IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Krishnan v. Jamieson Laboratories Inc.,* 2021 BCSC 1425

Date: 20210721
Docket: S199401
Registry: Vancouver

Between:

Uttra Kumari Krishnan

Plaintiff

And

Jamieson Laboratories Inc., WN Pharmaceuticals Ltd., Natural Factors Nutritional Products Limited, Vita Health Products Inc., Sisu, Inc., Sobeys Capital Incorporated, Rexall/Pharma Plus Pharmacies Ltd., Rexall/Pharma Plus Pharmacies (BC) Ltd., Rexall Pharmacy Group Ltd., Medicine Shoppe Canada Inc., Loblaw Companies Limited, Loblaws Inc., T&T Supermarket Inc., Shoppers Drug Mart Corporation, Shoppers Drug Mart Inc., Georgia Main Food Group Ltd., London Drugs Limited, Buy-Low Foods Limited Partnership, Buy-Low Foods Ltd., Choices Market Ltd., Save-On-Foods Limited Partnership, Save-On-Foods Ltd., Quality Foods Ltd., Pure Integrative Pharmacy, Pharmasave Drugs Ltd., Pharmasave Drugs (National) Ltd., Pharmasave Drugs (Pacific) Ltd., Pharmachoice Canada Inc., Costco Wholesale Canada Ltd., and Wal-Mart Canada Corp.

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Corrected Judgment: Paragraphs 4 and 7 of the judgment was corrected on August 18, 2021.

Before: The Honourable Mr. Justice Branch

Reasons for Judgment on Settlement Approval

In Chambers

Counsel for the Plaintiff:	D. Jones J. Fung M. Mounteer A. Sunter P. Chiswell Y. Guo
Counsel for the Defendants, Jamieson Laboratories Inc.:	C. Hunter, QC
Counsel for the Defendants, WN Pharmaceuticals Ltd. and Natural Factors Nutritional Products Limited:	R. Hawkes, QC K. Ervin C. Stokes
Counsel for the Defendants, Vita Health Products Inc. and Sisu Inc.:	M. Eizenga J. Blinick M. Laity
Place and Date of Hearing:	Vancouver, B.C. June 1, 2021
Place and Date of Judgment:	Vancouver, B.C. July 21, 2021

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I. INTRODUCTION

[1] On June 1, 2021, I approved a partial settlement of this class action with reasons to follow. These are those reasons.

II. THE FACTS

A. Generally

[2] I described the facts underlying this litigation in my reasons on certification as against certain other manufacturer defendants indexed at *Krishnan v. Jamieson Laboratories*, 2021 BCSC 1396. I will not repeat the facts set out therein except as necessary for this settlement approval decision. I will use the same defined terms.

[3] On this motion, the plaintiff seeks to certify the claim against two of the defendants, Vita Health Products Inc. and Sisu, Inc. (“Settling Defendants”), and to approve a settlement with these Settling Defendants (“Settlement Agreement”).

B. The Settlement

[4] The settlement includes the following core components:

1. a commitment to seek relabelling of their GS Products;
2. cooperation through the provision of documents; and
3. payment of $600,000.

[5] As for the relabelling, the Settlement Agreement contemplates a label change such that, once effected, these products will no longer reference "glucosamine sulfate", "glucosamine sulfate potassium chloride", "glucosamine sulfate KCL", or "glucosamine sulfate ♦ KCL". Instead, it is contemplated that the front labels will reference "glucosamine" or one or more brand names, and the back labels will reference "glucosamine hydrochloride" or such other commonly accepted chemical or proper names as are approved by the regulatory authorities.

[6] In terms of cooperation, the Settling Defendants will provide a representative sample of documentation (purchase orders, bills of materials, certificates of analysis,

and regulatory information sheets) from their manufacturers and suppliers of the raw glucosamine ingredients. Because much of this information is not publicly available, the plaintiff submits that this information will assist in the ongoing conduct of the action against the remaining defendants.

[7] The Settlement Agreement also provides for payment of $600,000. Class counsel says that in arriving at this figure, they considered confidential information provided by the Settling Defendants during the negotiation process, including information regarding the volume of commerce, the Settling Defendants' market share, and the Settling Defendants' profitability on the relevant sales. There is no proposal to distribute these funds at this time. They will be held in trust for the benefit of the class. A distribution plan will be put forward at a later date.

III. THE CERTIFICATION TEST

[8] The test for class certification is described in the Certification Reasons.

[9] Based generally on the same analysis which I applied to certify the claim in the Certification Reasons, I also certify the present claim for settlement purposes. As noted in *Wilson v. Depuy International Ltd*., 2018 BCSC 1192, aff'd 2019 BCCA 440, leave to appeal dismissed 2020 CanLII 60364 (SCC), although the requirements for class certification in a settlement context are the same as in a contested context, they need not be as rigorously applied: para. 50. This approach is consistent with the court's desire to encourage settlement, be it partial or otherwise: Catherine Piché, "Judging Fairness in Class Action Settlements" (2010) 28:1 Windsor YB on Access Just 111 at 120 (2010 CanLIIDocs 31) [Piché].

[10] I confirm that:

1. the action is certified as a class proceeding against the Settling Defendants, only for the purpose of settlement and in accordance with the terms of the Settlement Agreement.

2. the class is defined as follows:

> All residents of Canada who, on or after May 6, 2004, purchased a product labelled as containing "glucosamine sulfate", "glucosamine sulfate potassium chloride", "glucosamine sulfate KCL", or "glucosamine sulfate • KCL", for purposes that were primarily personal, family or household, that was manufactured by one of the Defendant Manufacturers except for the Excluded Persons.
>
> [the "Class".]

3. the plaintiff is appointed as representative plaintiff for the Class.

4. The certified common issue is:

> Did the Settling Defendants misrepresent the active ingredients in their Glucosamine Sulfate Products? If so, what damages, if any, did Settlement Class Members suffer?

IV. THE SETTLEMENT APPROVAL TEST

[11] The test for settlement approval is as set out in *Wilson*, at paras. 56-61. To those comments, I would add the following guidance from Piché at 129, 141, 146-7, 149-150:

> [The] judge must be active, forthcoming and engaged in "ascertaining ultimate verities." Judicial review must be "exacting and thorough." To overcome potential abuse, he or she must carefully scrutinize the proposed settlement, to determine whether it is "fair, reasonable and adequate" to the class…
>
> In the Canadian common law provinces, the court's role at the settlement approval stage is considered to be one of "protector of the interests of absent class members."…
>
> In the class action context, judges are naturally led to be more active and involved, due to the public interest nature of this kind of litigation, and to its length and complexity. This natural propensity to be more involved and active is even greater at the stage of assessing the fairness of proposed settlements. Hence, at that stage, judges should actively address and discuss the merits of the case, the extent of the injury at stake, and the elements each party has relinquished in the settlement negotiation process. They should also actively engage in ascertaining the substantive elements of fairness regarding the proposed settlement…
>
> In the peculiar context of class action settlement review, where settlement parties are more vulnerable and their rights more fragile, reviewing judges should be principally preoccupied with finding the truth and what is "just" about the settlement. They should assume that the truth will arise from a thorough review of the relevant evidence in light of what they believe are the true interests and advantages of the settlement to class action members. To find the "truth," judges should become closely involved in defining the legal

> and factual issues, and verifying that they are addressed adequately in the settlement agreement. They should never rely entirely on the lawyers to adequately gather and interpret the evidence. Class action representatives should be asked to explain why they agreed to the proposed settlement. Arguments from objectors and attorneys on file should be welcomed and carefully evaluated. This more "paternalistic," activist and outspoken judicial role would certainly, in my view, help preserve the rights of absent class members, and the respect of their interests…
>
> … Acting inquisitorially does not necessarily require conducting an additional extensive inquiry into the facts. It requires sifting through the evidence, absorbing oneself in it, and asking questions – aloud or not. These tasks can properly be effectuated by the judge. And, in any event, when a judge acquires full knowledge and understanding of his case, he or she "knows what to look for," and what questions must be asked.
>
> [Footnotes omitted.]

[12] I agree wholeheartedly with this guidance. Consistent with it, I advised counsel during the hearing of my expectation as to the level of disclosure required before I would be able to properly assess the proposed settlement. In particular, I emphasized the importance of putting the court in a position to appreciate whether the proposed settlement is reasonable or not. The court will not be in a position to assess whether to approve a settlement unless the court understands:

1. the potential recovery if the action were to be successful;
2. the general nature of the risk discounts applied in order to validate the recommendation that the settlement be approved. These may include the following risks, among others:
    i. losing certification;
    ii. losing a preliminary motion, such as a motion to strike, or a motion challenging jurisdiction;
    iii. losing on the merits;
    iv. non-recovery, even if the case succeeds on the merits; or
    v. class size contraction over time.
3. the significance of any non-monetary benefits, such as the value of:

i. obtaining information that will increase the odds of success against the remaining parties;

ii. simplifying the prosecution of the case against those remaining parties.

[13] Here, I requested that counsel provide me with specific data on the Settling Defendants' total market revenue. Although defendants will often express concerns about confidentiality when faced with such requests, this case was an good example of how a surgical approach to this concern can protect the parties' commercial interests while still ensuring that the court receives the information it needs to make a proper assessment. Here, over the course of the hearing, the parties were able to agree on a limited form of confidentiality order that provided the court with access to the market volume figures, but maintained confidentiality over the specific data that raised the most competitive concerns for the Settling Defendants.

[14] Based on the information provided to the Court, it is clear that the class applied a relatively hefty discount in the negotiations.

[15] That said, I accept that such a discount was appropriate given the benefit the class will receive by the establishment of a framework for resolution that the remaining parties may be more willing to accept now that an "icebreaker" settlement has been achieved: *McKay v. Air Canada,* 2009 BCSC 392 at para. 18; *Fanshawe v. Sony*, 2018 ONSC 2629 at para. 18; *Di Filippo and Caron v. Bank of Nova Scotia,* 2019 ONSC 3282 at paras 16-18.

[16] I note that the cooperation provided by the Settling Defendant is quite limited in that it only calls for the production of a representative sample of documentation. Given that this is not a conspiracy proceeding, such information is unlikely to directly establish liability against the remaining defendants. However, I acknowledge that even this more limited disclosure may help put class counsel on a train of inquiry that will assist in the pursuit of the remaining parties.

[17] The change of the labelling is a positive step towards the behaviour modification sought by the action, and one can also see how such a change could put pressure on the remaining market participants to do likewise.

[18] Moving from the benefits to the risks, from the Certification Reasons it will be clear that the plaintiff:

1. carried a material risk of losing certification, and

2. continues to carry a material risk of losing on the merits.

[19] Considering the benefits, and factoring in those risks, I am prepared to accept that the settlement is fair and reasonable.

[20] I note that the Non-Settling Defendants did not oppose the settlement, presumably because they determined that it included adequate protection of their interests. In particular, the Settlement Agreement prevents the class from pursuing the Non-Settling Defendants for the Settling Defendants proportionate share of liability, among other terms.

[21] I also note that no class members appeared to oppose the settlement, notwithstanding the earlier approved and implemented notice program seeking their input. This also gives the court comfort as to the reasonableness of the settlement. To the extent that the court's role is to protect the interests of the absent class members, the fact that they have perceived no difficulties carries material weight.

[22] In her article, Piché notes that U.S. courts are advised to evaluate whether any of the following "hot button indicators" are present in evaluating the reasonableness of a proposed class settlement (133):

> If the judge notices "hot button indicators" which show unfairness on the face of settlement, counsel may be asked "hard questions" about the settlement's value to the class. The following elements are considered to be "hot button indicators" in the manual for Complex Litigation 4th, published by the U.S. Federal Judicial Center:

> • Granting class members illusory non-monetary benefits, such as discount coupons for more of the defendants' product, while granting substantial monetary attorney fee awards;
>
> • Imposing such strict eligibility conditions or cumbersome claims procedures that many members will be unlikely to claim benefits, particularly if the settlement provides that the unclaimed portions of the funds will revert to the defendants;
>
> • Treating similarly situated class members differently (for example, by settling objectors' claims at significant higher rates than class members' claims);
>
> • Releasing claims of parties who received no compensation in the settlement;
>
> • Setting attorney fee based on a very high value ascribed to non-monetary relief awarded to the class, such as medical monitoring injunctions or coupons, or calculating the fee based on the allocated settlement funds; rather than the funds actually claimed by and distributed to class members; and
>
> • Assessing class members for attorney fees in excess of the amount of damages awarded to each individual.

[23] This is a helpful checklist. I can confirm that I saw none of these "hot button indicators" in this case. In particular, some of the issues were avoided as a result of the fact that class counsel was not seeking a fee approval at this time. Furthermore, given that there will be no distribution of funds at the present time, there was no (present) issue regarding the potential unequal treatment of class members. Any such concern will still need to be addressed at a later point, when and if distribution is proposed.

V. CONCLUSION

[24] The case is certified against the Settling Defendants and the Settlement Agreement is approved.

"Branch J."