

Form 49

[Rule 13.19]

Clerk's Stamp



CMH
Dec 6, 2024

COURT FILE NUMBER	1201 12838
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
PLAINTIFFS	Fiona Singh And Muzaffar Hussain, by his litigation Representative Fiona Singh
DEFENDANTS	GlaxoSmithKline Inc., GlaxoSmithKline LLC and GlaxoSmithKline PLC
DOCUMENT	AFFIDAVIT OF MARIO D'ANGELO SWORN NOVEMBER 20, 2024

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION
OF PARTY
FILING THIS
DOCUMENT

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Toronto ON M5V 1R2
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Tel: 416-572-4910 ext. 132

AFFIDAVIT OF MARIO D'ANGELO

I, Mario D'Angelo, of the Hamlet of Bayport in the State of New York, **SWEAR THAT:**

1. I am an agent of McIntyre Law P.C. ("**McIntyre Law**"), which is a partner in Napoli Shkolnik Canada ("**NS Canada**"). With NS Canada, I have been thoroughly involved in litigating the above-captioned action (the "**Paxil Class Action**"). As such, I have knowledge of the matters

to which I swear below. To the extent any information in this affidavit is not within my direct knowledge, I have identified the source of the information and believe it to be true.

2. I make this affidavit in support of the application with respect to the portion of the approval of the Paxil Class Action settlement agreement with respect to legal costs, the representative plaintiff's honorarium, disbursements and taxes (the "**Proposed Legal Costs Application**").

BACKGROUND

3. Since 2007, I have been involved in litigation to recover compensation for children who suffered congenital birth defects caused by in-utero exposure to PAXIL®. I have litigated claims in the United States and have supported litigation efforts in other jurisdictions, including Canada. In the United States, firms like McIntyre and Napoli Shkolnik PLLC ("**NS PLLC**")—another partner in NS Canada—have prosecuted hundreds of claims totaling more than USD \$1 billion. The first settlements occurred in 2010, and by 2018 the litigation in the United States had concluded.

4. In Canada, Merchant Law Group LLP ("**Merchant Law**") commenced this action, as part of a series of PAXIL® actions, on October 12, 2012, before this Court. In 2016 I was introduced to Casey R. Churko, then a lawyer at Merchant Law, by one of our experts whom they had contacted to assist in the Canadian action. She was concerned that Churko was not fully informed about the science related to Paxil® and teratology. To assist with the Paxil Class Action, Merchant Law and I (on behalf of McIntyre Law) entered arrangements wherein McIntyre Law would provide access to resources and work product, including expert and technical work, in exchange for a fee sharing arrangement with Merchant Law.

5. During our discussions with Churko and E.F. Anthony Merchant, K.C. (“**Tony Merchant**”), we learned that they had done little, if anything, to identify potential class members other than the representative plaintiff and child. To assist, we agreed to identify class members.

6. In or about 2019, Churko’s relationship with Tony Merchant soured. Churko left Merchant Law, sued the firm, and began practicing through KoT Law Professional Corporation (“**KoT**”). I understand that Churko took the Paxil Class Action with him to KoT.

7. Churko remained in contact with me and sought my assistance with the Paxil Class Action. I personally loaned him \$10,000 USD to pay his bills. Lacking the resources and experience to prosecute the Paxil Class Action alone, Churko proposed that McIntyre and KoT work together with Clint G. Docken, K.C.—an experienced litigator who was at Guardian Law Group LLP (“**Guardian**”) at the time.

8. In October 2019, McIntyre, NS PLLC (together with McIntyre, the “**American Partners**”) and KoT Canada executed an Interjurisdictional Partnership Agreement (the “**Partnership Agreement**”) forming NS Canada to prosecute actions such as the Paxil Class Action in Canada. The Paxil Class Action was ongoing and being prosecuted by Churko (through KoT) at the time that NS Canada was formed. As such, it was all parties’ intention that it be treated as “Authorized Litigation,” as that term is defined in the Partnership Agreement, such that NS Canada would fund its continued prosecution, and the NS Canada partners would share in any proceeds of settlement.

9. In April 2022, Docken joined NS Canada and transferred his files, including Guardian’s share of and role in the Paxil Class Action file, to NS Canada.

NS CANADA'S ROLE IN PAXIL CLASS ACTION

10. In 2019, Merchant Law triggered a carriage dispute in which, among other things, Merchant Law sought to deny Churko's and Docken's carriage of the Paxil Class Action. The American Partners funded the motion on the basis that, as set out above, the Paxil Class Action was an NS Canada matter and was governed by and subject to the Partnership Agreement.

11. Since Docken joined NS Canada in 2022, NS Canada has been the sole law firm representing the representative plaintiff—and after certification, the class—in the Paxil Class Action. No individual lawyer is responsible for the work done in the Paxil Class Action. Canadian lawyers, like Docken, Churko, Mathew Farrell and Adam Bordignon provided legal advice and representation while the American Partners contributed their technical expertise, prior work product, and financing. As would be expected for any class proceeding—particularly one with the medical complexities of the Paxil Class Action—reaching the \$7,500,000 settlement was an institutional effort.

12. NS Canada spent considerable time advancing the Paxil Class Action and negotiating its settlement. As part of settlement negotiations, the American Partners, along with Docken and Churko, attended a mediation in Toronto in August 2022. The American Partners, and Docken and Churko, contributed to subsequent settlement negotiations over the following months.

13. The American Partners also spent considerable time—both before and after the inception of NS Canada—locating and identifying class members, including among other things, time spent facilitating and conducting teratological assessments. We conducted an advertising campaign at our expense and opened files for 933 mother-child pairs who were sent screening questionnaires by our office. We received 183 answered questionnaires which my staff and I reviewed and entered

into the database. Based on our review, we requested the medical records for 147 mother-child pairs. In many cases, the records needed to establish proof of use of Paxil® were 15-20 years old. Given the record retention policies of pharmacies and physicians, most were difficult to locate and obtain. Upon receipt of the medical records, I personally reviewed each set to determine proof of use and whether the child was born with a congenital birth defect attributable to Paxil® and not related to a genetic anomaly or syndrome. While tragic, allowing children born with genetic or syndromic defects to submit claims would diminish the funds available for truly related claims. As part of this review, my staff and I prepared summaries for each case. Many of these were submitted to the defendant as part of our settlement discussions. From the original 933 files that were opened, we identified 41 pairs who may have compensable claims to be submitted. NS Canada executed retainers with these 41 pairs.

14. To reach this required 2124 hours of individual case investigation, by myself and our staff. A further 769.27 hours was spent by NS Canada lawyers and staff on class or common issues.

15. To finance NS Canada's prosecution of the Paxil Class Action, the American Partners incurred significant expenses. For instance, the American Partners have paid \$691,070.67 to Churko by way of a partnership draw. Churko has not contributed any money to the partnership nor have any of the partnership's cases settled and resulted in legal fees to the firm. Attached as **Exhibit "A"** is a table setting out the draw paid to Churko on a year-over-year basis.

16. As such, to date, the American Partners have been solely responsible for funding all of NS Canada's expenses (including Churko's draw) and all of its litigation. The American Partners have funded among other things, case expenses including fees for obtaining medical records, filing fees,

and overhead costs like staff salaries, office rent, and insurance. Specifically with respect to the class and individual case costs to date, the American Partners have spent \$227,355.06 CAD.

17. The figures described above are drawn directly from timekeeping and disbursement records maintained by NS Canada's partners. I have not attached these as exhibits to my affidavit because they would exceed the 40-page limit for exhibits as set out in paragraph 10 of the Endorsement of Justice E. Jane Sidnell, dated November 8, 2024.

THE ORIGINAL ARRANGEMENT

18. The parties reached a settlement in principle in 2023. By October 2023, Churko had circulated a draft master settlement agreement ("MSA") by email to defence counsel, Docken and the American Partners with certain revisions reflecting the negotiation of certain terms. A copy of this email is attached as **Exhibit "B"**.

19. The draft MSA attached to this email included the global settlement amount of \$7,500,000. Most of the key terms with respect to fees were also set by this point. Excerpts from the draft MSA attached to the October 24, 2023, email are attached as **Exhibit "C"**.

20. The provisions with respect to legal fees remained fundamentally consistent between October 24, 2023, and September 3, 2024. Excerpts from the draft MSA that Churko circulated on September 3, 2024, are attached as **Exhibit "D"**.

21. Between October 2023 and September 2024, the MSA included the following provisions:

(a) The definitions of "Class Counsel" and "Class Counsel Fees":

(i) "Class Counsel" means Clint Docken, K.C. and Casey R. Churko; and

- (ii) “Class Counsel Fee” is CDN \$500,000, separate, and apart from Lawyer’s Fees; and
 - (b) The definition of “Lawyer’s Fees”: up to 35% of Compensatory Payments paid to Eligible Claimants who are represented by Class Counsel or another lawyer of their choosing who has a valid and enforceable retainer agreement with an Eligible Claimant. Lawyer’s Fees paid to lawyers other than Class Counsel shall not exceed 25% where the retainers were executed before the *Notice of Settlement Approval Hearing* is given and 10% where the retainers were executed after. Class Counsel will receive 15% of Compensatory Payments that are made to Eligible Claimants who are unrepresented.
 - (c) NS Canada (through Docken and Churko) was identified as Class Counsel of record in notice provisions, on the cover of the MSA and throughout the document
22. With respect to Lawyers’ Fees, the parties negotiated the following revisions between October 2023 and September 2024 (with the revisions identified in red, below):

SECTION 8 – Legal Fees

8.1 Class Counsel may bring applications at the Settlement Approval Hearing or on a subsequent date for Court approval of payment of the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon. -Notice of such a hearing will be provided to the Defendants. -The Defendants will not oppose any applications-by the Plaintiff for approval of the Class Counsel Fee, Class Counsel Disbursements, Honorarium, and Lawyer’s Fees, insofar as any such application is applications are not contrary to the terms of this Settlement Agreement.

8.2 Class Counsel and other lawyers retained by an Eligible Claimant may charge Lawyer’s Fees and disbursements as a percentage of the Compensatory Payments paid to an Eligible Claimant that they represent after the determination of the Compensatory Payment by the Claims Officer, plus disbursements and applicable taxes.

8.3 The amount of the Lawyer’s Fees shall not exceed 35% of the Compensatory Payment allocated to any Class Member who is represented. For any Eligible Claimants who are unrepresented, Lawyer’s Fees will be 15% of the Compensatory Payments to the Eligible Claimant.

8.4 The Claims Administrator shall pay Class Counsel the Class Counsel Fee within 7 days of the Effective Date, and Lawyer’s Fees and plus disbursements and applicable taxes directly to Class Counsel and other lawyers retained by Eligible Claimants, when payments are made to Eligible Claimants.

8.5 Notwithstanding any other provision of this Settlement Agreement, the aggregate amount of the Class Counsel Fee and Lawyer’s Fees shall not exceed 35% of the Settlement Fund plus interest thereon, and the amount of the Class Counsel Fee shall not be less nor more than \$500,000.

23. By September 2024, the parties had agreed that the allocation of legal fees that was most reasonable and fairest to the class consisted of: (i) a class counsel fee of \$500,000, (ii) a limit of 35% on any payment of legal fees, including fees incurred on account of individual retainers with class members, and (iii) uncapped disbursements.

(i) The reasons for the original arrangement

24. NS Canada negotiated the terms of the MSA with a view to protecting the interests of the class. With respect to the fee arrangement, there were circumstances idiosyncratic to the Paxil Class Action that NS Canada sought to address in the fees provisions. Specifically, unlike many other class proceedings, considerable work is required to identify, locate and prove the eligibility of class members. The MSA thus needed to ensure class members would be adequately represented such that they could actually be identified and access the proceeds of the settlement.

25. Among other things, to make a claim, an individual class member will have to show that: (i) name-brand PAXIL[®] was implicated, (ii) PAXIL[®] was consumed in the first trimester, and (iii) the applicant suffered specific injuries. This requires extensive study and the assistance of counsel. NS Canada has already spent considerable time developing the requisite teratology experience, and identifying dozens of class members who are now entitled to recover under the MSA. The smaller class counsel fee contemplated in the MSA and larger allotment to individual retainers ensures that NS Canada is adequately compensated for this effort and incentivises other lawyers, including Merchant Law, to continue to take on this work and seek out other class members.

26. Conversely, a large class counsel fee and more stringent limit on individual retainers disincentivizes lawyers from seeking and assisting prospective class members.

(ii) *Merchant Law's entitlement to fees*

27. While negotiating the fee provisions, NS Canada was aware of the undertaking to Merchant Law arising out of the carriage dispute. Specifically, Associate Chief Justice Rooke referenced an undertaking by KoT and Guardian to pay Merchant Law "fair and reasonable fees and disbursements" at the end of the Paxil Class Action.

28. In connection with the carriage dispute, the representative plaintiff Fiona Singh swore an affidavit on February 7, 2020. Among other things, Ms. Singh's affidavit raised issues with the costs that Merchant Law had claimed up until that point. Excerpts from Ms. Singh's affidavit with respect to the fees claimed to that point in time are excerpted as **Exhibit "E"**.

29. Ms. Singh noted that as of August 29, 2019, Merchant Law claimed to have incurred \$3.7 million in work-in-progress. Ms. Singh noted that this fee was exorbitant and unfounded. She specifically noted the following:

- (a) The first 84 of 200 pages of time entries were incurred *before* the Paxil Class Action was ever filed;
- (b) Much of the time dealt with pediatrics and suicidality (not congenital malformations) and patent "evergreening";
- (c) Most of the time was incurred by lawyers who were no longer with Merchant Law; and
- (d) 558.39 hours were merely boilerplate entries by Evatt Merchant before 2012 and thereafter for "Read and review incoming documents".

30. In discussions about the undertaking, Churko consistently advised his NS Canada partners (including me, on behalf of McIntyre Law P.C.) that a \$500,000 class counsel fee would be sufficient to satisfy Merchant Law's fair and reasonable fees and disbursements. Specifically, Churko advised that Merchant Law had significantly inflated his "WIP" by including within its

scope separate actions that predated the filing of the Paxil Class Action. He also echoed the issues raised in Ms. Singh's affidavit referenced above. In effect, Merchant Law claimed for fees that were incurred on separate matters which NS Canada never had carriage over, and which were not subject to any undertaking and could not form the basis of a solicitor's lien. Churko expressed this view to his partners even as late as September 10, 2024.

31. Merchant Law now claims the value of its work is \$4,249,842.98. This would mean that Merchant Law incurred another \$500,000 after Ms. Singh had already stopped being represented by Merchant Law. As in 2019, the Merchant Law's claimed fees are egregiously inflated and largely out-of-scope.

CHURKO'S SURREPTITIOUS AMENDMENTS

32. Churko told nobody at NS Canada that he had submitted an MSA for Court approval with fundamentally different fee provisions than the ones described above. Despite constant requests from the American Partners, Churko refused to provide the MSA, and consistently refused to save any work product to NS Canada's server despite the American Partners' repeated requests.

33. It was only the day of the September 24, 2024 settlement approval hearing that Docken and the American Partners realized that Churko had unilaterally, and without the knowledge or consent of Docken or the American Partners, quadrupled the Class Counsel Fee from \$500,000 to \$2,000,000, and directed most of that fee to either his personal professional corporation, KoT (\$850,000) or to his former employer Merchant Law (\$1,100,000).

34. NS Canada was shocked that Churko was attempting to divert settlement funds away from the class, his partners, and co-counsel. In turn, NS Canada began to investigate Churko's conduct. On October 1, 2024, NS Canada and NS PLLC commenced an action in Ontario, bearing Court

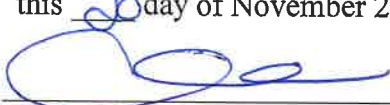
File No. CV-24-00728634-0000, with respect to his breaches of fiduciary duty to his partners, among other things (the “**Ontario Action**”).

35. NS Canada has learned that although Churko did not discuss the amended MSA with his own partners or co-counsel he *did* discuss the MSA with Tony Merchant of Merchant Law shortly before signing. Churko said that he allocated \$1,100,000 to Merchant Law, because they would not have otherwise signed the MSA. Excerpts of the transcript of cross-examination of Casey Churko dated October 30, 2024, which is publicly filed in the Ontario Action, are attached as **Exhibit “F”**.

Despite the centrality to the Ontario Action of Churko’s decision to amend the MSA, Churko has still not explained to NS Canada why he allocated \$850,000 to his personal professional corporation. His answers on cross-examination in the Ontario Action are a masterclass in obfuscation. The only explanation that he has ever given was given to co-counsel on another class proceeding, Philip Fourie. Churko told Fourie that he tried to take the \$850,000 because “NS Canada has done things that caused him concern and, in his view, may result in NS Canada moving away from the partnership with him”. Fourie recounted that Churko expressed concern that the American Partners were making overtures towards “Recon” (i.e., Reconstruct LLP) and away from Churko. The affidavit of Philip Fourie (without exhibits), sworn October 7, 2024, and excerpts from the transcript of his cross-examination dated October 29, 2024, each of which is publicly filed in the Ontario Action, are attached as **Exhibits “G” and “H”**.

36. Churko’s belief regarding Reconstruct LLP is not true. Even if it were, it does not justify Churko’s attempt to divert \$850,000 to himself and \$1,100,000 to Merchant Law to the detriment of the class, his partners, and his co-counsel.

SWORN BEFORE ME at
the City of Calgary,
in the Province of Alberta
this 10 day of November 2024.



A Notary Public

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MARIO D'ANGELO

THIS IS EXHIBIT " A "
 referred to in the Affidavit of
MARIO D'ANGELO
 Sworn before me this 80th
 day of November A.D. 2024

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

Summary of Casey Churko's draws

Casey Churko Draw by Year	Draw as of 10/2/2019 on Entry of ILPA	Remainder of 2019	2020	2021	2022	2023	2024	Total As of 9/24/2024
USD	\$53,250.00	\$22,157.98	\$41,610.00	\$65,000.00	\$130,000.00	\$120,000.00	\$80,000.00	\$512,017.98
Converted to CAD	\$71,871.52	\$29,906.63	\$56,161.02	\$87,730.50	\$175,461.00	\$161,964.00	\$107,976.00	\$691,070.67



From: Casey R. Churko <cchurko@napolilaw.ca>

Sent: Tuesday, October 24, 2023 4:29 PM

To: Justine Smith (she/her) <justine.smith@nortonrosefulbright.com>; Chris Schnieders <CSchnieders@NapoliLaw.com>; mdesq@dangelolaw.net; Sarah Ivany (she/her) <sarah.ivany@nortonrosefulbright.com>; Randy Sutton (he/him) <randy.sutton@nortonrosefulbright.com>; Clint Docken <CDocken@NapoliLaw.com>

Subject: Re: GSK/Singh Settlement Agreement Meeting [NRFC-DMS.FID8106805]

THIS IS EXHIBIT " B " referred to in the Affidavit of MARIO D'ANGELO Sworn before me this 20th day of November A.D. 2024

WITHOUT PREJUDICE

Justine/Randy,

I went through each of the redlines in the version you sent on Thursday, and believe I accepted most of the changes. I also went through the defined terms in detail to ensure consistency in capitalization and italicization throughout the agreement, though we are flexible on formatting.

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

I attach the resulting version, which has not yet accounted for the issues raised in your 4:56 pm below, but had them flagged to address. I believe that we will be in agreement on the list of additions to the qualifying malformations below and the continued exclusion for conditions that are not congenital, though I will confirm with my colleagues.

I will contact the remaining Health Insurers again to confirm their updated contact person and addresses to include. For any that do not respond, I will insert the most recently known address. Trilogy has been in contact with each of them in the last year.

From: "Casey R. Churko" <cchurko@napolilaw.ca>

Date: Tuesday, October 24, 2023 at 5:00 PM

To: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>, Chris Schnieders <CSchnieders@NapoliLaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>, Clint Docken <CDocken@NapoliLaw.ca>

Subject: Re: GSK/Singh Settlement Agreement Meeting [NRFC-DMS.FID8106805]

Thank you, I will send the revised copy in about 45 minutes. Just finishing up a thorough review.

From: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>

Date: Tuesday, October 24, 2023 at 4:56 PM

To: "Casey R. Churko" <cchurko@napolilaw.ca>, Chris Schnieders
<CSchnieders@Napolilaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>,
"Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)"
<randy.sutton@nortonrosefulbright.com>, Clint Docken <CDocken@NapoliLaw.ca>
Subject: RE: GSK/Singh Settlement Agreement Meeting [NRFC-DMS.FID8106805]

WITHOUT PREJUDICE AND SETTLEMENT PRIVILEGED

All,

We have discussed the claimant / compensable injury issue with GSK.

We propose the following, which we consider a reasonable compromise in a class action relating to congenital malformations:

- Vertical talus: The claimant child has a notation of "club foot" in his medical records, followed by a later diagnosis of vertical talus. GSK is willing to expand the relevant injury category from "true structural club foot" to "club foot" so that this claimant could recover on the basis that the claims officer could accept the initial diagnosis of club foot to provide for recovery.
- Spina bifida and encephalocele: GSK is willing to expand the current NTD category to include spina bifida and encephalocele, in addition to anencephaly which is listed under that category already.
- Spondylitis: This is an inflammatory disease and not a congenital defect. We do not see a basis to include this condition as a compensable injury, which are limited to congenital malformations.
- Encephalopathy: This is an acquired condition and not a congenital defect. Medical records state "no dysmorphic features or obvious congenital abnormalities". We do not see the basis for including encephalopathy to capture this claimant.

Let us know if you are prepared to proceed on this basis in terms of qualifying malformations. We do expect we will also get instructions on the confounding factors as discussed and to move to a medical doctor as opposed to a teratologist. Once we have instructions, we will propose some revised wording. We will address the other issues discussed at our meeting in the next circulated draft.

Casey – let us know if we should wait on the revised copy that you were going to circulate.

Best,

Justine Smith
Associate

Norton Rose Fulbright Canada LLP / S.E.N.C.R.L., s.r.l.
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T: +1 416.216.1921 | F: +1 416.216.3930
justine.smith@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

From: Casey R. Churko <cchurko@napolilaw.ca>
Sent: October 23, 2023 2:50 PM
To: Justine Smith (she/her) <justine.smith@nortonrosefulbright.com>; Chris Schnieders <CSchnieders@NapoliLaw.com>; mdesq@dangelolaw.net; Sarah Ivany (she/her) <sarah.ivany@nortonrosefulbright.com>; Randy Sutton (he/him) <randy.sutton@nortonrosefulbright.com>; Clint Docken <CDocken@NapoliLaw.ca>
Subject: Re: GSK/Singh Settlement Agreement Meeting

Justine/Randy,

As discussed on Thursday, I attach the first draft of the application to approve the certification notice, for our further discussion on Wednesday.

Paul Battaglia of Trilogy Class Action Services was gracious enough to meet this weekend to prepare his affidavit, which I attach hereto. He will be available to make any additional adjustments that are required.

I believe the application will be ready for filing with the Court this week, subject to your changes and comments.

From: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>
Date: Thursday, October 19, 2023 at 5:11 PM
To: "Casey R. Churko" <cchurko@napolilaw.ca>, Chris Schnieders <CSchnieders@NapoliLaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>, Clint Docken <CDocken@NapoliLaw.ca>
Subject: RE: GSK/Singh Settlement Agreement Meeting

Thanks, Casey.

Attached is the word copy for your edits, which includes the non-contentious changes from today's call in track changes.

Kindly also make your edits using track changes for ease of review.

Justine Smith
Associate

Norton Rose Fulbright Canada LLP / S.E.N.C.R.L., s.r.l.
222 Bay Street, Suite 3000, P.O. Box 53, Toronto ON M5K 1E7 Canada
T: +1 416.216.1921 | F: +1 416.216.3930
justine.smith@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

From: Casey R. Churko <cchurko@napolilaw.ca>
Sent: October 19, 2023 1:23 PM
To: Justine Smith (she/her) <justine.smith@nortonrosefulbright.com>; Chris Schnieders

<CSchnieders@Napolilaw.com>; mdesq@dangelolaw.net; Sarah Ivany (she/her)
<sarah.ivany@nortonrosefulbright.com>; Randy Sutton (he/him)
<randy.sutton@nortonrosefulbright.com>; Clint Docken <CDocken@Napolilaw.ca>
Subject: Re: GSK/Singh Settlement Agreement Meeting

November 17 was the next filing deadline in the ABCA (less than a month away).

Provided that I do not get unexpectedly drawn into other matters, I expect to have a draft application for certification notice approval ready to review for our call on Wednesday, and if aggregable, for filing later that week.

From: "Casey R. Churko" <cchurko@napolilaw.ca>
Date: Thursday, October 19, 2023 at 1:15 PM
To: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>, Chris Schnieders <CSchnieders@Napolilaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>, Clint Docken <CDocken@Napolilaw.ca>
Subject: Re: GSK/Singh Settlement Agreement Meeting

WITHOUT PREJUDICE

Justine,

Further to our Teams meeting, the "standalone" malformation cases I mentioned were:

- bilateral vertical talus (child Dmitri Delic) (note, Manitoba subrogation records coded it as "club foot")
- spondylolitis (child Stephanie Nolette)
- spina bifida / encephalocele (child Emerald Weatherilt)

I also mentioned a case of encephalopathy (child Kaitlyn Paul)

From: "Casey R. Churko" <cchurko@napolilaw.ca>
Date: Thursday, October 19, 2023 at 9:24 AM
To: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>, Chris Schnieders <CSchnieders@Napolilaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "cgd@docken.com" <cgd@docken.com>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>
Subject: Re: GSK/Singh Settlement Agreement Meeting

Justine/Randy,

For reference on the meeting today, I attach the most recent redlined draft of the settlement agreement that I received.

From: Cathy Dawson <cathy.dawson@nortonrosefulbright.com> on behalf of "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>

Date: Wednesday, October 18, 2023 at 12:06 PM

To: "cchurko@napolilaw.ca" <cchurko@napolilaw.ca>, "CSchnieders@NapoliLaw.com" <CSchnieders@NapoliLaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "cgd@docken.com" <cgd@docken.com>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>

Subject: GSK/Singh Settlement Agreement Meeting

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THIS IS EXHIBIT " C "
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 20th
day of November A.D. 2021

ingesting Paxil® or Paxil CR™ while pregnant; family members who may make claims under *Family Compensation Legislation* following the death of, or injury in relation to the congenital malformations; children born alive to such women; and provincial and territorial governments who paid health care costs on their behalf.

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

- (o) "Class Counsel" means Clint Docken, K.C. and Casey R. Churko.
- (p) "Class Counsel Disbursements" means the actual amount of legitimate and reasonable disbursements incurred by or at the request of Class Counsel or Merchant Law Group LLP between the filing of this Class Proceeding (and no other class action or class proceeding filed anywhere in Canada at any time relating to the prescription or use of Paxil®, Paxil CR™, or paroxetine) and the Court Approval Date; except that the disbursements that may be claimed by Merchant Law Group LLP shall further be limited to those incurred before April 12th, 2019, being the date that the Plaintiffs served a *Notice of Change of Representation*, and shall be further reduced by the costs awarded against Merchant Law Group LLP on April 21st, 2021.
- (q) "Class Counsel Fee" is CDN \$500,000, separate and apart from Lawyer's Fees.
- (r) "Class Member" means any person, or his/her estate or legal representative, who (i) is a member of the Class and (ii) has not delivered an opt-out request to Class Counsel on or before the Opt-Out Deadline.
- (s) "Class Period" means the period that runs from January 1st, 1993 to the date of the Approval Order.
- (t) "Class Proceeding" means the proceeding commenced by Muzzafar Hussain, by- his Mother and Litigation Guardian, Fiona Singh, and the said Fiona Singh, in the Court of King's Bench of Alberta against the Defendants (Court File No. 1201-12838), and that was certified as a class proceeding by the Certification Order.
- (u) "Compensation Fund" means the Settlement Fund after deducting Administration Costs incurred before the Approval Order is made; the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon; and the Honorarium; and after adding the interest while the Settlement Fund is held in the Account. After deductions, the Administration Costs incurred after the Approval Order and Compensatory Payments will be fully paid from the remainder of the Compensation Fund.
- (v) "Compensatory Payments" means the amounts that are allocated to Class Members out of the Compensation Fund, including the amounts to be paid to their Health Insurers pursuant to Health Insurer Claims and the amounts allocated for Lawyer's Fees.
- (w) "Court" means the Court of King's Bench of Alberta.
- (x) "Court Approval Date" and "Effective Date" means the later of:
- (i) 60 days after the date on which the Court issues the Approval Order if there is no appeal from the Approval Order; and
- (ii) 60 days after the date on which any appeals from the Approval Order have been quashed or finally disposed of.
- (y) "Damages" means all claims for pain and suffering, loss of guidance, care and companionship, non-pecuniary claims, in trust claims, subrogated claims (in the form of claims of Health Insurers and non-governmental insurers), past and future income loss

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claims, past and future care claims, aggravated or punitive damages, and special damages.

- (z) **"Distribution Protocol"** means the plan setting out a Class Member's entitlement to Damages under this Settlement Agreement and how Compensatory Payments to Class Members and Lawyer's Fees and payments to Health Insurers shall be determined and distributed, as approved by the Court as part of the Approval Hearing, a draft of which is attached hereto as **Schedule "I"**.
- (aa) **"Eligible Claimant"** means a Claimant, or his or her estate representative, who has satisfied the Claims Officer that he or she is a Class Member who is eligible for a Compensatory Payment, and, in particular that:
- (i) the Claimant Mother or the biological mother of a Claimant Child was prescribed Paxil® or Paxil CR™ for use during her First Trimester of pregnancy;
 - (ii) the Claimant Mother or the biological mother of a Claimant Child took Paxil® or Paxil CR™ during the Class Period while in her First Trimester of pregnancy who delivered a Claimant Child, born alive, who has been diagnosed with one or more Qualifying Congenital Malformations; and
 - (iii) there is a medical or other reliable record or affidavit indicating that (1) a physician determined that the Claimant Child had or has one or more Qualifying Congenital Malformations, and (2) the biological mother of the Claimant Child took Paxil® or Paxil CR™ (and not generic paroxetine) during her First Trimester of pregnancy.

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Further information with respect to eligibility is contained within the Distribution Protocol.

- (bb) **"First Trimester"** means the first 13 weeks of pregnancy calculated from the date of the last menstrual period.
- (cc) **"Health Insurers"** means all of the Provincial and Territorial Ministries of Health or governmental bodies that provide publicly funded plans of health care in Canada.
- (dd) **"Health Insurer Claims"** means the entitlement of the Health Insurers to any subrogated or direct claims arising from the provision of health care services to Class Members in relation to the Allegations, and pursuant to legislation that permits the recovery of healthcare costs or medical expenses from third parties.
- (ee) **"Honorarium"** means the amount of CDN \$50,000.
- (ff) **"Lawyer's Fees"** are up to 35% of Compensatory Payments paid to Eligible Claimants who are represented by Class Counsel or another lawyer of their choosing who has a valid and enforceable retainer agreement with an Eligible Claimant. Lawyer's Fees paid to lawyers other than Class Counsel shall not exceed 25% where the retainers were executed before the Notice of Settlement Approval Hearing is given and 10% where the retainers were executed after. Class Counsel will receive 15% of Compensatory Payments that are made to Eligible Claimants who are unrepresented.
- (gg) **"Notice Provider"** means Trilogy Class Actions Services, which will provide the Notice of Certification, Notice of Settlement Approval Hearing, and Notice of Settlement Approval.
- (hh) **"Notice of Certification"** means the form of notice, agreed to by the Parties and approved by the Court, that informs Class Members of certification of the class proceeding.

7.2 The Releases and Dismissals set out herein apply to each Class Member whether or not the Class Member receives compensation under this Settlement Agreement as an Eligible Class Member.

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7.3 The Releasors (other than the Health Insurers) agree to obtain through Class Counsel a full and final release of the Released Claims from the Health Insurers in substantially the form attached hereto as **Appendix "A"** and undertake to indemnify the Releasees from all awards, recoveries, amounts, costs and expenses incurred on account of any claims, liens, demands, rights, or causes of action by the Health Insurers and/or U.S. Medicare (if applicable) claiming a lien upon, subrogated interest in, or right or entitlement to the proceeds of this settlement, in whole or in part, for any reason, including the provision of medical and/or hospital care and/or the payment of medical and/or hospital expenses by any third party provider/payer, and/or a right to reimbursement or subrogation for any reason arising out of the consideration payable under this Settlement Agreement.

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7.4 As of the Effective Date, the Class Proceeding shall be dismissed with prejudice and without costs and the Defendants shall abandon their appeal in the Alberta Court of Appeal.

7.5 The Defendants agree to further abandon any claim for costs against any Class Member who has been a plaintiff in any previously filed class action or proceeding in Canada, and whether costs have been ordered to date or not.

7.6 After the Opt Out Deadline, any Class Member who has not opted out, will immediately dismiss on a with prejudice basis any action or proceeding pertaining to recovery relating to the subject matter of the Class Proceedings on a without costs basis, regardless of whether or not compensation is received under this Settlement Agreement, including the plaintiffs Megan and Tammy Thompson (Saskatchewan Court of King's Bench (KBG-PA-000276-2019)).

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7.7 To the extent such action or proceeding is not dismissed within 30 days of Opt Out Deadline as contemplated in section 7.6, the Plaintiff on behalf of each Class Member, agrees to consent to a dismissal or discontinuance of the action or proceeding at the request of, or on the motion of the Defendants, on a with prejudice and without costs basis and to pay the legal costs associated with the steps taken by the Defendants.

Section 8 – Legal Fees

8.1 Class Counsel may bring applications at the Approval Hearing or on a subsequent date for Court approval of payment of the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon. Notice of such a hearing will be provided to the Defendants. The Defendants will not oppose any applications by the Plaintiff for approval of the Class Counsel Fee, Class Counsel Disbursements, Honourarium, and Lawyer's Fees, insofar as any such application is not contrary to the terms of this Settlement Agreement.

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8.2 Class Counsel and other lawyers retained by an Eligible Claimant may charge Lawyer's Fees and disbursements as a percentage of the Compensatory Payments paid to an Eligible Claimant that they represent after the determination of the Compensatory Payment by the Claims Officer.

8.3 The amount of the Lawyer's Fees shall not exceed 35% of the Compensatory Payment allocated to any Class Member who is represented. For any Eligible Claimants who are unrepresented, Lawyer's Fees will be 15% of the Compensatory Payments to the Eligible Claimant.

8.4 The Claims Administrator shall pay the Lawyer's Fees and disbursements directly to Class Counsel and other lawyers retained by Eligible Claimants.

THIS IS EXHIBIT " D "
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 20th
day of November A.D. 2024

Page 2 of 33

shall be paid by the Defendants and on which the interest accrued will be added to the Compensation Fund.

- (b) **"Administration Costs"** means the costs of giving the *Notice of Certification*, *Notice of Settlement Approval Hearing*, and the *Notice of Settlement Approval* and the amounts invoiced to administer and distribute the Compensation Fund, including the expenses and professional fees of the Notice Provider, Claims Officer, and the Claims Administrator.
- (c) **"Allegations"** means the assertions of fact or law, causes of action, injuries, and damages that were pleaded in the *Amended Amended Statement of Claim*, filed January 9th, 2019.
- (d) **"Certification Order"** means the *Order (Class Certification)* of the Honorable Associate Chief Justice Rooke, pronounced November 17th, 2022 and filed December 19th, 2022.
- (e) **"Claim"** means the claim made by a Claimant in accordance with the procedure in the Distribution Protocol, which is attached hereto as **Schedule "D"**.
- (f) **"Claimant Child"** means a Class Member who was born with a Qualifying Congenital Malformation, or his or her estate or legal representative, who files a Claim pursuant to the terms hereof.
- (g) **"Claimant Mother"** means a Class Member who was prescribed Paxil® or Paxil CR™ in Canada and subsequently aborted, delivered, or miscarried children with Qualifying Congenital Malformations after ingesting Paxil® or Paxil CR™ while pregnant, or her estate or legal representative, who files a Claim pursuant to the terms hereof.
- (h) **"Claims Administrator"** means Trilogy Class Action Services, the person or entity agreed to by the Parties and approved by the Court to assist the Claims Officer with the administration of the claims process in accordance with the Distribution Protocol.
- (i) **"Claims Deadline"** means 90 days from the publication of the *Notice of Settlement Approval*, unless extended as provided for in the *Settlement Approval Order*.
- (j) **"Claims Officer"** means a qualified and independent physician agreed to by the Parties who will determine, *inter alia*: whether a Claimant was born with a Qualifying Congenital Malformation; identify the category in the Distribution Protocol within which each Claim falls; and assign a points value within the range identified in the Distribution Protocol.
- (k) **"Claims Perfection Deadline"** means 90 days after the Claims Deadline.
- (l) **"Class"** means women who were prescribed Paxil® or Paxil CR™ in Canada and subsequently aborted, delivered, or miscarried children with congenital malformations after ingesting Paxil® or Paxil CR™ while pregnant; family members who may make claims under *Family Compensation Legislation* following the death of, or injury in relation to the congenital malformations; children born alive to such women; and provincial and territorial governments who paid health care costs on their behalf.
- (m) **"Class Counsel"** means Clint Docken, K.C. and Casey R. Churko.
- (n) **"Class Counsel Disbursements"** means the actual amount of legitimate and reasonable disbursements incurred by or at the request of Class Counsel or Merchant Law Group LLP between the filing of this Class Proceeding (and no other class action or class proceeding filed anywhere in Canada at any time relating to the prescription or use of Paxil®, Paxil CR™, or paroxetine) and the Effective Date; except that the disbursements that may be claimed by Merchant Law Group LLP shall further be limited to those incurred before April

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

12th, 2019, being the date that the Plaintiffs served a *Notice of Change of Representation*, and shall be further reduced by the costs awarded against Merchant Law Group LLP on April 21st, 2021.

- (o) **"Class Counsel Fee"** is CDN \$500,000, separate and apart from Lawyer's Fees.
- (p) **"Class Member"** means any person, or his/her estate or legal representative, who is a member of the Class and did not deliver an *Opt-Out Form* to the Notice Provider on or before April 8th, 2024.
- (q) **"Class Period"** means the period that runs from January 1st, 1993 to April 8th, 2024.
- (r) **"Class Proceeding"** means the proceeding commenced by Muzzafar Hussain, by his Mother and Litigation Guardian, Fiona Singh, and the said Fiona Singh, in the Court of King's Bench of Alberta against the Defendants (Court File No. 1201-12838), and that was certified as a *class proceeding* by the *Certification Order*.
- (s) **"Compensation Fund"** means the Settlement Fund after deducting: Administration Costs incurred before the *Settlement Approval Order* is made; \$400,000 to resolve Health Insurer Claims; the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon; and the Honorarium; and after adding the interest while the Settlement Fund is held in the Account. After deductions, the Administration Costs incurred after the *Settlement Approval Order* and Compensatory Payments will be fully paid from the remainder of the Compensation Fund.
- (t) **"Compensatory Payments"** means the amounts that are allocated to Eligible Claimants out of the Compensation Fund, including the amounts allocated for Lawyer's Fees.
- (u) **"Court"** means the Court of King's Bench of Alberta.
- (v) **"Court Approval Date"** means the later of September 24th, 2024 and the date on which the Court approves the *Settlement Agreement*.
- (w) **"Damages"** means all claims for pain and suffering, loss of guidance, care and companionship, non-pecuniary claims, in trust claims, subrogated claims (in the form of claims of Health Insurers and non-governmental insurers), past and future income loss claims, past and future care claims, aggravated or punitive damages, and special damages.
- (x) **"Distribution Protocol"** means the plan setting out a Class Member's entitlement to make a Claim under this *Settlement Agreement* and how Compensatory Payments to Eligible Claimants and Lawyer's Fees shall be determined and distributed, as approved by the Court as part of the Settlement Approval Hearing, a draft of which is attached hereto as *Schedule "D"*.
- (y) **"Effective Date"** means the later of:
 - (i) 60 days after ~~Court Approval Date the date on which the Court issues the Settlement Approval Order~~ if there is no appeal from the *Settlement Approval Order*,
 - (ii) 60 days after the date on which any appeals from the *Settlement Approval Order* have been quashed or finally disposed of.

Commented [1]: This formerly said "Class Members". "Eligible Claimants" is more accurate.

Commented [2]: I moved "Court Approval Date" from here, so that the King's Bench approval is the "Court Approval Date" and the "Effective Date" is the appeals deadline. This ensures that the Notice of Settlement Approval Hearing can be published on the date of the approval hearing without waiting to see whether appeals are taken.

Commented [3]: Can this 60 days be deleted?

- (z) **"Eligible Claimant"** means a Claimant, or his or her estate representative, who has satisfied the Claims Officer that he or she is a Class Member who is eligible for a Compensatory Payment, and, in particular that:
- (i) the Claimant Mother or the biological mother of a Claimant Child was prescribed Paxil® or Paxil CR™ for use during her First Trimester of pregnancy;
 - (ii) the Claimant Mother or the biological mother of a Claimant Child took Paxil® or Paxil CR™ during the Class Period while in her First Trimester of pregnancy who delivered a Claimant Child, born alive, who has been diagnosed with one or more Qualifying Congenital Malformations; and
 - (iii) there is a medical or other reliable record or affidavit indicating that (1) a physician determined that the Claimant Child had or has one or more Qualifying Congenital Malformations, and (2) the biological mother of the Claimant Child took Paxil® or Paxil CR™ (and not generic paroxetine) during her First Trimester of pregnancy.

Further information with respect to eligibility is contained within the Distribution Protocol.

- (aa) **"First Trimester"** means the first 13 weeks of pregnancy calculated from the date of the last menstrual period.
- (bb) **"Health Insurers"** means all of the provincial and territorial ministries of health or governmental bodies that provide publicly funded plans of health care in Canada.
- (cc) **"Health Insurer Claims"** means the entitlement of the Health Insurers to any subrogated or direct claims arising from the provision of health care services to Class Members in relation to the Allegations, and pursuant to legislation that permits the recovery of health care costs or medical expenses from third parties.
- (dd) **"Honorarium"** means the amount of CDN \$50,000.
- (ee) **"Lawyer's Fees"** are up to 35% of Compensatory Payments paid to Eligible Claimants who are represented by Class Counsel or another lawyer of their choosing who has a valid and enforceable retainer agreement with an Eligible Claimant. Lawyer's Fees paid to lawyers other than Class Counsel shall not exceed 25% where the retainers were executed before the *Notice of Settlement Approval Hearing* is given and 10% where the retainers were executed after. Class Counsel will receive 15% of Compensatory Payments that are made to Eligible Claimants who are unrepresented.
- (ff) **"Notice Provider"** means Trilogy Class Action Services, who provided the *Notice of Certification* and the *Notice of Settlement Approval Hearing* and will provide the *Notice of Settlement Approval*.
- (gg) **"Notice of Certification"** means the form of notice, approved by the Court on February 8th, 2024 that informed Class Members of certification of the Class Proceeding.
- (hh) **"Notice of Settlement Approval"** means the form of notice, agreed to by the Parties and approved by the Court, and to be given within 30 days of the Court Approval Date, that informs Class Members, including Health Insurers, of the approval of this *Settlement Agreement*, the process for making Claims, and the Distribution Protocol, a draft of which is attached hereto as **Schedule "A"**.
- (ii) **"Notice of Settlement Approval Hearing"** means the form of notice, approved by the Court as Schedule 1 to the *Order (Settlement Approval Hearing Notice)* pronounced June

- 7.4 As of the Effective Date, the Class Proceeding shall be dismissed with prejudice and without costs and the Defendants shall abandon their appeal in the Alberta Court of Appeal.
- 7.5 The Defendants agree to further abandon any claim for costs against any Class Member who has been a plaintiff in any previously filed class action or other proceeding in Canada, and whether costs have been ordered to date or not.
- 7.6 After the Effective Date, any Class Member who has not opted out, will immediately dismiss on a with prejudice basis any action or proceeding pertaining to recovery relating to the subject matter of the Class Proceedings on a without costs basis, regardless of whether or not compensation is received under this *Settlement Agreement*, including the plaintiffs Megan and Tammy Thompson (Saskatchewan Court of King's Bench (QBG-PA-000276-2019)).
- 7.7 To the extent such action or proceeding is not dismissed within 30 days of the Effective Date as contemplated in section 7.6, the Plaintiff on behalf of each Class Member, agrees to consent to a dismissal or discontinuance of the action or proceeding at the request of, or on the application of the Defendants, on a with prejudice and without costs basis and to pay the legal costs associated with the steps taken by the Defendants.

Section 8 – Legal Fees

- 8.1 Class Counsel may bring applications at the Settlement Approval Hearing or on a subsequent date for Court approval of payment of the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon. Notice of such a hearing will be provided to the Defendants. The Defendants will not oppose any applications for approval of the Class Counsel Fee, Class Counsel Disbursements, Honorarium, and Lawyer's Fees, insofar as any such applications are not contrary to the terms of this *Settlement Agreement*.
- 8.2 Class Counsel and other lawyers retained by an Eligible Claimant may charge Lawyer's Fees as a percentage of the Compensatory Payments paid to an Eligible Claimant that they represent after the determination of the Compensatory Payment by the Claims Officer, plus disbursements and applicable taxes.
- 8.3 The amount of the Lawyer's Fees shall not exceed 35% of the Compensatory Payment allocated to any Class Member who is represented. For any Eligible Claimants who are unrepresented, Lawyer's Fees will be 15% of the Compensatory Payments to the Eligible Claimant.
- 8.4 The Claims Administrator shall pay Class Counsel the Class Counsel Fee within 7 days of the Effective Date, and Lawyer's Fees plus disbursements and applicable taxes directly to Class Counsel and other lawyers retained by Eligible Claimants when payments are made to Eligible Claimants.
- 8.5 Notwithstanding any other provision of this *Settlement Agreement*, the aggregate amount of the Class Counsel Fee and Lawyer's Fees shall not exceed 35% of the Settlement Fund plus interest thereon, and the amount of the Class Counsel Fee shall not be less nor more than \$500,000.

Section 9 – No Admission of Liability

- 9.1 The Parties agree that whether or not the *Settlement Agreement* is approved by the Court, the *Settlement Agreement* and anything contained herein, and any and all negotiations, documents, discussions, and proceedings associated with the *Settlement Agreement*, and any action taken to carry out the *Settlement Agreement*, shall not be deemed, construed, or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing or liability by the Releasees, or of the truth of any of the claims or allegations made in the Class Proceeding or in any other pleading filed by the Plaintiffs.

COURT FILE NO. 1201-12838

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

PLAINTIFFS FIONA SINGH and MUZAFFAR HUSSAIN by his litigation
(APPLICANTS) representative FIONA SINGH

DEFENDANTS GLAXOSMITHKLINE INC.,
(RESPONDENTS) GLAXOSMITHKLINE LLC, and
GLAXOSMITHKLINE PLC.

RESPONDENTS MERCHANT LAW GROUP LLP and
MARIANNE AUCH

Brought under the Class Proceedings Act

DOCUMENT AFFIDAVIT

ADDRESS FOR GUARDIAN LAW GROUP LLP
SERVICE AND 342 – 4 Avenue S.E.
CONTACT Calgary, Alberta
INFORMATION OF T2G 1C9
PARTIES FILING &
THIS DOCUMENT Clint Docken, Q.C.
Tel: (403) 457-7778
Fax: (877) 517-6373



THIS IS EXHIBIT " E "
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 20th
day of NOVEMBER A.D. 2024
[Signature]
Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

KoT LAW
1201 – 1914 Hamilton St.
Regina, Saskatchewan
S4P 3N6

Casey R. Churko
Tel: (306) 540-2284
Fax: (639) 739-2223

AFFIDAVIT OF FIONA SINGH
(February 7th, 2020)

I, Fiona Singh, of Calgary, Alberta, AFFIRM AND SAY:

1. I have personal knowledge of the matters to which I hereinafter depose, except where stated to be on information, in which case I set out the source of my information, and in each case I believe the information to be true (unless otherwise indicated).

2. I am the proposed Representative Plaintiff in this class proceeding. I am a former client of E.F Anthony Merchant, Q.C. of the Merchant Law Group. I am now

retainer in front of a judge. He would not let me speak a word. He berated me, and hung up before I could say anything.

31. Under that pressure, I went in to sign the retainer agreement. The Merchant Law Group never served it on me within 10 days, nor gave me 5 days to terminate it.

B. Choice of Counsel

32. Before Mr. Churko became involved, Mr. Merchant and the other lawyers at the Merchant Law Group did not listen to me, and I often felt bullied into doing what I was told to do. The circumstances surrounding the execution of a retainer agreement in July of 2018 was a prime example.

33. During the course of my time working with Mr. Churko, I came to understand my role as litigation representative, and to take a more active role in the litigation. I became committed to pursuing justice for people like me that may have been harmed by taking Paxil®. I worked closely with Mr. Churko to advance this action towards certification. I am proud to have fought for people who may not otherwise have a voice.

34. On January 17th, 2019, Mr. Merchant wrote me (**Exhibit “1”**) that:

(a) “Casey Churko has left our firm” (which I do not believe). On January 16th, 2019, Mr. Churko informed me (and I believe) that he served a *Statement of Claim* on Mr. Merchant, over fee distribution on the “60s Scoop” class action, and that his cchurko@merchantlaw.com e-mail had been turned off that day.

(b) “We already have \$3.7 million in the value of time”. He did not define “We”, but having reviewed the *Matter Draft Report* on the time and disbursements of the Merchant Law Group as of August 29th, 2019, I believe that

(i) \$1,785,651 was for approximately 3,000 hours of time incurred by Mr. Churko (billed by the Merchant Law Group at \$530.89 an hour) in

preparing for and conducting cross-examinations, preparing expert affidavits and amended pleadings, and researching and drafting the certification brief,

(ii) much of the time was incurred on other Paxil® claims dealing with pediatrics and suicidality (not congenital malformations) and patent “evergreening” issues,

(iii) most of the time was incurred by lawyers who are no longer with the Merchant Law Group, and that

(iv) the first 84 of 200 pages of time entries were incurred *before* this class action was filed in Alberta and

(v) thereafter there are numerous boilerplate entries by Evatt Merchant before 2012, and thereafter for “Read and review incoming documents”, totaling 558.39 (I had no dealings with Evatt Merchant).

(c) “four lawyers argued certification.” I attended the certification hearing, and observed that, other than Mr. Merchant and Mr. Churko, the other two lawyers were Joshua Merchant who had 8.7 “posted hours” and Anthony Tibbs, who had 138.98 hours.

35. As the months went on in 2019, Mr. Merchant did not resolve the claim with Mr. Churko. In early 2019, I had not received reports or updates from the Merchant Law Group (as was the situation before 2017). I was happy to be working with Mr. Churko from 2017, and I did not want to go back to working with Mr. Merchant and the first year lawyers and articling students at his firm. When I was working with other lawyers from the Merchant Law Group, there was very little progress in the case, I was not kept informed of the few events that I later learned occurred, and I was not informed of my role and responsibilities as a representative plaintiff.

36. When Mr. Merchant phoned me in 2012 to ask me to be the Alberta named


plaintiff, he did not explain to me what being a representative plaintiff meant, what my responsibilities would be, or what risks would be involved. My understanding was that I was just going to tell my story so that he could hold GSK to account.

37. After working with Mr. Churko, I now understand what is expected of me, and what I ought to expect from my counsel, and I do not believe that Mr. Merchant would be able to effectively advance my interests or those of the class. I believe the *GSK Certification Brief* that the class actions were mismanaged by the Merchant Law Group before 2017 when Mr. Churko became involved in acting on my behalf.

38. Despite having agreed to act on my behalf in any costs proceedings brought by GSK against me, Mr. Merchant has now taken the position that I should be personally responsible for the prior costs awarded by the Court as a result of mismanagement by the Merchant Law Group, and that his new “recruit” should replace me. I was happy to continue the class action as representative plaintiff with Mr. Churko as counsel, but almost immediately after my *Notice of Change of Representation* was served with a cover letter (**Exhibit “2”**), Mr. Merchant sought to replace me and, as I understand it, to “take” the class action “back” from me.


39. I do not want to work with Mr. Merchant, but as long as the Merchant Law Group is prepared to assume the prior costs orders relating to conduct of their lawyers, I would prefer to continue my action as an individual action rather than engage in a prolonged dispute for control of the class action for another two years. It has been approximately 12 years since I contacted the Merchant Law Group, and I would prefer to advance my case to resolution as an individual action along with the approximately 40 other clients who are represented by KoT Law.

SWORN BEFORE ME at Calgary,)
Alberta this 7th day of February, 2020)



A NOTARY PUBLIC in and for
the Province of Alberta)

MATHEW FARRELL
Barrister and Solicitor, Notary Public
in and for the Province of Alberta)



Fiona Singh

1 ONTARIO SUPERIOR COURT OF JUSTICE

2 Court File No. CV-24-00728634-0000

3 -----
4 Between:

5 NAPOLI SHKOLNIK CANADA and NAPOLI SHOLNIK

6 PLLC,

7 Plaintiffs,

8
9 and

10 KOT LAW PROFESSIONAL CORPORATION and CASEY B.

11 CHURKO,

12
13 Defendants.
14 -----

THIS IS EXHIBIT " F " referred to in the Affidavit of MARIO D'ANGELO Sworn before me this 20th day of November A.D. 2024

Clint G. Bocken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

15
16 The Cross-Examination of Casey

17 Churko, a Defendant herein, on his affidavit
18 affirmed October 11, 2024, taken pursuant to
19 Notice of Examination, taken before Deb
20 Beauvais, RPR, CRR, and a Notary Public in
21 and for the County of Ramsey, State of
22 Minnesota, taken remotely on October 30,
23 2024, commencing at approximately 8:30 a.m.
24
25

1 Q. Okay. Tell me about your discussions with
2 your Napoli Shkolnik Canada partners about
3 including that term in the settlement
4 agreement.

5 A. The undertaking and how to comply with it was
6 one of the most frequently discussed topics
7 of the settlement with Mr. D'Angelo and
8 Mr. Schnieders. That was a specific term
9 that was thoroughly discussed during
10 mediation and subsequent meetings, subsequent
11 morning meetings, and subsequent telephone
12 discussions. There was few terms there were
13 more discussed than the undertaking to
14 Merchant Law Group.

15 Q. Okay. Did you specifically discuss the \$1.1
16 million figure with your Napoli Shkolnik
17 Canada partners?

18 A. Yes, I did.

19 Q. When and how did you specifically discuss
20 that?

21 A. That was from September 20th when D'Angelo
22 requested a copy of the signed settlement
23 agreement. Chris Schnieders called it an
24 MSA, and it was talked about particularly
25 after September 24th. But the professional

1 undertaking was frequently discussed before
2 then.

3 Q. Okay. I'm asking about the \$1.1 million
4 figure in particular. My question didn't use
5 the word "undertaking." And just so I
6 understand your answer, Mr. Churko, you
7 discussed it with them by giving them a copy
8 of the signed settlement agreement on or
9 about September 20th; is that your evidence,
10 sir?

11 A. No, it wasn't. My evidence has been
12 transcribed, and you can read it again.

13 Q. Okay. When is the first date on which you
14 discussed or raised personally with your
15 Napoli Shkolnik Canada partners the \$1.1
16 million figure in the settlement agreement?
17 Not the undertaking, the \$1.1 million figure.

18 A. As soon as it was asked of me. And the first
19 time I was specifically asked about it was on
20 September 24th and September 25th.

21 Q. That's the first time you discussed it with
22 your Napoli Shkolnik Canada partners?

23 A. The undertaking, as I said, was frequently
24 discussed. Few topics were discussed more.
25 The \$1.1 million figure, I was specifically

1 asked about that on September 24th and 25th,
2 and I immediately provided the information
3 and the answers to the questions that I was
4 asked.

5 Q. Did you speak with Tony Merchant about that
6 figure?

7 A. Yes, I did.

8 Q. When did you speak to him?

9 A. Before the agreement was signed. He was
10 willing to sign the agreement on the basis of
11 a \$1.1 million figure. He was not willing to
12 do it on the less than \$500,000 that
13 Mr. Schnieders thought he was going to get.

14 Q. So you had that conversation with
15 Mr. Merchant before the agreement was signed,
16 but you didn't even report that conversation
17 to your partners in Napoli Shkolnik Canada,
18 did you?

19 A. In good faith I engaged in several
20 discussions with them about the settlement
21 agreement.

22 Q. Did you report to your Napoli Shkolnik Canada
23 partners that you had agreed with Merchant
24 Law Group that they would receive \$1.1
25 million under the Paxil class-action

1 settlement?

2 A. Yes, I did.

3 Q. When did you report that to them?

4 A. As soon as I was asked.

5 Q. On September 24th and 25th?

6 A. Yes.

7 Q. Okay. I'd like an undertaking for your
8 communications with anyone at Merchant Law
9 Group relating to the Paxil class-action
10 settlement, please.

11 A. That's refused at this time. Your client,
12 Mr. Schnieders and Mr. D'Angelo, haven't even
13 filed a statement of claim at this point.
14 The issues in the litigation have not been
15 defined. I'm not going to give that
16 undertaking at this time.

17 I will, however, fully comply with
18 all disclosure obligations of litigants in
19 Ontario.

20 Q. Mr. Churko, when you were negotiating and
21 finalizing the settlement agreement, what
22 email address did you use?

23 A. Cchurko@napolilaw.com, and which I believe
24 was also forwarded to cchurko@napolilaw.ca.

25 Q. Those are the only email addresses that you

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

NAPOLI SHKOLNIK CANADA and NAPOLI SHKOLNIK PLLC

and

KOT LAW PROFESSIONAL CORPORATION and CASEY R. CHURKO

Defendants

THIS IS EXHIBIT " G "
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 20th
day of November A.D. 2024

Plaintiffs
Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

AFFIDAVIT OF PHILIP FOURIE

I, Philip Fourie, of the City of Prince Albert, in the Province of Saskatchewan, MAKE
OATH AND SAY THAT:

1. I am a Partner at the law firm of Kirkby Fourie in Prince Albert, Saskatchewan. I work alongside Casey R. Churko in the prosecution of certain class actions. As such, I have knowledge of the matters to which I depose below. To the extent any information in this affidavit is not within my direct knowledge, I have identified the source of the information and believe it to be true.
2. I make this affidavit in support of the Plaintiffs' motion for urgent injunctive relief.
3. On or about 11:26 AM on October 2, 2024, Churko phoned me on my cell phone. My handwritten notes from this call are attached at **Exhibit "A"**.
4. On this call, Churko told me that I have probably heard that he has split from Napoli Shkolnik Canada ("**NS Canada**") on account of events surrounding the Paxil and Opioid Class Action settlements.

5. He then informed me that he currently does not have access to his e-mails but that he believes October 2nd is the deadline to file a notice of discontinuance for two defendants in the Opioid class action matter pursuant to a fiat from Justice Popescul. He told me that although I am co-counsel of record, he is willing to help me draft the notice if I need his help. I thanked him for the reminder and told him I will let him know if I need his help.

6. He also recommended that we follow up on a related British Columbia Court of Appeal matter that may result in cost being awarded to the extent of \$50,000 if the matter is not addressed.

7. I inquired from him what about the Paxil Settlement has caused the issues and him splitting from NS Canada.

8. He explained that the NS Canada lawyers are upset with him due to him agreeing to a revised fees provision in a parallel settlement agreement.

9. He clarified that there was an original "agreement in principle" that was agreed to during negotiations which provided for \$500,000 fee for counsel cost.

10. Churko stated to me that the eventual settlement was for \$7.5 million and that he renegotiated the \$500,000 fee provision. He was concerned that the way the original provision was drafted it may cause the class to pay additional fees. He explained that he renegotiated the fee provision based on the fact that the retainer agreement allowed for 35% for "bulk legal fees". He stated that he ended up negotiating a lesser percentage for bulk legal fees that amounted to a total of \$2 million. He explained that the lesser settlement amount of about 33% was due to the Provincial and Territorial Government being entitled to some of the settlement fees and rather that

17. I wished him the best, and we ended our conversation.

SWORN by Philip Fourie, at the City of)
Prince Albert, in the Province of)
Saskatchewan, before me at the city of)
Toronto, in the Province of Ontario, on)
October 7, 2024 in accordance with)
O. Reg. 431/20, Administering Oath or)
Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

VIKTOR NIKOLOV
LSO# 84503P



PHILIP FOURIE

to refer to this firm when he alluded to "Recon". He stated that he believes NS Canada has breached the partnership agreement and not him.

15. Churko also mentioned during our conversation that NS Canada is upset with him because of him unilaterally settling with some minor Opioid Class Action defendants. He explained that he settled with one defendant for a relatively small amount. I am co-counsel and counsel of record in the action and I was not advised or consulted about the settlement prior to the execution of the agreement. I inquired from him how much he settled for and how much lac La Ronge, one of my clients, may be expecting. I cannot recall the total settlement amount he mentioned but he did indicate to me that Lac la Ronge may be expecting around \$50,000 in settlement fees. He explained that the total settlement amount was reasonable in relation to the particular defendant, that it was similar to other actions and that the settlement was strategically beneficial because it would assist in overriding issues with having a Case Management Judge appointed in the matter. Churko also mentioned that he has been approached by some additional defendants to potentially settle the matter but that he is unable to follow up on these offers given that NS Canada has prevented him from having access to his e-mails.

16. Towards the end of our conversation, Churko advised me that he would not mind me sharing the information with NS Canada if it would help "resolve any misunderstandings", and he described certain future arrangements that would be acceptable to him.

requiring the class to pay something in addition to the 35% Churko decided to reduce the percentage legal fees to 33% to accommodate the fees payable to the Government.

11. Churko clarified that with respect to the 33% legal fees in the amended settlement agreement, \$1,100,000 was to go to the Merchant Law Group LLP ("**Merchant**"), \$850,000 was to go to his personal professional corporation and \$50,000 was to go to Mr. Clint Docken, his co-counsel in the case.

12. Churko explained that the reason why he renegotiated a \$1,100,000 fee settlement for Merchant was because there was an undertaking that they would receive a fair and reasonable distribution of the legal fees. He believed that \$1,100,000 was a good faith fair distribution to Merchant given that they had "4 million dollars in time on the file". He explained that not restructuring the legal fee arrangement in accordance with the revised agreement may have caused the plaintiff GSK not being released from liability.

13. Churko explained that the reason he only negotiated \$50,000 legal fees for Clint Docken is because Docken had minimal involvement in the Paxil file as co-counsel. He mentioned that he believes that NS Canada misunderstands the reasons for his actions.

14. I inquired about the \$850,000 being paid into his personal professional account. He stated that NS Canada is a partner in his personal professional account. He also explained that NS Canada has done things that caused him concern and, in his view, may result in NS Canada moving away from the partnership with him. According to Churko, NS Canada had stopped paying his monthly draw, and had not paid his office rent for some time and they have made overtures toward another law firm in British Columbia called "Recon". I now understand that Recon LLP is a Toronto-based law firm working on insolvency aspects of the Opioids Class Action, and I believe Churko intended

Court File No. CV-24-00728634-0000

THIS IS EXHIBIT ^H
referred to in the Affidavit of

MARIO D'ANGELO

Sworn before me this 20th
day of NOVEMBER A.D. 2024

ONTARIO

SUPERIOR COURT OF JUSTICE

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

B E T W E E N:

NAPOLI SHKOLNIK CANADA AND NAPOLI SHKOLNIK PLLC

Plaintiffs

- and -

KOT LAW PROFESSIONAL CORPORATION AND CASEY R. CHURKO

Defendants

This is the Cross-Examination on Affidavit of PHILIP
FOURIE taken via videoconference, on the 29th of
October, 2024.

1 70 Q. Mr. Fourie, do you recall that I
2 informed you that Napoli US filed a motion in Ontario
3 to dissolve the partnership?

4 A. No, not at all.

5 71 Q. And at paragraph 14 you say:
6 "He also explained that NS Canada has done
7 things that may result in NS Canada moving away
8 from the partnership with him."

9 I had, in fact, taken the position that I had not
10 withdrawn, I did not split from the firm. I said
11 that firm may be splitten up. Is that your
12 understanding?

13 A. No. I -- beginning of our
14 conversation you started with specifically
15 statements. I probably have heard that you've split
16 from Napoli, so that can only mean Napoli Canada.
17 But then at the same time later in our conversation
18 you took the position that you believe that they have
19 breached the agreement. But you did indicate to me
20 that I probably heard that you have split from -- so
21 I'm just stating what you indicated to me, from what
22 I recall anyway that you indicated to me.

23 72 Q. At paragraph 16 you say I described
24 "certain future arrangements." And your notes are
25 bear on that, it doesn't show up anywhere. What

1 not in here, I stated to you that I don't believe
2 recon -- you know, that those overtures is -- if in
3 fact should be a concern because they -- their
4 involvement is just with respect to the very narrow
5 matter of that BC matter of where they are involved
6 in trying to -- the CECA matter, I think, and the --
7 I've had no indication in my conversations over --
8 you know, and being on those weekly meetings that
9 this was any -- that they are going to take over or
10 in any way -- yeah.

11 Essentially, I think what I tried to convey to you
12 is that I don't think there's any concerns about them
13 trying to take over your job. They are just in their
14 lane, so to speak, and I've never had any indication
15 that they're going to take over what you are doing.
16 Something in that line anyway. I didn't make much on
17 that, but that's what I recall anyway.

18 CNSL C. CHURKO: Those are my questions for this witness.

19 THE REPORTER: Mr. Churko, are you ordering the transcript?
20 Did you want a rough draft tonight?

21 CNSL C. CHURKO: Yes. We don't need a draft copy, just the
22 final copy is okay. Electronic copy. Can you send a
23 copy by e-mail? Also, I believe I requested a draft
24 from the prior cross-examination today. I don't need
25 a draft of that, just the final, if that's all the

1 certain future arrangements did I describe?

2 A. Oh, you mentioned that you would
3 after -- like I've mentioned to you that you've
4 indicated to me that there's a split, that you said
5 in the future you would like to continue to be
6 involved in I believe you said on the opioid matters
7 as well as the Treaty 6 matters. That is what you've
8 indicated to me, that.

9 And what I understood that to mean at the time was
10 that given you've split from them that you would like
11 to continue to be involved potentially with that,
12 whether it would be in cooperation with Napoli in
13 some way or directly with me and the request, whether
14 I would be willing to work with you, I don't know. I
15 can only speculate to that. But we did not go into
16 detail. That was very brief and that's what you
17 indicated to me.

18 73 Q. Last topic, paragraph 14. This is
19 recon. I never said to you that they were in British
20 Columbia.

21 CNSL V. NIKOLOV: Mr. Churko, that's clearly --

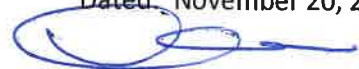
22 THE WITNESS: Yeah, I don't know where they are. For
23 whatever reason that was my understanding. Whether
24 it was something that you misspoke or whether I -- I
25 don't know. But as you would recall something that's

COMMISSIONER FOR OATHS CERTIFICATE

CANADA }
PROVINCE OF ALBERTA }
ALBERTA }

I, Clint Docken, a Notary Public in and for the Province of Alberta, Counsel with Napoli Shkolnik Canada, located in the City of Calgary in the Province of Alberta, DO CERTIFY that this affidavit was sworn before me using video conferencing through Zoom and that Mario D'Angelo executed the Affidavit. I am satisfied that this process was necessary because it was impossible for Mr. D'Angelo and myself to be physically present together for swearing of his affidavit.

Dated: November 20, 2024



A Notary Public in and for
the Province of Alberta

Clerk's Stamp

COURT FILE NUMBER	1201 12838
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	Calgary
PLAINTIFFS	Fiona Singh And Muzaffar Hussain, by his litigation Representative Fiona Singh
DEFENDANTS	GlaxoSmithKline Inc., GlaxoSmithKline LLC and GlaxoSmithKline PLC
DOCUMENT	AFFIDAVIT OF MARIO D'ANGELO SWORN NOVEMBER 20, 2024
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	ROSS NASSERI LLP 312 Adelaide St. W, Suite 700 Toronto ON M5V 1R2 Tel: 416-572-4910 Eric S. Block, LSO# 47479K eblock@rossnasseri.com Tel: 416-572-4909 Eric Brousseau, LSO# 68025G ebrousseau@rossnasseri.com Tel: 416-572-4906 Viktor Nikolov, LSO# 84503P vnikolov@rossnasseri.com Tel: 416-572-4910 ext. 132

AFFIDAVIT OF MARIO D'ANGELO

I, Mario D'Angelo, of the Hamlet of Bayport in the State of New York, **SWEAR THAT:**

1. I am an agent of McIntyre Law P.C. ("**McIntyre Law**"), which is a partner in Napoli Shkolnik Canada ("**NS Canada**"). With NS Canada, I have been thoroughly involved in litigating the above-captioned action (the "**Paxil Class Action**"). As such, I have knowledge of the matters

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to which I swear below. To the extent any information in this affidavit is not within my direct knowledge, I have identified the source of the information and believe it to be true.

2. I make this affidavit in support of the application with respect to the portion of the approval of the Paxil Class Action settlement agreement with respect to legal costs, the representative plaintiff's honorarium, disbursements and taxes (the "**Proposed Legal Costs Application**").

BACKGROUND

3. Since 2007, I have been involved in litigation to recover compensation for children who suffered congenital birth defects caused by in-utero exposure to PAXIL®. I have litigated claims in the United States and have supported litigation efforts in other jurisdictions, including Canada. In the United States, firms like McIntyre and Napoli Shkolnik PLLC ("**NS PLLC**")—another partner in NS Canada—have prosecuted hundreds of claims totaling more than USD \$1 billion. The first settlements occurred in 2010, and by 2018 the litigation in the United States had concluded.

4. In Canada, Merchant Law Group LLP ("**Merchant Law**") commenced this action, as part of a series of PAXIL® actions, on October 12, 2012, before this Court. In 2016 I was introduced to Casey R. Churko, then a lawyer at Merchant Law, by one of our experts whom they had contacted to assist in the Canadian action. She was concerned that Churko was not fully informed about the science related to Paxil® and teratology. To assist with the Paxil Class Action, Merchant Law and I (on behalf of McIntyre Law) entered arrangements wherein McIntyre Law would provide access to resources and work product, including expert and technical work, in exchange for a fee sharing arrangement with Merchant Law.

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5. During our discussions with Churko and E.F. Anthony Merchant, K.C. ("**Tony Merchant**"), we learned that they had done little, if anything, to identify potential class members other than the representative plaintiff and child. To assist, we agreed to identify class members.
6. In or about 2019, Churko's relationship with Tony Merchant soured. Churko left Merchant Law, sued the firm, and began practicing through KoT Law Professional Corporation ("**KoT**"). I understand that Churko took the Paxil Class Action with him to KoT.
7. Churko remained in contact with me and sought my assistance with the Paxil Class Action. I personally loaned him \$10,000 USD to pay his bills. Lacking the resources and experience to prosecute the Paxil Class Action alone, Churko proposed that McIntyre and KoT work together with Clint G. Docken, K.C.—an experienced litigator who was at Guardian Law Group LLP ("**Guardian**") at the time.
8. In October 2019, McIntyre, NS PLLC (together with McIntyre, the "**American Partners**") and KoT Canada executed an Interjurisdictional Partnership Agreement (the "**Partnership Agreement**") forming NS Canada to prosecute actions such as the Paxil Class Action in Canada. The Paxil Class Action was ongoing and being prosecuted by Churko (through KoT) at the time that NS Canada was formed. As such, it was all parties' intention that it be treated as "Authorized Litigation," as that term is defined in the Partnership Agreement, such that NS Canada would fund its continued prosecution, and the NS Canada partners would share in any proceeds of settlement.
9. In April 2022, Docken joined NS Canada and transferred his files, including Guardian's share of and role in the Paxil Class Action file, to NS Canada.

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NS CANADA'S ROLE IN PAXIL CLASS ACTION

10. In 2019, Merchant Law triggered a carriage dispute in which, among other things, Merchant Law sought to deny Churko's and Docken's carriage of the Paxil Class Action. The American Partners funded the motion on the basis that, as set out above, the Paxil Class Action was an NS Canada matter and was governed by and subject to the Partnership Agreement.

11. Since Docken joined NS Canada in 2022, NS Canada has been the sole law firm representing the representative plaintiff—and after certification, the class—in the Paxil Class Action. No individual lawyer is responsible for the work done in the Paxil Class Action. Canadian lawyers, like Docken, Churko, Mathew Farrell and Adam Bordinon provided legal advice and representation while the American Partners contributed their technical expertise, prior work product, and financing. As would be expected for any class proceeding—particularly one with the medical complexities of the Paxil Class Action—reaching the \$7,500,000 settlement was an institutional effort.

12. NS Canada spent considerable time advancing the Paxil Class Action and negotiating its settlement. As part of settlement negotiations, the American Partners, along with Docken and Churko, attended a mediation in Toronto in August 2022. The American Partners, and Docken and Churko, contributed to subsequent settlement negotiations over the following months.

13. The American Partners also spent considerable time—both before and after the inception of NS Canada—locating and identifying class members, including among other things, time spent facilitating and conducting teratological assessments. We conducted an advertising campaign at our expense and opened files for 933 mother-child pairs who were sent screening questionnaires by our office. We received 183 answered questionnaires which my staff and I reviewed and entered

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into the database. Based on our review, we requested the medical records for 147 mother-child pairs. In many cases, the records needed to establish proof of use of Paxil® were 15-20 years old. Given the record retention policies of pharmacies and physicians, most were difficult to locate and obtain. Upon receipt of the medical records, I personally reviewed each set to determine proof of use and whether the child was born with a congenital birth defect attributable to Paxil® and not related to a genetic anomaly or syndrome. While tragic, allowing children born with genetic or syndromic defects to submit claims would diminish the funds available for truly related claims. As part of this review, my staff and I prepared summaries for each case. Many of these were submitted to the defendant as part of our settlement discussions. From the original 933 files that were opened, we identified 41 pairs who may have compensable claims to be submitted. NS Canada executed retainers with these 41 pairs.

14. To reach this required 2124 hours of individual case investigation, by myself and our staff. A further 769.27 hours was spent by NS Canada lawyers and staff on class or common issues.

15. To finance NS Canada's prosecution of the Paxil Class Action, the American Partners incurred significant expenses. For instance, the American Partners have paid \$691,070.67 to Churko by way of a partnership draw. Churko has not contributed any money to the partnership nor have any of the partnership's cases settled and resulted in legal fees to the firm. Attached as **Exhibit "A"** is a table setting out the draw paid to Churko on a year-over-year basis.

16. As such, to date, the American Partners have been solely responsible for funding all of NS Canada's expenses (including Churko's draw) and all of its litigation. The American Partners have funded among other things, case expenses including fees for obtaining medical records, filing fees,

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and overhead costs like staff salaries, office rent, and insurance. Specifically with respect to the class and individual case costs to date, the American Partners have spent \$227,355.06 CAD.

17. The figures described above are drawn directly from timekeeping and disbursement records maintained by NS Canada's partners. I have not attached these as exhibits to my affidavit because they would exceed the 40-page limit for exhibits as set out in paragraph 10 of the Endorsement of Justice E. Jane Sidnell, dated November 8, 2024.

THE ORIGINAL ARRANGEMENT

18. The parties reached a settlement in principle in 2023. By October 2023, Churko had circulated a draft master settlement agreement ("MSA") by email to defence counsel, Docken and the American Partners with certain revisions reflecting the negotiation of certain terms. A copy of this email is attached as **Exhibit "B"**.

19. The draft MSA attached to this email included the global settlement amount of \$7,500,000. Most of the key terms with respect to fees were also set by this point. Excerpts from the draft MSA attached to the October 24, 2023, email are attached as **Exhibit "C"**.

20. The provisions with respect to legal fees remained fundamentally consistent between October 24, 2023, and September 3, 2024. Excerpts from the draft MSA that Churko circulated on September 3, 2024, are attached as **Exhibit "D"**.

21. Between October 2023 and September 2024, the MSA included the following provisions:

(a) The definitions of "Class Counsel" and "Class Counsel Fees":

(i) "Class Counsel" means Clint Docken, K.C. and Casey R. Churko; and

MD

- (ii) "Class Counsel Fee" is CDN \$500,000, separate, and apart from Lawyer's Fees; and
 - (b) The definition of "Lawyer's Fees": up to 35% of Compensatory Payments paid to Eligible Claimants who are represented by Class Counsel or another lawyer of their choosing who has a valid and enforceable retainer agreement with an Eligible Claimant. Lawyer's Fees paid to lawyers other than Class Counsel shall not exceed 25% where the retainers were executed before the *Notice of Settlement Approval Hearing* is given and 10% where the retainers were executed after. Class Counsel will receive 15% of Compensatory Payments that are made to Eligible Claimants who are unrepresented.
 - (c) NS Canada (through Docken and Churko) was identified as Class Counsel of record in notice provisions, on the cover of the MSA and throughout the document
22. With respect to Lawyers' Fees, the parties negotiated the following revisions between October 2023 and September 2024 (with the revisions identified in red, below):

SECTION 8 – Legal Fees

- 8.1 Class Counsel may bring applications at the Settlement Approval Hearing or on a subsequent date for Court approval of payment of the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon. -Notice of such a hearing will be provided to the Defendants. -The Defendants will not oppose any applications~~by the Plaintiff~~ for approval of the Class Counsel Fee, Class Counsel Disbursements, Honorarium, and Lawyer's Fees, insofar as any such application is applications are not contrary to the terms of this Settlement Agreement.
- 8.2 Class Counsel and other lawyers retained by an Eligible Claimant may charge Lawyer's Fees ~~and disbursements~~ as a percentage of the Compensatory Payments paid to an Eligible Claimant that they represent after the determination of the Compensatory Payment by the Claims Officer, plus disbursements and applicable taxes.
- 8.3 The amount of the Lawyer's Fees shall not exceed 35% of the Compensatory Payment allocated to any Class Member who is represented. For any Eligible Claimants who are unrepresented, Lawyer's Fees will be 15% of the Compensatory Payments to the Eligible Claimant.
- 8.4 The Claims Administrator shall pay Class Counsel the Class Counsel Fee within 7 days of the Effective Date, and Lawyer's Fees and plus disbursements and applicable taxes directly to Class Counsel and other lawyers retained by Eligible Claimants~~when payments are made to Eligible Claimants~~.
- 8.5 Notwithstanding any other provision of this Settlement Agreement, the aggregate amount of the Class Counsel Fee and Lawyer's Fees shall not exceed 35% of the Settlement Fund plus interest thereon, and the amount of the Class Counsel Fee shall not be less nor more than \$500,000

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23. By September 2024, the parties had agreed that the allocation of legal fees that was most reasonable and fairest to the class consisted of: (i) a class counsel fee of \$500,000, (ii) a limit of 35% on any payment of legal fees, including fees incurred on account of individual retainers with class members, and (iii) uncapped disbursements.

(i) The reasons for the original arrangement

24. NS Canada negotiated the terms of the MSA with a view to protecting the interests of the class. With respect to the fee arrangement, there were circumstances idiosyncratic to the Paxil Class Action that NS Canada sought to address in the fees provisions. Specifically, unlike many other class proceedings, considerable work is required to identify, locate and prove the eligibility of class members. The MSA thus needed to ensure class members would be adequately represented such that they could actually be identified and access the proceeds of the settlement.

25. Among other things, to make a claim, an individual class member will have to show that: (i) name-brand PAXIL[®] was implicated, (ii) PAXIL[®] was consumed in the first trimester, and (iii) the applicant suffered specific injuries. This requires extensive study and the assistance of counsel. NS Canada has already spent considerable time developing the requisite teratology experience, and identifying dozens of class members who are now entitled to recover under the MSA. The smaller class counsel fee contemplated in the MSA and larger allotment to individual retainers ensures that NS Canada is adequately compensated for this effort and incentivises other lawyers, including Merchant Law, to continue to take on this work and seek out other class members.

26. Conversely, a large class counsel fee and more stringent limit on individual retainers disincentivizes lawyers from seeking and assisting prospective class members.

(ii) *Merchant Law's entitlement to fees*

27. While negotiating the fee provisions, NS Canada was aware of the undertaking to Merchant Law arising out of the carriage dispute. Specifically, Associate Chief Justice Rooke referenced an undertaking by KoT and Guardian to pay Merchant Law "fair and reasonable fees and disbursements" at the end of the Paxil Class Action.

28. In connection with the carriage dispute, the representative plaintiff Fiona Singh swore an affidavit on February 7, 2020. Among other things, Ms. Singh's affidavit raised issues with the costs that Merchant Law had claimed up until that point. Excerpts from Ms. Singh's affidavit with respect to the fees claimed to that point in time are excerpted as **Exhibit "E"**.

29. Ms. Singh noted that as of August 29, 2019, Merchant Law claimed to have incurred \$3.7 million in work-in-progress. Ms. Singh noted that this fee was exorbitant and unfounded. She specifically noted the following:

- (a) The first 84 of 200 pages of time entries were incurred *before* the Paxil Class Action was ever filed;
- (b) Much of the time dealt with pediatrics and suicidality (not congenital malformations) and patent "evergreening";
- (c) Most of the time was incurred by lawyers who were no longer with Merchant Law; and
- (d) 558.39 hours were merely boilerplate entries by Evatt Merchant before 2012 and thereafter for "Read and review incoming documents".

30. In discussions about the undertaking, Churko consistently advised his NS Canada partners (including me, on behalf of McIntyre Law P.C.) that a \$500,000 class counsel fee would be sufficient to satisfy Merchant Law's fair and reasonable fees and disbursements. Specifically, Churko advised that Merchant Law had significantly inflated his "WIP" by including within its



scope separate actions that predated the filing of the Paxil Class Action. He also echoed the issues raised in Ms. Singh's affidavit referenced above. In effect, Merchant Law claimed for fees that were incurred on separate matters which NS Canada never had carriage over, and which were not subject to any undertaking and could not form the basis of a solicitor's lien. Churko expressed this view to his partners even as late as September 10, 2024.

31. Merchant Law now claims the value of its work is \$4,249,842.98. This would mean that Merchant Law incurred another \$500,000 after Ms. Singh had already stopped being represented by Merchant Law. As in 2019, the Merchant Law's claimed fees are egregiously inflated and largely out-of-scope.

CHURKO'S SURREPTITIOUS AMENDMENTS

32. Churko told nobody at NS Canada that he had submitted an MSA for Court approval with fundamentally different fee provisions than the ones described above. Despite constant requests from the American Partners, Churko refused to provide the MSA, and consistently refused to save any work product to NS Canada's server despite the American Partners' repeated requests.

33. It was only the day of the September 24, 2024 settlement approval hearing that Docken and the American Partners realized that Churko had unilaterally, and without the knowledge or consent of Docken or the American Partners, quadrupled the Class Counsel Fee from \$500,000 to \$2,000,000, and directed most of that fee to either his personal professional corporation, KoT (\$850,000) or to his former employer Merchant Law (\$1,100,000).

34. NS Canada was shocked that Churko was attempting to divert settlement funds away from the class, his partners, and co-counsel. In turn, NS Canada began to investigate Churko's conduct. On October 1, 2024, NS Canada and NS PLLC commenced an action in Ontario, bearing Court

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File No. CV-24-00728634-0000, with respect to his breaches of fiduciary duty to his partners, among other things (the “**Ontario Action**”).

35. NS Canada has learned that although Churko did not discuss the amended MSA with his own partners or co-counsel he *did* discuss the MSA with Tony Merchant of Merchant Law shortly before signing. Churko said that he allocated \$1,100,000 to Merchant Law, because they would not have otherwise signed the MSA. Excerpts of the transcript of cross-examination of Casey Churko dated October 30, 2024, which is publicly filed in the Ontario Action, are attached as **Exhibit “F”**.

Despite the centrality to the Ontario Action of Churko’s decision to amend the MSA, Churko has still not explained to NS Canada why he allocated \$850,000 to his personal professional corporation. His answers on cross-examination in the Ontario Action are a masterclass in obfuscation. The only explanation that he has ever given was given to co-counsel on another class proceeding, Philip Fourie. Churko told Fourie that he tried to take the \$850,000 because “NS Canada has done things that caused him concern and, in his view, may result in NS Canada moving away from the partnership with him”. Fourie recounted that Churko expressed concern that the American Partners were making overtures towards “Recon” (i.e., Reconstruct LLP) and away from Churko. The affidavit of Philip Fourie (without exhibits), sworn October 7, 2024, and excerpts from the transcript of his cross-examination dated October 29, 2024, each of which is publicly filed in the Ontario Action, are attached as **Exhibits “G” and “H”**.

36. Churko’s belief regarding Reconstruct LLP is not true. Even if it were, it does not justify Churko’s attempt to divert \$850,000 to himself and \$1,100,000 to Merchant Law to the detriment of the class, his partners, and his co-counsel.

MC

SWORN BEFORE ME at
the City of Calgary,
in the Province of Alberta
this ____ day of November 2024.

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)
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)
)
)



A Notary Public

MARIO D'ANGELO

MD

THIS IS EXHIBIT " A "
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 80th
day of November A.D. 2024

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

Summary of Casey Churko's draws

Casey Churko Draw by Year	Draw as of 10/2/2019 on Entry of ILPA	Remainder of 2019	2020	2021	2022	2023	2024	Total As of 9/24/2024
USD	\$53,250.00	\$22,157.98	\$41,610.00	\$65,000.00	\$130,000.00	\$120,000.00	\$80,000.00	\$512,017.98
Converted to CAD	\$71,871.52	\$29,906.63	\$56,161.02	\$87,730.50	\$175,461.00	\$161,964.00	\$107,976.00	\$691,070.67

MD

[REDACTED]

From: Casey R. Churko <cchurko@napolilaw.ca>

Sent: Tuesday, October 24, 2023 4:29 PM

To: Justine Smith (she/her) <justine.smith@nortonrosefulbright.com>; Chris Schnieders <CSchnieders@NapoliLaw.com>; mdesq@dangelolaw.net; Sarah Ivany (she/her) <sarah.ivany@nortonrosefulbright.com>; Randy Sutton (he/him) <randy.sutton@nortonrosefulbright.com>; Clint Docken <CDocken@NapoliLaw.ca>

Subject: Re: GSK/Singh Settlement Agreement Meeting [NRFC-DMS.FID8106805]

THIS IS EXHIBIT " B " referred to in the Affidavit of MARIO D'ANGELO Sworn before me this 20th day of November A.D. 2024

WITHOUT PREJUDICE

Justine/Randy,

I went through each of the redlines in the version you sent on Thursday, and believe I accepted most of the changes. I also went through the defined terms in detail to ensure consistency in capitalization and italicization throughout the agreement, though we are flexible on formatting.

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

I attach the resulting version, which has not yet accounted for the issues raised in your 4:56 pm below, but had them flagged to address. I believe that we will be in agreement on the list of additions to the qualifying malformations below and the continued exclusion for conditions that are not congenital, though I will confirm with my colleagues.

I will contact the remaining Health Insurers again to confirm their updated contact person and addresses to include. For any that do not respond, I will insert the most recently known address. Trilogi has been in contact with each of them in the last year.

From: "Casey R. Churko" <cchurko@napolilaw.ca>

Date: Tuesday, October 24, 2023 at 5:00 PM

To: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>, Chris Schnieders <CSchnieders@NapoliLaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>, Clint Docken <CDocken@NapoliLaw.ca>

Subject: Re: GSK/Singh Settlement Agreement Meeting [NRFC-DMS.FID8106805]

Thank you, I will send the revised copy in about 45 minutes. Just finishing up a thorough review.

From: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>

Date: Tuesday, October 24, 2023 at 4:56 PM

MD

To: "Casey R. Churko" <cchurko@napolilaw.ca>, Chris Schnieders
<CSchnieders@NapoliLaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>,
"Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)"
<randy.sutton@nortonrosefulbright.com>, Clint Docken <CDocken@NapoliLaw.ca>
Subject: RE: GSK/Singh Settlement Agreement Meeting [NRFC-DMS.FID8106805]

WITHOUT PREJUDICE AND SETTLEMENT PRIVILEGED

All,

We have discussed the claimant / compensable injury issue with GSK.

We propose the following, which we consider a reasonable compromise in a class action relating to congenital malformations:

- Vertical talus: The claimant child has a notation of "club foot" in his medical records, followed by a later diagnosis of vertical talus. GSK is willing to expand the relevant injury category from "true structural club foot" to "club foot" so that this claimant could recover on the basis that the claims officer could accept the initial diagnosis of club foot to provide for recovery.
- Spina bifida and encephalocele: GSK is willing to expand the current NTD category to include spina bifida and encephalocele, in addition to anencephaly which is listed under that category already.
- Spondylitis: This is an inflammatory disease and not a congenital defect. We do not see a basis to include this condition as a compensable injury, which are limited to congenital malformations.
- Encephalopathy: This is an acquired condition and not a congenital defect. Medical records state "no dysmorphic features or obvious congenital abnormalities". We do not see the basis for including encephalopathy to capture this claimant.

Let us know if you are prepared to proceed on this basis in terms of qualifying malformations. We do expect we will also get instructions on the confounding factors as discussed and to move to a medical doctor as opposed to a teratologist. Once we have instructions, we will propose some revised wording. We will address the other issues discussed at our meeting in the next circulated draft.

Casey – let us know if we should wait on the revised copy that you were going to circulate.

Best,

Justine Smith
Associate

Norton Rose Fulbright Canada LLP / S.E.N.C.R.L., s.r.l.
222 Bay Street, Suite 3000, P.O. Box 53, Toronto ON M5K 1E7 Canada
T: +1 416.216.1921 | F: +1 416.216.3930
justine.smith@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

From: Casey R. Churko <cchurko@napolilaw.ca>
Sent: October 23, 2023 2:50 PM
To: Justine Smith (she/her) <justine.smith@nortonrosefulbright.com>; Chris Schnieders <CSchnieders@NapoliLaw.com>; mdesq@dangelolaw.net; Sarah Ivany (she/her) <sarah.ivany@nortonrosefulbright.com>; Randy Sutton (he/him) <randy.sutton@nortonrosefulbright.com>; Clint Docken <CDocken@NapoliLaw.ca>
Subject: Re: GSK/Singh Settlement Agreement Meeting

Justine/Randy,

As discussed on Thursday, I attach the first draft of the application to approve the certification notice, for our further discussion on Wednesday.

Paul Battaglia of Trilogy Class Action Services was gracious enough to meet this weekend to prepare his affidavit, which I attach hereto. He will be available to make any additional adjustments that are required.

I believe the application will be ready for filing with the Court this week, subject to your changes and comments.

From: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>
Date: Thursday, October 19, 2023 at 5:11 PM
To: "Casey R. Churko" <cchurko@napolilaw.ca>, Chris Schnieders <CSchnieders@NapoliLaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>, Clint Docken <CDocken@NapoliLaw.ca>
Subject: RE: GSK/Singh Settlement Agreement Meeting

Thanks, Casey.

Attached is the word copy for your edits, which includes the non-contentious changes from today's call in track changes.

Kindly also make your edits using track changes for ease of review.

Justine Smith
Associate

Norton Rose Fulbright Canada LLP / S.E.N.C.R.L., s.r.l.
222 Bay Street, Suite 3000, P.O. Box 53, Toronto ON M5K 1E7 Canada
T: +1 416.216.1921 | F: +1 416.216.3930
justine.smith@nortonrosefulbright.com

NORTON ROSE FULBRIGHT

From: Casey R. Churko <cchurko@napolilaw.ca>
Sent: October 19, 2023 1:23 PM
To: Justine Smith (she/her) <justine.smith@nortonrosefulbright.com>; Chris Schnieders

MD

<CSchnieders@Napolilaw.com>; mdesq@dangelolaw.net; Sarah Ivany (she/her)
<sarah.ivany@nortonrosefulbright.com>; Randy Sutton (he/him)
<randy.sutton@nortonrosefulbright.com>; Clint Docken <CDocken@Napolilaw.ca>
Subject: Re: GSK/Singh Settlement Agreement Meeting

November 17 was the next filing deadline in the ABCA (less than a month away).

Provided that I do not get unexpectedly drawn into other matters, I expect to have a draft application for certification notice approval ready to review for our call on Wednesday, and if aggregable, for filing later that week.

From: "Casey R. Churko" <cchurko@napolilaw.ca>
Date: Thursday, October 19, 2023 at 1:15 PM
To: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>, Chris Schnieders <CSchnieders@Napolilaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>, Clint Docken <CDocken@Napolilaw.ca>
Subject: Re: GSK/Singh Settlement Agreement Meeting

WITHOUT PREJUDICE

Justine,

Further to our Teams meeting, the "standalone" malformation cases I mentioned were:

- bilateral vertical talus (child Dmitri Delic) (note, Manitoba subrogation records coded it as "club foot")
- spondylolitis (child Stephanie Nolette)
- spina bifida / encephalocele (child Emerald Weatherilt)

I also mentioned a case of encephalopathy (child Kaitlyn Paul)

From: "Casey R. Churko" <cchurko@napolilaw.ca>
Date: Thursday, October 19, 2023 at 9:24 AM
To: "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>, Chris Schnieders <CSchnieders@Napolilaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "cgd@docken.com" <cgd@docken.com>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>
Subject: Re: GSK/Singh Settlement Agreement Meeting

Justine/Randy,

For reference on the meeting today, I attach the most recent redlined draft of the settlement agreement that I received.

MD

From: Cathy Dawson <cathy.dawson@nortonrosefulbright.com> on behalf of "Justine Smith (she/her)" <justine.smith@nortonrosefulbright.com>

Date: Wednesday, October 18, 2023 at 12:06 PM

To: "cchurko@napolilaw.ca" <cchurko@napolilaw.ca>, "CSchnieders@NapoliLaw.com" <CSchnieders@NapoliLaw.com>, "mdesq@dangelolaw.net" <mdesq@dangelolaw.net>, "cgd@docken.com" <cgd@docken.com>, "Sarah Ivany (she/her)" <sarah.ivany@nortonrosefulbright.com>, "Randy Sutton (he/him)" <randy.sutton@nortonrosefulbright.com>

Subject: GSK/Singh Settlement Agreement Meeting

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THIS IS EXHIBIT " C "
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 20th
day of November A.D. 2021

ingesting Paxil® or Paxil CR™ while pregnant; family members who may make claims under *Family Compensation Legislation* following the death of, or injury in relation to the congenital malformations; children born alive to such women; and provincial and territorial governments who paid health care costs on their behalf.

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

- (o) "Class Counsel" means Clint Docken, K.C. and Casey R. Churko.
- (p) "Class Counsel Disbursements" means the actual amount of legitimate and reasonable disbursements incurred by or at the request of Class Counsel or Merchant Law Group LLP between the filing of this Class Proceeding (and no other class action or class proceeding filed anywhere in Canada at any time relating to the prescription or use of Paxil®, Paxil CR™, or paroxetine) and the Court Approval Date; except that the disbursements that may be claimed by Merchant Law Group LLP shall further be limited to those incurred before April 12th, 2019, being the date that the Plaintiffs served a Notice of Change of Representation, and shall be further reduced by the costs awarded against Merchant Law Group LLP on April 21st, 2021.
- (q) "Class Counsel Fee" is CDN \$500,000, separate and apart from Lawyer's Fees.
- (r) "Class Member" means any person, or his/her estate or legal representative, who (i) is a member of the Class and (ii) has not delivered an opt-out request to Class Counsel on or before the Opt-Out Deadline.
- (s) "Class Period" means the period that runs from January 1st, 1993 to the date of the Approval Order.
- (t) "Class Proceeding" means the proceeding commenced by Muzzafar Hussain, by- his Mother and Litigation Guardian, Fiona Singh, and the said Fiona Singh, in the Court of King's Bench of Alberta against the Defendants (Court File No. 1201-12838), and that was certified as a class proceeding by the Certification Order.
- (u) "Compensation Fund" means the Settlement Fund after deducting: Administration Costs incurred before the Approval Order is made; the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon; and the Honorarium; and after adding the interest while the Settlement Fund is held in the Account. After deductions, the Administration Costs incurred after the Approval Order and Compensatory Payments will be fully paid from the remainder of the Compensation Fund.
- (v) "Compensatory Payments" means the amounts that are allocated to Class Members out of the Compensation Fund, including the amounts to be paid to their Health Insurers pursuant to Health Insurer Claims and the amounts allocated for Lawyer's Fees.
- (w) "Court" means the Court of King's Bench of Alberta.
- (x) "Court Approval Date" and "Effective Date" means the later of:
- (i) 60 days after the date on which the Court issues the Approval Order if there is no appeal from the Approval Order; and
- (ii) 60 days after the date on which any appeals from the Approval Order have been quashed or finally disposed of.
- (y) "Damages" means all claims for pain and suffering, loss of guidance, care and companionship, non-pecuniary claims, in trust claims, subrogated claims (in the form of claims of Health Insurers and non-governmental insurers), past and future income loss

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claims, past and future care claims, aggravated or punitive damages, and special damages.

- (z) **"Distribution Protocol"** means the plan setting out a Class Member's entitlement to Damages under this Settlement Agreement and how Compensatory Payments to Class Members and Lawyer's Fees and payments to Health Insurers shall be determined and distributed, as approved by the Court as part of the Approval Hearing, a draft of which is attached hereto as **Schedule "I"**.

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- (aa) **"Eligible Claimant"** means a Claimant, or his or her estate representative, who has satisfied the Claims Officer that he or she is a Class Member who is eligible for a Compensatory Payment, and, in particular that:

- (i) the Claimant Mother or the biological mother of a Claimant Child was prescribed Paxil® or Paxil CR™ for use during her First Trimester of pregnancy;
- (ii) the Claimant Mother or the biological mother of a Claimant Child took Paxil® or Paxil CR™ during the Class Period while in her First Trimester of pregnancy who delivered a Claimant Child, born alive, who has been diagnosed with one or more Qualifying Congenital Malformations; and
- (iii) there is a medical or other reliable record or affidavit indicating that (1) a physician determined that the Claimant Child had or has one or more Qualifying Congenital Malformations, and (2) the biological mother of the Claimant Child took Paxil® or Paxil CR™ (and not generic paroxetine) during her First Trimester of pregnancy.

Further information with respect to eligibility is contained within the Distribution Protocol.

- (bb) **"First Trimester"** means the first 13 weeks of pregnancy calculated from the date of the last menstrual period.
- (cc) **"Health Insurers"** means all of the Provincial and Territorial Ministries of Health or governmental bodies that provide publicly funded plans of health care in Canada.
- (dd) **"Health Insurer Claims"** means the entitlement of the Health Insurers to any subrogated or direct claims arising from the provision of health care services to Class Members in relation to the Allegations, and pursuant to legislation that permits the recovery of healthcare costs or medical expenses from third parties.
- (ee) **"Honorarium"** means the amount of CDN \$50,000.
- (ff) **"Lawyer's Fees"** are up to 35% of Compensatory Payments paid to Eligible Claimants who are represented by Class Counsel or another lawyer of their choosing who has a valid and enforceable retainer agreement with an Eligible Claimant. Lawyer's Fees paid to lawyers other than Class Counsel shall not exceed 25% where the retainers were executed before the Notice of Settlement Approval Hearing is given and 10% where the retainers were executed after. Class Counsel will receive 15% of Compensatory Payments that are made to Eligible Claimants who are unrepresented.
- (gg) **"Notice Provider"** means Trilogy Class Actions Services, which will provide the *Notice of Certification*, *Notice of Settlement Approval Hearing*, and *Notice of Settlement Approval*.
- (hh) **"Notice of Certification"** means the form of notice, agreed to by the Parties and approved by the Court, that informs Class Members of certification of the class proceeding.

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7.2 The Releases and Dismissals set out herein apply to each Class Member whether or not the Class Member receives compensation under this Settlement Agreement as an Eligible Class Member.

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7.3 The Releasors (other than the Health Insurers) agree to obtain through Class Counsel a full and final release of the Released Claims from the Health Insurers in substantially the form attached hereto as **Appendix "A"** and undertake to indemnify the Releasees from all awards, recoveries, amounts, costs and expenses incurred on account of any claims, liens, demands, rights, or causes of action by the Health Insurers and/or U.S. Medicare (if applicable) claiming a lien upon, subrogated interest in, or right or entitlement to the proceeds of this settlement, in whole or in part, for any reason, including the provision of medical and/or hospital care and/or the payment of medical and/or hospital expenses by any third party provider/payer, and/or a right to reimbursement or subrogation for any reason arising out of the consideration payable under this Settlement Agreement.

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7.4 As of the Effective Date, the Class Proceeding shall be dismissed with prejudice and without costs and the Defendants shall abandon their appeal in the Alberta Court of Appeal.

7.5 The Defendants agree to further abandon any claim for costs against any Class Member who has been a plaintiff in any previously filed class action or proceeding in Canada, and whether costs have been ordered to date or not.

7.6 After the Opt Out Deadline, any Class Member who has not opted out, will immediately dismiss on a with prejudice basis any action or proceeding pertaining to recovery relating to the subject matter of the Class Proceedings on a without costs basis, regardless of whether or not compensation is received under this Settlement Agreement, including the plaintiffs Megan and Tammy Thompson (Saskatchewan Court of King's Bench (KBG-PA-000276-2019)).

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7.7 To the extent such action or proceeding is not dismissed within 30 days of Opt Out Deadline as contemplated in section 7.6, the Plaintiff on behalf of each Class Member, agrees to consent to a dismissal or discontinuance of the action or proceeding at the request of, or on the motion of the Defendants, on a with prejudice and without costs basis and to pay the legal costs associated with the steps taken by the Defendants.

Section 8 – Legal Fees

8.1 Class Counsel may bring applications at the Approval Hearing or on a subsequent date for Court approval of payment of the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon. Notice of such a hearing will be provided to the Defendants. The Defendants will not oppose any applications by the Plaintiff for approval of the Class Counsel Fee, Class Counsel Disbursements, Honourarium, and Lawyer's Fees, insofar as any such application is not contrary to the terms of this Settlement Agreement.

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8.2 Class Counsel and other lawyers retained by an Eligible Claimant may charge Lawyer's Fees and disbursements as a percentage of the Compensatory Payments paid to an Eligible Claimant that they represent after the determination of the Compensatory Payment by the Claims Officer.

8.3 The amount of the Lawyer's Fees shall not exceed 35% of the Compensatory Payment allocated to any Class Member who is represented. For any Eligible Claimants who are unrepresented, Lawyer's Fees will be 15% of the Compensatory Payments to the Eligible Claimant.

8.4 The Claims Administrator shall pay the Lawyer's Fees and disbursements directly to Class Counsel and other lawyers retained by Eligible Claimants.

MD

THIS IS EXHIBIT " D "
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 20th
day of November A.D. 2024

Page 2 of 33

shall be paid by the Defendants and on which the interest accrued will be added to the Compensation Fund.

- (b) **"Administration Costs"** means the costs of giving the *Notice of Certification*, *Notice of Settlement Approval Hearing*, and the *Notice of Settlement Approval* and the amounts invoiced to administer and distribute the Compensation Fund, including the expenses and professional fees of the Notice Provider, Claims Officer, and the Claims Administrator.
- (c) **"Allegations"** means the assertions of fact or law, causes of action, injuries, and damages that were pleaded in the *Amended Amended Statement of Claim*, filed January 9th, 2019.
- (d) **"Certification Order"** means the *Order (Class Certification)* of the Honorable Associate Chief Justice Rooke, pronounced November 17th, 2022 and filed December 19th, 2022.
- (e) **"Claim"** means the claim made by a Claimant in accordance with the procedure in the Distribution Protocol, which is attached hereto as **Schedule "D"**.
- (f) **"Claimant Child"** means a Class Member who was born with a Qualifying Congenital Malformation, or his or her estate or legal representative, who files a Claim pursuant to the terms hereof.
- (g) **"Claimant Mother"** means a Class Member who was prescribed Paxil® or Paxil CR™ in Canada and subsequently aborted, delivered, or miscarried children with Qualifying Congenital Malformations after ingesting Paxil® or Paxil CR™ while pregnant, or her estate or legal representative, who files a Claim pursuant to the terms hereof.
- (h) **"Claims Administrator"** means Trilogy Class Action Services, the person or entity agreed to by the Parties and approved by the Court to assist the Claims Officer with the administration of the claims process in accordance with the Distribution Protocol.
- (i) **"Claims Deadline"** means 90 days from the publication of the *Notice of Settlement Approval*, unless extended as provided for in the *Settlement Approval Order*.
- (j) **"Claims Officer"** means a qualified and independent physician agreed to by the Parties who will determine, *inter alia*: whether a Claimant was born with a Qualifying Congenital Malformation; identify the category in the Distribution Protocol within which each Claim falls; and assign a points value within the range identified in the Distribution Protocol.
- (k) **"Claims Perfection Deadline"** means 90 days after the Claims Deadline.
- (l) **"Class"** means women who were prescribed Paxil® or Paxil CR™ in Canada and subsequently aborted, delivered, or miscarried children with congenital malformations after ingesting Paxil® or Paxil CR™ while pregnant; family members who may make claims under *Family Compensation Legislation* following the death of, or injury in relation to the congenital malformations; children born alive to such women; and provincial and territorial governments who paid health care costs on their behalf.
- (m) **"Class Counsel"** means Clint Docken, K.C. and Casey R. Churko.
- (n) **"Class Counsel Disbursements"** means the actual amount of legitimate and reasonable disbursements incurred by or at the request of Class Counsel or Merchant Law Group LLP between the filing of this Class Proceeding (and no other class action or class proceeding filed anywhere in Canada at any time relating to the prescription or use of Paxil®, Paxil CR™, or paroxetine) and the Effective Date; except that the disbursements that may be claimed by Merchant Law Group LLP shall further be limited to those incurred before April

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

MD

12th, 2019, being the date that the Plaintiffs served a *Notice of Change of Representation*, and shall be further reduced by the costs awarded against Merchant Law Group LLP on April 21st, 2021.

- (o) **"Class Counsel Fee"** is CDN \$500,000, separate and apart from Lawyer's Fees.
- (p) **"Class Member"** means any person, or his/her estate or legal representative, who is a member of the Class and did not deliver an *Opt-Out Form* to the Notice Provider on or before April 8th, 2024.
- (q) **"Class Period"** means the period that runs from January 1st, 1993 to April 8th, 2024.
- (r) **"Class Proceeding"** means the proceeding commenced by Muzzafar Hussain, by his Mother and Litigation Guardian, Fiona Singh, and the said Fiona Singh, in the Court of King's Bench of Alberta against the Defendants (Court File No. 1201-12838), and that was certified as a class proceeding by the *Certification Order*.
- (s) **"Compensation Fund"** means the Settlement Fund after deducting: Administration Costs incurred before the *Settlement Approval Order* is made; \$400,000 to resolve Health Insurer Claims; the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon; and the Honorarium; and after adding the interest while the Settlement Fund is held in the Account. After deductions, the Administration Costs incurred after the *Settlement Approval Order* and Compensatory Payments will be fully paid from the remainder of the Compensation Fund.
- (t) **"Compensatory Payments"** means the amounts that are allocated to Eligible Claimants out of the Compensation Fund, including the amounts allocated for Lawyer's Fees.
- (u) **"Court"** means the Court of King's Bench of Alberta.
- (v) **"Court Approval Date"** means the later of September 24th, 2024 and the date on which the Court approves the *Settlement Agreement*.
- (w) **"Damages"** means all claims for pain and suffering, loss of guidance, care and companionship, non-pecuniary claims, in trust claims, subrogated claims (in the form of claims of Health Insurers and non-governmental insurers), past and future income loss claims, past and future care claims, aggravated or punitive damages, and special damages.
- (x) **"Distribution Protocol"** means the plan setting out a Class Member's entitlement to make a Claim under this *Settlement Agreement* and how Compensatory Payments to Eligible Claimants and Lawyer's Fees shall be determined and distributed, as approved by the Court as part of the Settlement Approval Hearing, a draft of which is attached hereto as **Schedule "D"**.
- (y) **"Effective Date"** means the later of:
 - (i) 60 days after ~~Court Approval Date the date on which the Court issues the Settlement Approval Order~~ if there is no appeal from the *Settlement Approval Order*,
 - (ii) 60 days after the date on which any appeals from the *Settlement Approval Order* have been quashed or finally disposed of.

Commented [1]: This formerly said "Class Members". "Eligible Claimants" is more accurate.

Commented [2]: I moved "Court Approval Date" from here, so that the King's Bench approval is the "Court Approval Date" and the "Effective Date" is the appeals deadline. This ensures that the Notice of Settlement Approval Hearing can be published on the date of the approval hearing without waiting to see whether appeals are taken.

Commented [3]: Can this 60 days be deleted?

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- (z) **"Eligible Claimant"** means a Claimant, or his or her estate representative, who has satisfied the Claims Officer that he or she is a Class Member who is eligible for a Compensatory Payment, and, in particular that:
- (i) the Claimant Mother or the biological mother of a Claimant Child was prescribed Paxil® or Paxil CR™ for use during her First Trimester of pregnancy;
 - (ii) the Claimant Mother or the biological mother of a Claimant Child took Paxil® or Paxil CR™ during the Class Period while in her First Trimester of pregnancy who delivered a Claimant Child, born alive, who has been diagnosed with one or more Qualifying Congenital Malformations; and
 - (iii) there is a medical or other reliable record or affidavit indicating that (1) a physician determined that the Claimant Child had or has one or more Qualifying Congenital Malformations, and (2) the biological mother of the Claimant Child took Paxil® or Paxil CR™ (and not generic paroxetine) during her First Trimester of pregnancy.

Further information with respect to eligibility is contained within the Distribution Protocol.

- (aa) **"First Trimester"** means the first 13 weeks of pregnancy calculated from the date of the last menstrual period.
- (bb) **"Health Insurers"** means all of the provincial and territorial ministries of health or governmental bodies that provide publicly funded plans of health care in Canada.
- (cc) **"Health Insurer Claims"** means the entitlement of the Health Insurers to any subrogated or direct claims arising from the provision of health care services to Class Members in relation to the Allegations, and pursuant to legislation that permits the recovery of health care costs or medical expenses from third parties.
- (dd) **"Honorarium"** means the amount of CDN \$50,000.
- (ee) **"Lawyer's Fees"** are up to 35% of Compensatory Payments paid to Eligible Claimants who are represented by Class Counsel or another lawyer of their choosing who has a valid and enforceable retainer agreement with an Eligible Claimant. Lawyer's Fees paid to lawyers other than Class Counsel shall not exceed 25% where the retainers were executed before the *Notice of Settlement Approval Hearing* is given and 10% where the retainers were executed after. Class Counsel will receive 15% of Compensatory Payments that are made to Eligible Claimants who are unrepresented.
- (ff) **"Notice Provider"** means Trilogy Class Action Services, who provided the *Notice of Certification* and the *Notice of Settlement Approval Hearing* and will provide the *Notice of Settlement Approval*.
- (gg) **"Notice of Certification"** means the form of notice, approved by the Court on February 8th, 2024 that informed Class Members of certification of the Class Proceeding.
- (hh) **"Notice of Settlement Approval"** means the form of notice, agreed to by the Parties and approved by the Court, and to be given within 30 days of the Court Approval Date, that informs Class Members, including Health Insurers, of the approval of this *Settlement Agreement*, the process for making Claims, and the Distribution Protocol, a draft of which is attached hereto as **Schedule "A"**.
- (ii) **"Notice of Settlement Approval Hearing"** means the form of notice, approved by the Court as Schedule 1 to the *Order (Settlement Approval Hearing Notice)* pronounced June

- 7.4 As of the Effective Date, the Class Proceeding shall be dismissed with prejudice and without costs and the Defendants shall abandon their appeal in the Alberta Court of Appeal.
- 7.5 The Defendants agree to further abandon any claim for costs against any Class Member who has been a plaintiff in any previously filed class action or other proceeding in Canada, and whether costs have been ordered to date or not.
- 7.6 After the Effective Date, any Class Member who has not opted out, will immediately dismiss on a with prejudice basis any action or proceeding pertaining to recovery relating to the subject matter of the Class Proceedings on a without costs basis, regardless of whether or not compensation is received under this *Settlement Agreement*, including the plaintiffs Megan and Tammy Thompson (Saskatchewan Court of King's Bench (QBG-PA-000276-2019)).
- 7.7 To the extent such action or proceeding is not dismissed within 30 days of the Effective Date as contemplated in section 7.6, the Plaintiff on behalf of each Class Member, agrees to consent to a dismissal or discontinuance of the action or proceeding at the request of, or on the application of the Defendants, on a with prejudice and without costs basis and to pay the legal costs associated with the steps taken by the Defendants.

Section 8 – Legal Fees

- 8.1 Class Counsel may bring applications at the Settlement Approval Hearing or on a subsequent date for Court approval of payment of the Class Counsel Fee and Class Counsel Disbursements and applicable taxes thereon. Notice of such a hearing will be provided to the Defendants. The Defendants will not oppose any applications for approval of the Class Counsel Fee, Class Counsel Disbursements, Honorarium, and Lawyer's Fees, insofar as any such applications are not contrary to the terms of this *Settlement Agreement*.
- 8.2 Class Counsel and other lawyers retained by an Eligible Claimant may charge Lawyer's Fees as a percentage of the Compensatory Payments paid to an Eligible Claimant that they represent after the determination of the Compensatory Payment by the Claims Officer, plus disbursements and applicable taxes.
- 8.3 The amount of the Lawyer's Fees shall not exceed 35% of the Compensatory Payment allocated to any Class Member who is represented. For any Eligible Claimants who are unrepresented, Lawyer's Fees will be 15% of the Compensatory Payments to the Eligible Claimant.
- 8.4 The Claims Administrator shall pay Class Counsel the Class Counsel Fee within 7 days of the Effective Date, and Lawyer's Fees plus disbursements and applicable taxes directly to Class Counsel and other lawyers retained by Eligible Claimants when payments are made to Eligible Claimants.
- 8.5 Notwithstanding any other provision of this *Settlement Agreement*, the aggregate amount of the Class Counsel Fee and Lawyer's Fees shall not exceed 35% of the Settlement Fund plus interest thereon, and the amount of the Class Counsel Fee shall not be less nor more than \$500,000.

Section 9 – No Admission of Liability

- 9.1 The Parties agree that whether or not the *Settlement Agreement* is approved by the Court, the *Settlement Agreement* and anything contained herein, and any and all negotiations, documents, discussions, and proceedings associated with the *Settlement Agreement*, and any action taken to carry out the *Settlement Agreement*, shall not be deemed, construed, or interpreted to be an admission of any violation of any statute or law, or of any wrongdoing or liability by the Releasees, or of the truth of any of the claims or allegations made in the Class Proceeding or in any other pleading filed by the Plaintiffs.

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COURT FILE NO. 1201-12838
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY



PLAINTIFFS FIONA SINGH and MUZAFFAR HUSSAIN by his litigation
(APPLICANTS) representative FIONA SINGH

DEFENDANTS GLAXOSMITHKLINE INC.,
(RESPONDENTS) GLAXOSMITHKLINE LLC, and
GLAXOSMITHKLINE PLC.

RESPONDENTS MERCHANT LAW GROUP LLP and
MARIANNE AUCH

Brought under the Class Proceedings Act

DOCUMENT AFFIDAVIT

ADDRESS FOR
SERVICE AND
CONTACT
INFORMATION OF
PARTIES FILING
THIS DOCUMENT

GUARDIAN LAW GROUP LLP
342 - 4 Avenue S.E.
Calgary, Alberta
T2G 1C9

&

Clint Docken, Q.C.
Tel: (403) 457-7778
Fax: (877) 517-6373

KoT LAW
1201 - 1914 Hamilton St.
Regina, Saskatchewan
S4P 3N6

Casey R. Churko
Tel: (306) 540-2284
Fax: (639) 739-2223

THIS IS EXHIBIT " E "
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 20th
day of NOVEMBER A.D. 2024

Clint G. Docken, K.C.
**Barrister and Solicitor
A Notary Public in and for
The Province of Alberta**

AFFIDAVIT OF FIONA SINGH
(February 7th, 2020)

I, Fiona Singh, of Calgary, Alberta, AFFIRM AND SAY:

1. I have personal knowledge of the matters to which I hereinafter depose, except where stated to be on information, in which case I set out the source of my information, and in each case I believe the information to be true (unless otherwise indicated).

2. I am the proposed Representative Plaintiff in this class proceeding. I am a former client of E.F Anthony Merchant, Q.C. of the Merchant Law Group. I am now

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retainer in front of a judge. He would not let me speak a word. He berated me, and hung up before I could say anything.

31. Under that pressure, I went in to sign the retainer agreement. The Merchant Law Group never served it on me within 10 days, nor gave me 5 days to terminate it.

B. Choice of Counsel

32. Before Mr. Churko became involved, Mr. Merchant and the other lawyers at the Merchant Law Group did not listen to me, and I often felt bullied into doing what I was told to do. The circumstances surrounding the execution of a retainer agreement in July of 2018 was a prime example.

33. During the course of my time working with Mr. Churko, I came to understand my role as litigation representative, and to take a more active role in the litigation. I became committed to pursuing justice for people like me that may have been harmed by taking Paxil®. I worked closely with Mr. Churko to advance this action towards certification. I am proud to have fought for people who may not otherwise have a voice.

34. On January 17th, 2019, Mr. Merchant wrote me (**Exhibit "1"**) that:

(a) "Casey Churko has left our firm" (which I do not believe). On January 16th, 2019, Mr. Churko informed me (and I believe) that he served a *Statement of Claim* on Mr. Merchant, over fee distribution on the "60s Scoop" class action, and that his cchurko@merchantlaw.com e-mail had been turned off that day.

(b) "We already have \$3.7 million in the value of time". He did not define "We", but having reviewed the *Matter Draft Report* on the time and disbursements of the Merchant Law Group as of August 29th, 2019, I believe that

(i) \$1,785,651 was for approximately 3,000 hours of time incurred by Mr. Churko (billed by the Merchant Law Group at \$530.89 an hour) in

MD

preparing for and conducting cross-examinations, preparing expert affidavits and amended pleadings, and researching and drafting the certification brief,

(ii) much of the time was incurred on other Paxil® claims dealing with pediatrics and suicidality (not congenital malformations) and patent “evergreening” issues,

(iii) most of the time was incurred by lawyers who are no longer with the Merchant Law Group, and that

(iv) the first 84 of 200 pages of time entries were incurred *before* this class action was filed in Alberta and

(v) thereafter there are numerous boilerplate entries by Evatt Merchant before 2012, and thereafter for “Read and review incoming documents”, totaling 558.39 (I had no dealings with Evatt Merchant).

(c) “four lawyers argued certification.” I attended the certification hearing, and observed that, other than Mr. Merchant and Mr. Churko, the other two lawyers were Joshua Merchant who had 8.7 “posted hours” and Anthony Tibbs, who had 138.98 hours.

35. As the months went on in 2019, Mr. Merchant did not resolve the claim with Mr. Churko. In early 2019, I had not received reports or updates from the Merchant Law Group (as was the situation before 2017). I was happy to be working with Mr. Churko from 2017, and I did not want to go back to working with Mr. Merchant and the first year lawyers and articling students at his firm. When I was working with other lawyers from the Merchant Law Group, there was very little progress in the case, I was not kept informed of the few events that I later learned occurred, and I was not informed of my role and responsibilities as a representative plaintiff.

36. When Mr. Merchant phoned me in 2012 to ask me to be the Alberta named

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plaintiff, he did not explain to me what being a representative plaintiff meant, what my responsibilities would be, or what risks would be involved. My understanding was that I was just going to tell my story so that he could hold GSK to account.


37. After working with Mr. Churko, I now understand what is expected of me, and what I ought to expect from my counsel, and I do not believe that Mr. Merchant would be able to effectively advance my interests or those of the class. I believe the *GSK Certification Brief* that the class actions were mismanaged by the Merchant Law Group before 2017 when Mr. Churko became involved in acting on my behalf.

38. Despite having agreed to act on my behalf in any costs proceedings brought by GSK against me, Mr. Merchant has now taken the position that I should be personally responsible for the prior costs awarded by the Court as a result of mismanagement by the Merchant Law Group, and that his new “recruit” should replace me. I was happy to continue the class action as representative plaintiff with Mr. Churko as counsel, but almost immediately after my *Notice of Change of Representation* was served with a cover letter (**Exhibit “2”**), Mr. Merchant sought to replace me and, as I understand it, to “take” the class action “back” from me.

39. I do not want to work with Mr. Merchant, but as long as the Merchant Law Group is prepared to assume the prior costs orders relating to conduct of their lawyers, I would prefer to continue my action as an individual action rather than engage in a prolonged dispute for control of the class action for another two years. It has been approximately 12 years since I contacted the Merchant Law Group, and I would prefer to advance my case to resolution as an individual action along with the approximately 40 other clients who are represented by KoT Law.

MD

SWORN BEFORE ME at Calgary,)
Alberta this 7th day of February, 2020)



A NOTARY PUBLIC in and for
the Province of Alberta

MATHEW FARRELL
Barrister and Solicitor, Notary Public
in and for the Province of Alberta



Fiona Singh

MD

1 ONTARIO SUPERIOR COURT OF JUSTICE

2 Court File No. CV-24-00728634-0000

3 -----
4 Between:

5 NAPOLI SHKOLNIK CANADA and NAPOLI SHOLNIK

6 PLLC,

7 Plaintiffs,

8
9 and

10 KOT LAW PROFESSIONAL CORPORATION and CASEY B.

11 CHURKO,

12
13 Defendants.
14 -----

THIS IS EXHIBIT " F " referred to in the Affidavit of MARIO D'ANGELO Sworn before me this 20th day of November A.D. 2024

Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

15
16 The Cross-Examination of Casey

17 Churko, a Defendant herein, on his affidavit
18 affirmed October 11, 2024, taken pursuant to
19 Notice of Examination, taken before Deb
20 Beauvais, RPR, CRR, and a Notary Public in
21 and for the County of Ramsey, State of
22 Minnesota, taken remotely on October 30,
23 2024, commencing at approximately 8:30 a.m.
24
25

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1 Q. Okay. Tell me about your discussions with
2 your Napoli Shkolnik Canada partners about
3 including that term in the settlement
4 agreement.

5 A. The undertaking and how to comply with it was
6 one of the most frequently discussed topics
7 of the settlement with Mr. D'Angelo and
8 Mr. Schnieders. That was a specific term
9 that was thoroughly discussed during
10 mediation and subsequent meetings, subsequent
11 morning meetings, and subsequent telephone
12 discussions. There was few terms there were
13 more discussed than the undertaking to
14 Merchant Law Group.

15 Q. Okay. Did you specifically discuss the \$1.1
16 million figure with your Napoli Shkolnik
17 Canada partners?

18 A. Yes, I did.

19 Q. When and how did you specifically discuss
20 that?

21 A. That was from September 20th when D'Angelo
22 requested a copy of the signed settlement
23 agreement. Chris Schnieders called it an
24 MSA, and it was talked about particularly
25 after September 24th. But the professional

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1 undertaking was frequently discussed before
2 then.

3 Q. Okay. I'm asking about the \$1.1 million
4 figure in particular. My question didn't use
5 the word "undertaking." And just so I
6 understand your answer, Mr. Churko, you
7 discussed it with them by giving them a copy
8 of the signed settlement agreement on or
9 about September 20th; is that your evidence,
10 sir?

11 A. No, it wasn't. My evidence has been
12 transcribed, and you can read it again.

13 Q. Okay. When is the first date on which you
14 discussed or raised personally with your
15 Napoli Shkolnik Canada partners the \$1.1
16 million figure in the settlement agreement?
17 Not the undertaking, the \$1.1 million figure.

18 A. As soon as it was asked of me. And the first
19 time I was specifically asked about it was on
20 September 24th and September 25th.

21 Q. That's the first time you discussed it with
22 your Napoli Shkolnik Canada partners?

23 A. The undertaking, as I said, was frequently
24 discussed. Few topics were discussed more.
25 The \$1.1 million figure, I was specifically

MD

1 asked about that on September 24th and 25th,
2 and I immediately provided the information
3 and the answers to the questions that I was
4 asked.

5 Q. Did you speak with Tony Merchant about that
6 figure?

7 A. Yes, I did.

8 Q. When did you speak to him?

9 A. Before the agreement was signed. He was
10 willing to sign the agreement on the basis of
11 a \$1.1 million figure. He was not willing to
12 do it on the less than \$500,000 that
13 Mr. Schnieders thought he was going to get.

14 Q. So you had that conversation with
15 Mr. Merchant before the agreement was signed,
16 but you didn't even report that conversation
17 to your partners in Napoli Shkolnik Canada,
18 did you?

19 A. In good faith I engaged in several
20 discussions with them about the settlement
21 agreement.

22 Q. Did you report to your Napoli Shkolnik Canada
23 partners that you had agreed with Merchant
24 Law Group that they would receive \$1.1
25 million under the Paxil class-action

MD

1 settlement?

2 A. Yes, I did.

3 Q. When did you report that to them?

4 A. As soon as I was asked.

5 Q. On September 24th and 25th?

6 A. Yes.

7 Q. Okay. I'd like an undertaking for your
8 communications with anyone at Merchant Law
9 Group relating to the Paxil class-action
10 settlement, please.

11 A. That's refused at this time. Your client,
12 Mr. Schnieders and Mr. D'Angelo, haven't even
13 filed a statement of claim at this point.
14 The issues in the litigation have not been
15 defined. I'm not going to give that
16 undertaking at this time.

17 I will, however, fully comply with
18 all disclosure obligations of litigants in
19 Ontario.

20 Q. Mr. Churko, when you were negotiating and
21 finalizing the settlement agreement, what
22 email address did you use?

23 A. Cchurko@napolilaw.com, and which I believe
24 was also forwarded to cchurko@napolilaw.ca.

25 Q. Those are the only email addresses that you

MD

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THIS IS EXHIBIT " G "
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 20th
day of November A.D. 2024

BETWEEN:

NAPOLI SHKOLNIK CANADA and NAPOLI SHKOLNIK PLLC

and

KOT LAW PROFESSIONAL CORPORATION and CASEY R. CHURKO

Plaintiffs
Clint G. Docken, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

Defendants

AFFIDAVIT OF PHILIP FOURIE

I, Philip Fourie, of the City of Prince Albert, in the Province of Saskatchewan, MAKE
OATH AND SAY THAT:

1. I am a Partner at the law firm of Kirkby Fourie in Prince Albert, Saskatchewan. I work alongside Casey R. Churko in the prosecution of certain class actions. As such, I have knowledge of the matters to which I depose below. To the extent any information in this affidavit is not within my direct knowledge, I have identified the source of the information and believe it to be true.
2. I make this affidavit in support of the Plaintiffs' motion for urgent injunctive relief.
3. On or about 11:26 AM on October 2, 2024, Churko phoned me on my cell phone. My handwritten notes from this call are attached at **Exhibit "A"**.
4. On this call, Churko told me that I have probably heard that he has split from Napoli Shkolnik Canada ("**NS Canada**") on account of events surrounding the Paxil and Opioid Class Action settlements.

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5. He then informed me that he currently does not have access to his e-mails but that he believes October 2nd is the deadline to file a notice of discontinuance for two defendants in the Opioid class action matter pursuant to a fiat from Justice Popescul. He told me that although I am co-counsel of record, he is willing to help me draft the notice if I need his help. I thanked him for the reminder and told him I will let him know if I need his help.

6. He also recommended that we follow up on a related British Columbia Court of Appeal matter that may result in cost being awarded to the extent of \$50,000 if the matter is not addressed.

7. I inquired from him what about the Paxil Settlement has caused the issues and him splitting from NS Canada.

8. He explained that the NS Canada lawyers are upset with him due to him agreeing to a revised fees provision in a parallel settlement agreement.

9. He clarified that there was an original "agreement in principle" that was agreed to during negotiations which provided for \$500,000 fee for counsel cost.

10. Churko stated to me that the eventual settlement was for \$7.5 million and that he renegotiated the \$500,000 fee provision. He was concerned that the way the original provision was drafted it may cause the class to pay additional fees. He explained that he renegotiated the fee provision based on the fact that the retainer agreement allowed for 35% for "bulk legal fees". He stated that he ended up negotiating a lesser percentage for bulk legal fees that amounted to a total of \$2 million. He explained that the lesser settlement amount of about 33% was due to the Provincial and Territorial Government being entitled to some of the settlement fees and rather that

MD

requiring the class to pay something in addition to the 35% Churko decided to reduce the percentage legal fees to 33% to accommodate the fees payable to the Government.

11. Churko clarified that with respect to the 33% legal fees in the amended settlement agreement, \$1,100,000 was to go to the Merchant Law Group LLP ("**Merchant**"), \$850,000 was to go to his personal professional corporation and \$50,000 was to go to Mr. Clint Docken, his co-counsel in the case.

12. Churko explained that the reason why he renegotiated a \$1,100,000 fee settlement for Merchant was because there was an undertaking that they would receive a fair and reasonable distribution of the legal fees. He believed that \$1,100,000 was a good faith fair distribution to Merchant given that they had "4 million dollars in time on the file". He explained that not restructuring the legal fee arrangement in accordance with the revised agreement may have caused the plaintiff GSK not being released from liability.

13. Churko explained that the reason he only negotiated \$50,000 legal fees for Clint Docken is because Docken had minimal involvement in the Paxil file as co-counsel. He mentioned that he believes that NS Canada misunderstands the reasons for his actions.

14. I inquired about the \$850,000 being paid into his personal professional account. He stated that NS Canada is a partner in his personal professional account. He also explained that NS Canada has done things that caused him concern and, in his view, may result in NS Canada moving away from the partnership with him. According to Churko, NS Canada had stopped paying his monthly draw, and had not paid his office rent for some time and they have made overtures toward another law firm in British Columbia called "Recon". I now understand that Recon LLP is a Toronto-based law firm working on insolvency aspects of the Opioids Class Action, and I believe Churko intended

to refer to this firm when he alluded to "Recon". He stated that he believes NS Canada has breached the partnership agreement and not him.

15. Churko also mentioned during our conversation that NS Canada is upset with him because of him unilaterally settling with some minor Opioid Class Action defendants. He explained that he settled with one defendant for a relatively small amount. I am co-counsel and counsel of record in the action and I was not advised or consulted about the settlement prior to the execution of the agreement. I inquired from him how much he settled for and how much lac La Ronge, one of my clients, may be expecting. I cannot recall the total settlement amount he mentioned but he did indicate to me that Lac la Ronge may be expecting around \$50,000 in settlement fees. He explained that the total settlement amount was reasonable in relation to the particular defendant, that it was similar to other actions and that the settlement was strategically beneficial because it would assist in overriding issues with having a Case Management Judge appointed in the matter. Churko also mentioned that he has been approached by some additional defendants to potentially settle the matter but that he is unable to follow up on these offers given that NS Canada has prevented him from having access to his e-mails.

16. Towards the end of our conversation, Churko advised me that he would not mind me sharing the information with NS Canada if it would help "resolve any misunderstandings", and he described certain future arrangements that would be acceptable to him.

MD

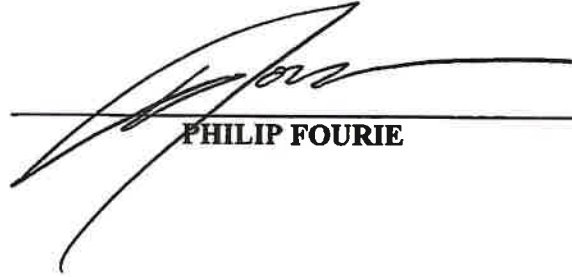
17. I wished him the best, and we ended our conversation.

SWORN by Philip Fourie, at the City of)
Prince Albert, in the Province of)
Saskatchewan, before me at the city of)
Toronto, in the Province of Ontario, on)
October 7, 2024 in accordance with)
O. Reg. 431/20, Administering Oath or)
Declaration Remotely.



Commissioner for Taking Affidavits
(or as may be)

VIKTOR NIKOLOV
LSO# 84503P



PHILIP FOURIE

MD

Court File No. CV-24-00728634-0000

THIS IS EXHIBIT H
referred to in the Affidavit of
MARIO D'ANGELO
Sworn before me this 20th
day of NOVEMBER A.D. 2024

ONTARIO

SUPERIOR COURT OF JUSTICE

Clint G. Docket, K.C.
Barrister and Solicitor
A Notary Public in and for
The Province of Alberta

B E T W E E N:

NAPOLI SHKOLNIK CANADA AND NAPOLI SHKOLNIK PLLC

Plaintiffs

- and -

KOT LAW PROFESSIONAL CORPORATION AND CASEY R. CHURKO

Defendants

This is the Cross-Examination on Affidavit of PHILIP
FOURIE taken via videoconference, on the 29th of
October, 2024.

1 70 Q. Mr. Fourie, do you recall that I
2 informed you that Napoli US filed a motion in Ontario
3 to dissolve the partnership?

4 A. No, not at all.

5 71 Q. And at paragraph 14 you say:

6 "He also explained that NS Canada has done
7 things that may result in NS Canada moving away
8 from the partnership with him."

9 I had, in fact, taken the position that I had not
10 withdrawn, I did not split from the firm. I said
11 that firm may be splitten up. Is that your
12 understanding?

13 A. No. I -- beginning of our
14 conversation you started with specifically
15 statements. I probably have heard that you've split
16 from Napoli, so that can only mean Napoli Canada.
17 But then at the same time later in our conversation
18 you took the position that you believe that they have
19 breached the agreement. But you did indicate to me
20 that I probably heard that you have split from -- so
21 I'm just stating what you indicated to me, from what
22 I recall anyway that you indicated to me.

23 72 Q. At paragraph 16 you say I described
24 "certain future arrangements." And your notes are
25 bear on that, it doesn't show up anywhere. What

1 certain future arrangements did I describe?

2 A. Oh, you mentioned that you would
3 after -- like I've mentioned to you that you've
4 indicated to me that there's a split, that you said
5 in the future you would like to continue to be
6 involved in I believe you said on the opioid matters
7 as well as the Treaty 6 matters. That is what you've
8 indicated to me, that.

9 And what I understood that to mean at the time was
10 that given you've split from them that you would like
11 to continue to be involved potentially with that,
12 whether it would be in cooperation with Napoli in
13 some way or directly with me and the request, whether
14 I would be willing to work with you, I don't know. I
15 can only speculate to that. But we did not go into
16 detail. That was very brief and that's what you
17 indicated to me.

18 73 Q. Last topic, paragraph 14. This is
19 recon. I never said to you that they were in British
20 Columbia.

21 CNSL V. NIKOLOV: Mr. Churko, that's clearly --

22 THE WITNESS: Yeah, I don't know where they are. For
23 whatever reason that was my understanding. Whether
24 it was something that you misspoke or whether I -- I
25 don't know. But as you would recall something that's

1 not in here, I stated to you that I don't believe
2 recon -- you know, that those overtures is -- if in
3 fact should be a concern because they -- their
4 involvement is just with respect to the very narrow
5 matter of that BC matter of where they are involved
6 in trying to -- the CECA matter, I think, and the --
7 I've had no indication in my conversations over --
8 you know, and being on those weekly meetings that
9 this was any -- that they are going to take over or
10 in any way -- yeah.

11 Essentially, I think what I tried to convey to you
12 is that I don't think there's any concerns about them
13 trying to take over your job. They are just in their
14 lane, so to speak, and I've never had any indication
15 that they're going to take over what you are doing.
16 Something in that line anyway. I didn't make much on
17 that, but that's what I recall anyway.

18 CNSL C. CHURKO: Those are my questions for this witness.

19 THE REPORTER: Mr. Churko, are you ordering the transcript?
20 Did you want a rough draft tonight?

21 CNSL C. CHURKO: Yes. We don't need a draft copy, just the
22 final copy is okay. Electronic copy. Can you send a
23 copy by e-mail? Also, I believe I requested a draft
24 from the prior cross-examination today. I don't need
25 a draft of that, just the final, if that's all the