risk factors and limitations inherent in this case, the proposed Settlement Agreement is fair and within the acceptable range of reasonableness.
8. Class counsel further submits that notwithstanding the risk factors and limitations, the proposed Settlement Agreement:
1. provides a recovery fund adequate for covering claims; and
  2. distributes the fund through a simple, objective and fair means.

**Adequate coverage of claims**

9. While it would be most desirable to know the exact number and amount of each claim, the nature of class litigation often requires that class counsel estimate the potential.
10. Class counsel submits that the Settlement Agreement allows for a fair and adequate

coverage of class members claims based on estimated values for the:

1. number of claimants; and
2. range of outcomes for each claimant.

### **Estimating the expected number of claimants**

11. It is estimated that the number of actual claimants who will advance claims for compensable personal injury will be in the range of 200. The basis for this estimate is set out below.

Affidavit of James H. MacMaster (“MacMaster”), para. 10-18.

12. Notice to class members was issued when this case was certified. The campaign included direct mail to all class members of whom the Defendants had knowledge and newspaper advertising across the country. Class counsel 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.

MacMaster, para. 10.

13. 351 class members contacted Plaintiff’s counsel as a result of this notice campaign.

MacMaster, para. 11.

14. Given the structure of the *Class Proceedings Act*, the size of the extra-provincial class is fixed at 256. No other extra-provincial class members will be entitled to opt in. Given that there were approximately 1235 extra-provincial customers persons eligible to opt in, the response rate was approximately 20%.

MacMaster, para. 12.

15. The total number of class members in B.C. who purchased at least 4 ounces of Miralex

Cream, and would therefore be eligible to apply for benefits, is approximately 900. The number of class members from B.C. who have contacted class counsel to date is 99. While it is possible that the remaining 800 class members could now seek to participate in the settlement, for the reasons set out below, it is expected that relatively few will advance claims.

MacMaster, para. 13

Affidavit of Peter Hughes dated August 31, 2000, Exhibit "L"

16. First, even though they did not formally need to do so in order to be part of the class, the notice specifically encouraged class members from B.C. to contact class counsel.

MacMaster, para. 14.

17. Second, assuming that B.C. residents had been required to opt in (which they will effectively have to do in order to participate in the settlement), the extraprovincial experience suggests that only about 20% would have done so, or approximately 180 of the 900. Since 99 have already contacted Plaintiff's counsel to date, the number of interested (but unknown) B.C. class members could reasonably be estimated to be in the range of 80..

MacMaster, para. 15.

18. 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.

MacMaster, para. 16.

19. Given that the requirements for seeking payment under the settlement are more rigorous than the steps required to complete the voluntary questionnaire, it could be assumed that no more than 162 of the 351 known class members will come forward to advance claims,

or approximately 50%.

MacMaster, para. 17.

20. In relation to the estimated 80 interested but unknown B.C. class members, it is therefore projected that 50% of the estimated 80 will come forward with personal injury claims. This yields a global estimate of approximately 200.

MacMaster, para. 18.

### **Distribution through the “Point System”**

21. The proposed Settlement Agreement distributes claims based on points calculated from claimants responses to a number of questions concerning their experience with Miralex.

MacMaster, Miralex Settlement Claim Form, Exhibit “A”, Appendix A.

22. After all claims are submitted each claimant will receive an amount of the global recovery fund proportionate with their number of points. This framework for distributing claims ensures that the entirety of the available fund, net of expenses, goes to claimants, and that individual claimants within the class receive as much compensation as possible, but still an amount in proportion to their damages.

23. The implementation of a point system in settling the value of individual claims has found approval in class actions with similar factual settings. In *Sawatzky*, the court approved a settlement to compensate class members who had received defective facial bone implants that caused complications of varying severity. The approved agreement included a distribution system that set the level of compensation based on points awarded for the number of implants, age at implantation, nature of symptoms, and severity of injury.

*Sawatzky*, para. 1.

24. Class counsel submits that the use of a point system in settling individual claims is the fairest and most effective way of administering the claims. It is conceded that this framework does not allow for the hearing and first hand assessment of each individual claim. However, any process satisfying this would be expensive and inefficient, and may ultimately drain the limited amount of the fund available for recovery. Given that there is a fixed pool of recovery funds to draw from, it is most fair to all members of the class that claims are not heard on their individual merits but rather are distributed administratively based on objective factors that, to the extent possible, mirror the likely results of a full hearing.
  
25. In *Dabbs*, Justice Sharpe confirmed that the court is concerned with the interests of the class as a whole rather than the demands of a particular class member.  

*Dabbs*, para. 11.
  
26. Class counsel submits that this Settlement Agreement utilizes a particular point system which distributes the recovery fund in an efficient, effective and fair way given all the circumstances, discussed further below.

**The point system is based on objective standards**

27. *More points are available the more product that was used.* In the majority of cases, using more product will result in longer and more severe symptoms and/or suffering. While it is true there is not a perfect correlation, the amount of product used is a reasonable indicator of damages when accompanied with the other standards.
  
28. *Class members who used so little that they would not suffer damage will gain no points.* Medical experts consulted during this litigation agree that a person applying less than 4 oz. of this product would not suffer any damage. Indeed, the Defendants' physicians suggest that damage would not occur until far greater amounts were used. Withholding points from these class members ensures that questionable claims will not drain the recovery fund.

29. *More points are available for more serious side effects and symptoms, and for the duration of those side effects.*
  
30. *Corroboration by a medical doctor increases the level of recovery:* The point value attributed to any symptoms will double with corroborating evidence from a doctor. It is important to note that while medical corroboration of symptoms is a valuable and reliable tool for identifying meritorious claims, it is imperative to also allow for successful claims absent medical corroboration. Miralex was originally distributed as an “all-natural” product, which may appeal to people not wishing to seek traditional medical attention. This factor needs to be balanced with the reasonable expectation that those suffering would often seek a medical opinion of some kind. Class counsel submits that doubling the points for those symptoms confirmed by a medical opinion achieves this balance.

#### **The System has Received the Approval of Experts in the Field**

31. The manner in which the recovery fund is to be distributed has been approved by medical experts involved in this case as fair and reasonable from a medical standpoint.  
Affidavit of Dr. Neil Shear, para. 2.  
Affidavit of Dr. Stuart Maddin, para. 2.

#### **The System has Protections against Fraud**

32. Given that the amount of recovery is dependent on the claims of the other class members, it is essential that the claims process be protected against fraudulent or frivolous claims. At the same time, in order to maximize the recoverable amount for the class, these protections must be afforded in an efficient and inexpensive manner. Class counsel submits that the following characteristics of the settlement achieves these ends.

33. *Each claimant will be required to swear a statutory declaration as to the truth of their reported symptoms.* The need to attend before a lawyer or notary public to swear the declaration should discourage frivolous or casual claims.

Claim Form, Exhibit A, Appendix A, pg. 10

34. *The claims process will be overseen by Arthur Andersen LLP.* Andersen has appointed a team of professionals with experience in claims administration processes.

MacMaster, Andersen Memo, Exhibit "B"

35. *Defense Counsel will provide the Claims Administrators with a purchase list for cross referencing the purchase claims.* This will allow the Claims Administrators to verify the credibility of the claim by cross referencing the purchase list with the amount of product reportedly used by the claimant.

36. *The Claims Administrator can apply for directions from the court should intractable issues arise.*

37. *The persons who obtain the largest point values will be those who have verification from a medical physician.*

### **Estimated Recoveries**

38. 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 claimants);

Affidavit of Michelle Tribe-Soiseth, Defendant's Mediation Brief, para. 202

- 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;
- f. the fund available for distribution to class members is \$837,065.25 (\$1.4 million less proposed disbursements, fees, taxes and administrative expenses of \$25,000)

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.<sup>1</sup>

MacMaster, para. 30.

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<sup>1</sup> 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

39. Running a few scenarios based on the preceding estimates yields the following net amount payable to class members after payment of all legal fees, disbursements, taxes and administrative expenses:

1. Purchaser of at least 4 ounces from the uninsured company, Hueson Pharmaceutical Corp, no physician support required: \$450-\$900
2. 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 cannot obtain any physician support: \$900-\$1800
3. Purchaser from Miralex Health Care Inc. 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;
4. Purchaser from Miralex Health Care Inc. 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

MacMaster, para 31.

40. Given:

1. that no defences will be advanced by the defendants to limit recovery of any class members;
2. the claims process is extremely simple and does not require personal attendance before a court or claims administrator;
3. the estimated recoveries are net of deductions for legal fees, disbursements and taxes;

these recoveries are reasonable, even before one considers the risks on liability, causation and recoverability;. The risks are discussed in greater detail below.

MacMaster, para. 32.

41. In relation to the administrative expenses, the Plaintiff's have received a very positive quote from the Claim Administrator estimating that the required work can be done for \$25,000. Furthermore, the agreement makes it necessary for the Administrator to seek

court approval for any fee greater than \$35,000. These steps and features ensure that the fund will not be improperly depleted for defence costs.

42. One other positive feature of the settlement is that although the Plaintiffs have retained the class members right to pursue the manufacturer of the product (“Manon”), for their percentage fault in the process, should they wish to do so. This took some substantial negotiation, given that the Defendants would have preferred to any potential for future litigation regarding this matter.

**2. Are the plaintiffs better served by the settlement than a trial, which includes future expense and additional litigation?**

43. The answer to this question is an unqualified “yes”.
44. Unfortunately, the available amount of recovery is limited by form of the insurance policy. The policy had “declining limits”. This means that the limits of liability insurance - originally \$5 million - decline as defense costs are expended. At the time of this settlement it is estimated that more than \$1 million had been spent defending the case. This was before any documentary or other discovery processes had begun, and before the common or any individual trials had occurred.
45. If mediation failed and the case proceeded to trial, there was a real risk that any available recovery would have been consumed by defence fees, even by the time of the common issues trial. In particular, there was the real concern that by the time of any individual issues trials defense counsel would defend so vigorously as to completely deplete the limited fund for recovery.

Affidavit of Michelle Tribe-Soiseth (“Tribe-Soiseth”), para. 5.  
MacMaster, para. 38-39.

46. The structure of this policy also meant that the insurer had little incentive to settle given that fighting the case did not increase the insurer’s global exposure by \$1.00. In the usual

circumstances, the defence has motivation to settle in order to avoid incurring defence costs which can take them above and beyond their liability exposure. The declining limits policy served to greatly diminish this usual leverage.

Tribe-Soiseth, para. 5.

MacMaster, para. 40.

47. Given that class members will make a recovery under this Settlement Agreement comparable with the potential recovery available after a full trial, and given that class members are able to make this recovery without incurring the time, expense or risks of the trial, (more fully explained below) it is clear that this Settlement Agreement is not only fair and reasonable but preferable to extended litigation.

### **3. What is the likelihood of success?**

48. The success of the Plaintiffs' case was made less certain by a number of risk factors-issues concerning the insurance policy, liability, causation and damages were all potentially fatal to the Plaintiffs' ability to succeed and/or recover.

#### **Insurance Risk**

49. Certain characteristics of the insurance policy and certain facts of this case called into question the extent of insurance coverage available. These coverage issues are set out in detail below.

MacMaster, para. 33-48.

#### **Declining Limits**

50. As noted, the implications of the policy being of "declining limits" form was to limit the Plaintiff's leverage during negotiation while at the same time making extended litigation a factor jeopardizing the class' chance of recovery.

MacMaster, Letter from William Clark, coverage counsel for Miralex's insurers, Exhibit "M" ("Clark letter"), p. 372.

### Misrepresentation

51. There was a serious concern that 1) Miralex misrepresented the nature of the cream when it applied for insurance, and 2) that the steroid was placed in the cream intentionally or with wilful blindness. If either of these scenarios were found to be true, coverage could have been denied based on a failure to disclose or "intentional act" exclusion.

Clark Letter, pg. 370.

MacMaster, para. 42-43.

### The "Hueson Problem"

52. Hueson Pharmaceutical Corporation ("Hueson") was a company incorporated in Washington State in 1988. In August of 1997, Hueson entered into a distribution agreement with Manon Pharmaceuticals and cosmetics to distribute Miralex Cream. Hueson did not obtain any liability insurance. In 1998, a BC numbered company which later became Miralex was incorporated. In 1999, Miralex began the sales and marketing of Miralex Cream. Defence counsel took the position that Miralex is not responsible for the effect of any sales made by Hueson. It may have been successfully argued that for those class members who also purchased from Hueson, their damage occurred prior to the inception of the policy.

Clark Letter, pg. 370.

MacMaster, para. 33-36.

### Appropriate "Trigger"

53. 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 January, 1999. Also, 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 first occurred prior to January 1999.

Clark Letter, pg. 371.

MacMaster, para. 44.

### Deductibles Argument

54. The insurer may have been able to argue that the deductibles applied to each class member, rather than to the class as a whole, which could have greatly reduced if not negated each individual’s recovery.

Clark Letter, pg. 371.

MacMaster, para. 46.

### Coverage of Injury Claims, Not Economic Loss

55. Another problem with the insurance coverage is that it only covers personal injury claims rather than claims for economic loss. As such, the Settlement Agreement does not contemplate any recovery for the cost of purchasing the cream.

MacMaster, para. 47.

### **Liability Risk**

56. The defendants made no admission of liability and they intended to argue that the steroid was not in every jar. The Defendants had obtained some tests that did not show the presence of steroid in certain product. It is possible that several class members may not have met the burden of establishing that the product was in the jar they applied.

## **Causation Risk**

57. The disagreement as to causation was fueled by conflicting expert medical reports. Class counsel argued that injuries as a result of using Miralex ranged from short term flare-ups of a fairly minor nature to permanent worsening of the condition and/or permanent scarring. Defence counsel argued that any injury from the usage of Miralex was only temporary and of a minor nature, and that the permanent worsening of the condition was not scientifically supportable based on the current research available.

Tribe-Soiseth, Defendant's Mediation Brief, Part 19.

58. 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.

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Amount of Product Used: Medical experts for the Defence maintain that injury from Miralex would only be possible after a minimum dosage of 7 four ounce jars. Defence counsel may have been able to argue that only those class members having purchased over this minimum amount should be eligible to make a claim. After review of the 351 known class members, Defence counsel claimed that the actual number of claimants who purchased over this amount and therefore would be considered eligible claimants were only 18.

Tribe-Soiseth, para. 26-27, Defendant’s Mediation Brief, para. 209.

### **Damages Risk**

53. The defendants considered the injuries of a mild nature and intended to argue that the appropriate damages figures were between \$250 and \$3000.

Tribe-Soiseth, para. 33, Defendant’s Mediation Brief, Part 19.

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### **4. Are the named plaintiffs or the representative getting a larger share of the settlement?**

54. The named plaintiffs will have their claims assessed on a point scale in the exact manner as the rest of the class.

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### **5. Are particular segments of the class being treated differently and, if so, why?**

55. All members of the class are subject to the same point system . Those that purchased the Miralex cream prior to January 1, 1999 are receiving only one point. Before this time the product was distributed by Hueson. As noted, the fundamental problem with Hueson is that it has no assets nor did it purchase any insurance. Class members who used less than

four ounces of the product will not be compensated, but the medical evidence is that injury is either unlikely or impossible at that level of usage. The most rare potential side effects are not been specifically compensated, but the number of persons likely to have suffered such side effect is expected to be very low and such persons are expected to have had some of the far more common side effect as well.

MacMaster, paras. 33-36.

**6. What are the recommendations and experience of counsel?**

56. Class counsel have substantial experience in the area of class actions and are supporting the settlement.

**7. What is the amount and nature of discovery, other evidence, or investigation?**

**Should further discovery be ordered or expert opinions be obtained to be sure that the settlement is fair and reasonable (for example, an actuary to value the settlement or a review of legal fees.)**

57. This case primarily concerned medical issues. These issues were exhaustively canvassed in many reports from both sides.

MacMaster, Medical Report of Dr. Neil Shear, Exhibit F, pg. 18-154

MacMaster, Supplementary Medical Report of Dr. Neil Shear, Exhibit G, pg. 155-160

MacMaster, Medical Report of Dr. Stuart Maddin, Exhibit H, pg. 169-359.

MacMaster, Letter of Dr. Stuart Maddin (Jan.3, 2002), Exhibit I, pg. 360.

Tribe-Soiseth, Medical Report of Dr. Howard Maibach, Defence Exhibit B, pg. 174.

Tribe-Soiseth, Letter of Dr. Howard Maibach (May 25, 2001), Defence Exhibit C, pg. 193.

Tribe-Soiseth, Letter of Dr. Howard Maibach (Nov.7, 2001), Defence Exhibit D, pg. 194.

Tribe-Soiseth, Medical Report of Dr. Frank Parker, Defence Exhibit E, pg. 203

Tribe-Soiseth, Letter of Dr. Frank Parker (Jan. 10, 2002), Defence Exhibit G, pg. 222.

Tribe-Soiseth, Medical Report of Dr. David Kendler, Defence Exhibit H, pg. 229.

Tribe-Soiseth, Letter of Dr. David Kendler (Oct. 10, 2001), Defence Exhibit I, pg. 235.

Tribe-Soiseth, Letter of Dr. David Kendler (Nov. 19, 2001), Defence Exhibit J, pg. 249.

58. A key factor affecting the bargaining positions of the parties was that Miralex and Hueson had no assets. The Plaintiffs insisted on and obtained statutory declarations confirming that there were no available assets.

**8. Have the absent class members received adequate notice of the settlement and its consequences?**

59. The form of notice was addressed by this court and approved by the court. Mr. Hanson has reviewed the response at the last case management hearing.

**9. Degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation?**

60. Class counsel maintained a high level of communication with the representative plaintiffs throughout the negotiation and mediation which lead to the settlement of this case.
61. Information as to the status of the litigation was regularly posted on the Branch MacMaster website. In addition, class members' inquiries were promptly addressed and answered through mail, email and numerous telephone calls. A questionnaire was delivered to all known class members prior to the mediation, which helped govern class counsel's conduct during the course of the mediation.

**10. Do many class members object to the settlement, and if so, why? Have cogent objections to the settlement been raised?**

62. This will be considered further at the hearing. Many class members are very positive

about the Settlement Agreement, as reported by Mr. Hanson at the last case management conference.

**11. Are there conflicts of interest in the representative or counsel? Was there indirect bargaining?**

63. No conflicts of interest emerged, and no indirect bargaining employed has been employed in the formation of this Settlement Agreement.
64. Counsel from both sides demonstrated good faith bargaining at all times during the negotiation process. The conduct of counsel was observed and commended by the mediator during efforts leading to this Settlement Agreement.

Letter of W.J. Wallace, Exhibit N.

**12. Fees**

68. The *Class Proceedings Act* addresses issues regarding agreements respecting fees and disbursements in s. 38. Factors in analyzing Approval of Fees and Disbursements has been set out by Justice Maczko in Class Proceedings Act - Annotated. They are:
1. time and labour required;
  2. novelty and difficulty of the question;
  3. skill required to perform the legal services properly;
  4. preclusion of the employment by counsel as a result of acceptance of the case;
  5. counsel's customary fee;
  6. whether the fee is fixed or contingent
  7. time limitations imposed by the client or the circumstances;
  8. the amount involved, result obtained, and number of persons benefitted;
  9. the experience, reputation, and ability of counsel;
  10. the undesirability of the case;
  11. the risk of non-payment;

12. the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel;
13. fees in similar cases.

Class Proceedings Act – Annotated, pg. 93.

*Class Proceedings Act*, s. 38.

### **Proposed Fee Structure**

70. The proposed fee is based on a 30% contingency agreement made with Mr. Head at the commencement of the action. Class members were made aware of this proposed contingency fee arrangement at the outset of the litigation, and again when the settlement was proposed.

MacMaster, Retainer Agreement, Exhibit L, pg. 366.

### **Time and labour required**

71. Class counsel has made a significant investment in both time and expenses to reach an adequate settlement.

Affidavit of James MacMaster sworn April 17, 2002 (MacMaster 2)

Affidavits of James Hanson sworn February 4, 2002, March 7, 2002, and April 16, 2002

### **Novelty and difficulty of the question**

72. As previously noted, class counsel was forced to wrestle with contentious legal issues at different times during the settlement process. Of particular difficulty were the issues surrounding insurance coverage and causation.

### **Skill required to perform the legal services properly**

73. The management of any class action is difficult. However, the various risk factors and circumstances associated with this claim made management particularly difficult in this case.
74. As described earlier, the declining limits insurance policy gave the Defence little incentive to settle, removed a great amount of leverage for the Plaintiffs, and subjected class counsel to a race against time, where further expenditures by either side meant lessening the available fund for recovery.
75. Management of this claim was also made difficult due to the lack of a clear and cohesive expert medical opinion on the causation issue. It is customary to rely heavily on medical evidence where available, and particularly in a medical-products liability dispute. However, the fact that the exact concentration of the steroid in the cream was unknown and/or exceeded concentrations which medical studies had dealt with meant that medical experts were left to speculate more than rely on existing scientific studies.
76. The logistics of assembling the class and defining the injuries of class members was extremely difficult. There exists a wide range of injuries which are dependent on a number of different factors, including the duration of Miralex usage, the quantity of Miralex used, the duration of the side effects and the extent of the pre-existing condition. This situation created the necessity for comprehensive research for counsel to have an in-depth understanding of the medical science involved in order to ensure that a Settlement Agreement could fulfill the claimants needs.

**Reclusion of the employment by counsel as a result of acceptance of the case**

77. Aside from doing class action work Branch MacMaster has a busy general civil litigation practice, acting for defendants and insurance companies both in class actions and other areas. Time spent prosecuting this case could have been easily substituted with existing defence files, and the firm's usual hourly rates with no risk of non-payment.
78. Hanson Wirsig Matheos primarily deals in personal injury law. The resources put into this

settlement would certainly have been used to secure more clients or advance existing files.

**Time limitations imposed by the client or the circumstances**

79. As noted, the declining limits policy provided that class counsel seek to minimize not only its own costs but also those of Defence counsel which were vigorously defending the claim on every issue. The longer the case proceeded the greater the risk that the recovery fund would become inadequate.

**The experience, reputation, and ability of counsel**

80. Class counsel are recognized as experienced in this field.

### **The undesirability of the case**

81. While class counsel would not characterize this case as undesirable, it may be said that it was less attractive than other class actions in the likelihood to compensate for the risks involved. It was a case which needed to be prosecuted and done so diligently, but at no point was it attractive based on its remunerative qualities.

### **The risk of non-payment**

82. For the reasons already outlined in detail, including the risks involving the insurance policy and the fulfillment of the legal tests for causation and liability, there was a very real risk that (a) the plaintiffs could lose the case if it were to proceed, or (b) that the funds remaining after a vigorous defence would be insufficient to cover growing class counsel costs.

### **The amount involved, result obtained, and number of persons benefitted**

83. For reasons articulated, the result of this Settlement Agreement is the compensation of claimants at levels comparable to the results which could be obtained through individual trials, but without the associated expense, time or risk. The Settlement Agreement benefits those who otherwise would not have the means to make a claim, or who do not have a claim substantial enough to justify pursuing an action on an individual basis. This settlement will likely provide class members throughout the world with access to justice and compensation to a degree that is of equal or greater value than what they might otherwise have obtained.

### **Fees in similar cases**

84. Class actions in B.C. have approved fees on a contingency basis in the range of 20-30%. It is also necessary to assess the proposed fee perceiving it as a multiplier value. Generally,

class counsel fees ranged from 1.0 to a 3.0 multiplier.

Branch, Ward K. Class Actions in Canada Western Legal Publications:  
Vancouver, p.7-6

85. As noted, the proposed fee in this case is based on a 30% contingency. This is justified given that on a multiplier basis this would equate to approximately 1.16. This low multiplier is a testament to the difficulty in managing this case and class counsel's commitment to represent the class as diligently as possible. A multiplier at any less an amount would discourage counsel from taking on such difficult cases.

MacMaster 2

86. The usual objection to contingency fee arrangements in class actions is that class counsel may be compensated far in excess of the value of the work done. That is certainly not the case here, where the class are essentially only compensating counsel for each hour of work done, with a very small premium to offset the risk of non-payment or delayed payment.

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## **12. Recommendations of neutral parties**

87. The mediation leading to this Settlement Agreement was conducted by former Justice W.J. Wallace over January 15-17, 2002. Mr. Wallace has stated his support for the agreement, particularly given the nature of the claim, the alternative of going to trial, and the nature of the declining limits policy. Mr. Wallace also expressed the opinion that this Settlement Agreement is in the best interests of all of the class members.

Letter of W.J. Wallace, Exhibit N, pg. 373.

88. As noted, this agreement also has the support of the well-respected medical experts assisting with the case.

Affidavit of Dr. Neil Shear, para. 2.

Affidavit of Dr. Stuart Maddin, para. 2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 17, 2002

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Ward Branch  
Counsel for the Plaintiffs