

Form 39.08

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

**Supplemental Affidavit of Madeleine Carter
Affirmed January 22, 2019**

I, Madeleine Carter, affirm and give evidence as follows:

1. I am a lawyer employed by the law firm of Wagners, in Halifax, Nova Scotia. I have been employed by Wagners since October of 2014. Wagners and Siskinds LLP are Class Counsel for the Plaintiffs and Class Members in the within proceeding.¹
2. I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information or belief.
3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.

¹ Unless otherwise stated or required by context, the capitalized terms in this brief have the meanings given to them in the Settlement Agreement.

4. I am providing this affidavit in support of the motions, to be heard on the 29th day of January, 2019, to approve the Settlement Agreement dated October 11, 2018 and to approve Class Counsel Legal Fees.
5. On December 14, 2018, I affirmed an affidavit in support of the Plaintiffs' motion to approve the Settlement Agreement ("Settlement Approval Affidavit") and a second affidavit in support of the Plaintiffs' motion to approve Class Counsel Legal Fees. I provide this affidavit to supplement information contained in each affidavit.

**SUPPLEMENTAL INFORMATION FROM MERCHANT LAW GROUP RE:
ESTIMATED NUMBER OF ELIGIBLE CLASS MEMBERS**

6. Merchant Law Group ("MLG") filed proposed class actions in six jurisdictions: BC, AB, SK, MB, NL and NS (collectively, the "MLG Avandia Actions"). In the Settlement Approval Affidavit I erroneously omitted reference to the sixth action, filed in NS.
7. At paragraph 83 of the Settlement Approval Affidavit, I stated that I had been informed by Anthony E.F. Merchant, Q.C. that approximately 1200 individuals have made contact with MLG with respect to the MLG Avandia Actions.
8. Subsequent to filing the Settlement Approval Affidavit I have been informed by Mr. Merchant that this number is more precisely 1214, and that this number includes all individuals who have contacted MLG relating to the MLG Avandia Actions from the time they were filed until January 10, 2019.
9. I am informed by Mr. Merchant that the vast majority of these individuals contacted MLG through the Avandia information webpage contained on MLG's website, at

<https://www.merchantlaw.com/class-actions/current-class-actions/avandia-national-class-action>.

10. MLG's Avandia webpage states: "Side effects from using Avandia can include cold-like symptoms, headaches, vision loss, swelling on many parts of the body, hepatitis, weight gain, tiredness or weakness, serious heart problems and other conditions."
11. MLG's Avandia webpage further states: "These class action lawsuits seek compensation for any individuals who have taken Avandia. Any consumers who may have used any of [sic] Avandia, whether experiencing symptoms or not, should contact our law firm by completing the questionnaire below. Please note, filling out the form below creates no financial obligation or cost for you."
12. The MLG Avandia Actions contain proposed class definitions including Avandia users suffering from a wide range of health problems alleged to be caused by Avandia. Attached and marked as **Exhibit "A"** to this affidavit is a description of the proposed class definitions advanced in the six MLG Avandia Actions.
13. Mr. Merchant has advised me, and I do verily believe, that MLG has not excluded from these 1214 contacts any individuals who: (i) are not Class Members (according to the definition in the within action); or (ii) allege Avandia caused side effects or injuries included in the MLG Avandia Actions, such as renal or kidney failure, frozen shoulder, weight gain/obesity, or vision problems, which are not the subject of the within action nor eligible compensable injuries under the Settlement Agreement.
14. Mr. Merchant has advised me, and I do verily believe, that MLG has not requested or reviewed the medical records of these 1214 individuals in order to determine whether

Avandia was used, the duration and/or timing of Avandia use, or whether the individuals experienced any injuries – including the narrower subset of cardiovascular injuries compensated under the Settlement Agreement – alleged to have been caused by Avandia.

15. Since the filing of the Settlement Approval Affidavit I have been informed by Mr. Merchant, and do verily believe, that he draws on his class action experience to estimate that of these 1214 individuals who have contacted MLG about the MLG Avandia Actions, only a fraction may be Class Members, and further still only a fraction of those who are Class Members will be eligible for compensation under the Settlement Agreement.
16. Mr. Merchant informs me that based on his class action experience, he anticipates that the number of Class Members eligible under the Settlement Agreement who have contacted MLG will be significantly fewer than 1214.
17. Mr. Merchant has further informed me, and I do verily believe, that he has only recently commenced the process of contacting these 1214 contacts to estimate the percentage who may be eligible Class Members.
18. In the context of national litigation in which overlapping actions are filed in various jurisdictions, it is reasonable to anticipate that some individuals will have contacted more than one firm representing Class Members. It is therefore expected that there will be some overlap between the 1214 individuals who have contacted MLG and those who have contacted Class Counsel and/or Related Counsel Firms, resulting in double counting of some individuals.
19. A review of the various percentages of individuals who have contacted Class Counsel and Related Counsel Firms who appear eligible for compensation under the Settlement

Agreement provides some assistance in estimating how many of MLG's 1214 contacts may have eligible claims, with some limitations in comparing the differing data.

20. Wagners has been contacted by 85 Class Members (versus individuals merely inquiring about the action). Wagners data is unique in that it does not include individuals who merely inquired about the action, but rather it includes only Class Members. As stated in the Settlement Approval Affidavit, Wagners has determined that 22 of these 85 Class Members appear to be eligible for compensation, upon reviewing medical information in its possession: 16 MI claims, 1 CABG claim, and 5 CHF claims. An additional 25 Class Members may be eligible for compensation (8 MI, 1 Stent, 16 CHF), but this cannot be presently determined as some required documentation is currently unavailable. If an assumption is made that these 25 individuals are, in fact, eligible under the Settlement Agreement, then 26 of 85, or 30.59%, may have eligible MI/CABG/Stent claims, and 21 of 85, or 24.7%, may have eligible CHF claims.

21. An analysis of the information provided by Siskinds and Related Counsel Firms yields differing results, with lower percentages than Wagners, presumably because the data of Siskinds and Related Counsel Firms relates to "contacts" rather than individuals pre-screened to be Class Members.
 - a. Siskinds – total of 917 contacts
 - i. 142 Pre-Approved MI/CABG/Stent claims
 - o $142/917 = 15.49\%$
 - ii. 34 Pre-Approved CHF claims
 - o $34/917 = 3.7\%$
 - iii. Additional 51 may have potentially eligible claims, specific category of injury unknown:

- If we apply the assumption that all 51 have eligible MI/CABG/Stent claims (the higher award category), although it is reasonable to expect that some will not:
 - A maximum of 193 (142+51) of 917, or 21.05%, may have eligible MI/CABG/Stent claims.

b. Guardian Law – total of 28 contacts

- i. 5 of 28, or 17.85%, may have eligible MI/CABG/Stent claims
- ii. 2 of 28, or 7.14%, may have eligible CHF claims
- iii. There are 21 contacts for whom eligibility cannot be determined due to incomplete medical records.

c. Consumer Law Group – total of 514 contacts

MI/CABG/Stent

- i. 6 apparently eligible MI claims
2 apparently eligible CABG claims
1 apparently eligible Stent claim
= 9/514 = 1.75% may have eligible MI/CABG/Stent claims
- ii. 18 additional contacts may have potentially eligible MI/CABG/Stent claims:
 - If we apply the assumption that all 18 will have eligible MI/CABG/Stent claims, although it is reasonable to expect that some will not:
 - A maximum of 27 (9+18) of 514, or 5.25%, may have eligible MI/CABG/Stent claims.

CHF

- i. 4 apparently eligible CHF claims
 - 4/514 = 0.78%
- ii. 3 additional contacts may have potentially eligible CHF claims
 - If we apply the assumption that all 7 (4+3) have eligible CHF claims, although it is reasonable to expect that some will not:
 - A maximum of 7/514, or 1.36%, may have eligible CHF claims.

d. McPhadden Samac Tuovi LLP – total of 10 contacts

- i. 1 of 10, or 10%, may have eligible MI/CABG/Stent claims.
- ii. 1 of 10, or 10%, may have eligible CHF claims.

e. Patient Injury Law – total of 1 contact

- i. The *Wiseman* action in NL was not materially advanced, and there is no information on potential Class Members in NL, other than the named proposed representative plaintiff in that action who may have an eligible myocardial infarction claim, although as of today's date there is no confirmation that he does.

22. Given that the figure of 1214 contacts provided by MLG relates to anyone who contacted MLG, whether a Class Member or not, and whether they experienced an eligible cardiovascular injury or some other unrelated side effect, is it reasonable to anticipate that the percentage of these 1214 individuals who will be eligible under the Settlement Agreement to be compensated for MI/CABG/Stent is significantly lower than the percentages above of 5.25%, 10%, 17.85% and 21.05%.²
23. For the same reasons, is it reasonable to anticipate that the percentage of these 1214 individuals who will be eligible under the Settlement Agreement to be compensated for CHF is significantly lower than the percentages above of 1.36%, 3.7%, 7.14% and 10%.³
24. Based on the currently available information from Class Counsel, Related Counsel Firms and MLG, Class Counsel continues to anticipate that the maximum number of claims contemplated by the Maximum Settlement Amount will not be reached (and thus no pro rata reductions applied) as the total number of Settling Claimants is estimated to be at or below 300 for each of the MI/CABG/Stenting category and the CHF categories, or, if there are more than 300 Settling Claimants who meet the criteria for payment of an MI, CABG, or Stenting claim, then there is expected to be some unused portion of the aggregate capped total of CAD\$1,000,000 available for payment of Settling Claimants who meet the criteria

² This excludes Wagners' data, as it relates to pre-screened Class Members rather than contacts.

³ This excludes Wagners' data, as it relates to pre-screened Class Members rather than contacts.

for payment of a CHF claim to be used for Settling Claimants who meet the criteria for payment of MI, CABG, or Stenting claims in excess of 300, pursuant to section 5.1(c) of the Settlement Agreement, as the number of eligible CHF claims is expected to be significantly fewer than 300.

NUMBER OF OPT-OUTS AND OBJECTIONS RECEIVED

25. As of the date of the filing of this affidavit, Wagners has received eight (8) opt-out forms.
26. Of these, two opt-outs have been determined to be sent in error: one of the opt-out forms was received from an individual who indicated that they had not used Avandia, and therefore were not a Class Member, and had previously mistakenly “registered” their interest in the litigation; a second opt-out form was received by someone who intended to communicate that he had already been communicating with one of the Related Counsel Firms and he therefore did not believe he needed to receive communication from a second firm. He wanted to continue to be represented by the first firm. After a conversation he clarified that he did not wish to opt out.
27. Of the remaining six (6) opt-out forms received, three (3) were received from individuals who indicate they have not experienced any of the eligible injuries, and the other three (3) opt out forms failed to include the portion inquiring about Avandia use/eligible injuries in order to permit this assessment.
28. As of the date of this affidavit, Wagners has received no notices of objection to the Settlement Agreement or to Class Counsel Legal Fees.

AFFIRMED before me on the 22nd)
day of January, 2019 at Halifax, Nova)
Scotia)



Signature of Authority)

LIAM H. M. O'REILLY
A Barrister of the Supreme
Court of Nova Scotia



Madeleine Carter)

2009

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This is Exhibit "A" referred to in the Affidavit of Madeleine Carter affirmed before me on the 22nd day of January, 2019.

A handwritten signature in blue ink, appearing to be 'LH M O'Reilly', written over a horizontal line.

Signature

LIAM H. M. O'REILLY
A Barrister of the Supreme
Court of Nova Scotia

EXHIBIT “A”

i) British Columbia Proceeding - Honour v. GlaxoSmithKline Inc. et al, Victoria Registry 07-3210

BRITISH COLUMBIA CLASS MEMBERS

Any person in the Province of British Columbia, who is taking or has taken Avandia, suffered or will suffer from one or more of the medical problems, including, but not limited to, heart failure or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or any person in Canada, who suffered or will suffer from one or more of the above-mentioned medical problems between March 21, 2000 to Jul[y] 31, 2007.

NON-RESIDENT CLASS MEMBERS

Any person in Canada but not in the Province of British Columbia, who is taking or has taken Avandia, suffered or will suffer from one or more of the medical problems, including, but not limited to, heart failure or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or any person in Canada, who suffered or will suffer from one or more of the above-mentioned medical problems between March 21, 2000 to Jul[y] 31, 2007.

ii) Alberta Proceeding - Allison v. GlaxoSmithKline Inc. et al, - Action No. 0701-08275

ALBERTA CLASS MEMBERS

(a) Any person, and their heirs and estates, in Alberta, who is taking or has taken Avandia, suffered or will suffer from one or more of the medical problems, including, but not limited to, heart failure, stroke or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or any person in Canada, who suffered or will suffer from one or more of the above-mentioned medical problems between March 21, 2000 to July 31, 2007.

NON-RESIDENT CLASS MEMBERS

(a) Any person, and their heirs and estates, in Canada but not in the Province of Alberta, who is taking or has taken Avandia, suffered or will suffer from one or more of the medical problems, including, but not limited to, heart failure, stroke or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or who suffered or will suffer from one or more of the above mentioned medical problems between March 21, 2000 to July 31, 2007.

**iii) Saskatchewan Proceeding – Estate of Wall et al. v. GlaxoSmithKline Inc. et al, -
QB No. 1073 of 2007**

SASKATCHEWAN CLASS MEMBERS

(a) Any person in Saskatchewan, who is taking or has taken Avandia, suffered or will suffer from one or more of the medical problems, including, but not limited to, heart failure or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or any person in Canada, who suffered or will suffer from one or more of the abovementioned medical problems between March 21, 2000 to Jul[y] 31, 2007.

NON-RESIDENT CLASS MEMBERS

(a) Any person in Canada but not in the Province of Saskatchewan, who is taking or has taken Avandia, suffered or will suffer from one or more of the medical problems, including, but not limited to, heart failure or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or who suffered or will suffer from one or more of the above-mentioned medical problems between March 21, 2000 to Jul[y] 31, 2007.

CLASS MEMBERS OF DECEASED RELATIVES

The Plaintiffs are representatives of a Class of persons in Canada, whose relatives including, but not limited to, spouses, children, parents and/or sisters and brothers have died after ingesting Avandia. more particularly, the **Relatives** include the following:

“Spouses” mean:

- (a) the wife or husband of the deceased; or
- (b) a person with whom the deceased co-habitated as spouses:
 - (i) continuously for a period of not less than two years; or
 - (ii) in a relationship of smne permanence, if they are the parents of a child.

“Parents” include father, mother, grandfather, grandmother, step-father, stepmother, a person who adopted a child, and a person who stood *in loco parentis* to the deceased; and

“Children” include son, daughter, grandson, grand-daughter, step-son, stepdaughter, adopted child a person to whom the deceased stood *in loco parentis*.

**iv) Manitoba Proceeding – Kernel v. GlaxoSmithKline Inc. et al. -
Action No. CI 07-01-53523**

MANITOBA CLASS MEMBERS

(a) Any person and their heirs and estates in Manitoba, who is taking or has taken Avandia, suffered or will suffer from one or more of the medical problems, including, but not limited to, heart failure, stroke, or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or any person in Canada, who suffered or will suffer from one or more of the above-mentioned medical problems between March 21, 2000 to July 31, 2007.

NON-RESIDENT CLASS MEMBERS

(a) Any person and their heirs and estates in Canada but not in the Province of Manitoba, who is taking or has taken Avandia, suffered or will suffer from one or more of the medical problems, including, but not limited to, heart failure, stroke, or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or who suffered or will suffer from one or more of the above-mentioned medical problems between March 21, 2000 to July 31, 2007.

**v) Newfoundland and Labrador Proceeding – Morris v. GlaxoSmithKline Inc. et al. -
Action No. 0597**

NEWFOUNDLAND AND LABRADOR CLASS MEMBERS

(a) Any person, or if deceased their personal representative, in Newfoundland and Labrador, who is taking, or has taken, Avandia and has suffered, or will suffer, from one or more medical problems, including, but not limited to, heart failure or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or any person in Canada but outside Quebec, who suffered or will suffer from one or more of the above-mentioned medical problems.

NON-RESIDENT CLASS MEMBERS

(a) Any person, or if deceased their personal representative, in Canada, but not in the Province of Newfoundland and Labrador or Quebec, who is taking, or has taken, Avandia and has suffered, or will suffer, from one or more of the medical problems, including, but not limited to, heart failure or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or who suffered or will suffer from one or more of the above-mentioned medical problems.

**vi) Nova Scotia Proceeding – *Finck v. GlaxoSmithKline Inc. et al.* -
Hfx No. 300379**

NOVA SCOTIA CLASS MEMBERS

(a) Any person, or if deceased their personal representative, in Nova Scotia, who is taking, or has taken, Avandia and has suffered, or will suffer, from one or more medical problems, including, but not limited to, heart failure or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or any person in Canada but outside Quebec, who suffered or will suffer from one or more of the above-mentioned medical problems.

NON-RESIDENT CLASS MEMBERS

(a) Any person, or if deceased their personal representative, in Canada, but not in the Province of Nova Scotia or Quebec, who is taking, or has taken, Avandia and has suffered, or will suffer, from one or more of the medical problems, including, but not limited to, heart failure or adverse cardiovascular events that may lead to death, heart attack or myocardial infarction (MI), renal or kidney failure, hepatitis, edema, anemia, frozen shoulder, weight gain or obesity, blindness or vision problems; or who suffered or will suffer from one or more of the above-mentioned medical problems.