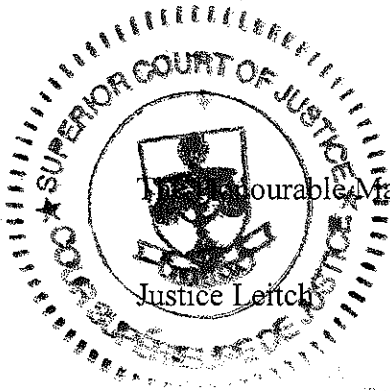


**ONTARIO  
SUPERIOR COURT OF JUSTICE**



Honourable Madam  
Justice Leitch

) Monday, the 25<sup>th</sup> day  
)  
) of April, 2011

**BETWEEN:**

LYNDA QUINTON and FRED QUINTON

Plaintiffs

- and -

C.B. FLEET HOLDING COMPANY, INC., C.B. FLEET COMPANY, INC., and  
JOHNSON & JOHNSON – MERCK CONSUMER PHARMACEUTICALS OF CANADA

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**ORDER**

**THIS MOTION**, made by the Plaintiffs for an Order that the within proceeding be certified as a class proceeding for settlement purposes, that the Settlement Agreement entered into between the Plaintiffs and Defendants be approved, and that NPT<sup>+</sup>RICEPOINT Class Action Services be appointed as the Claims Administrator, was heard this day at the Court House, 80 Dundas Street, London, Ontario.

**ON READING** the materials filed, including the Settlement Agreement dated December 23, 2010, and on hearing the submissions of counsel for the Plaintiffs and counsel for the Defendants:

1. **THIS COURT ORDERS AND DECLARES** that for the purposes of this Order the definitions set out in the Settlement Agreement apply to and are incorporated into this Order;
2. **THIS COURT ORDERS** that this action be certified as a class proceeding for settlement purposes pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6;
3. **THIS COURT ORDERS** that the Class be defined as:
  - (a) All persons resident in Canada, including their estates, who purchased, used or ingested Fleet Phospho-soda; and
  - (b) All persons who by virtue of a personal relationship to one or more of such persons described in (a) above have standing in this action pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended (or equivalent derivative or direct claim by statute or common law in other provinces or territories);
4. **THIS COURT ORDERS** that the within action be certified as a class proceeding for settlement purposes on the basis of the following common issue:

Were the Defendants negligent in the manufacture, marketing, or distribution of Fleet Phospho-soda in Canada?;
5. **THIS COURT ORDERS** that Lynda Quinton and Fred Quinton be appointed as representative plaintiffs for the Class;

6. **THIS COURT DECLARES** that the Settlement Agreement with its attached Schedules, attached hereto as Appendix "A", is fair, reasonable and in the best interests of Class Members;
7. **THIS COURT ORDERS** that the Settlement Agreement be and is hereby approved pursuant to s. 29 of the *Class Proceedings Act, 1992*, and shall be implemented in accordance with its terms;
8. **THIS COURT DECLARES** that the Quebec Superior Court will maintain jurisdiction with respect to any appeals arising from the claims administration process with respect to residents of Quebec.
9. **THIS COURT DECLARES** that the Settlement Agreement is incorporated by reference into and forms part of this Order and is binding upon the Representative Plaintiffs, upon all Class Members, upon Representative Claimants, and upon the Defendants and Participating Insurers;
10. **THIS COURT ORDERS AND DECLARES** that this Order, including the Settlement Agreement, is binding upon each Class Member, including those persons who are minors or mentally incapable and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* R.S.O. Reg. 194 are dispensed with in respect of this action;
11. **THIS COURT ORDERS** that each Class Member, personally and on behalf of their respective heirs, successors, executors, administrators, trustees, and assigns, and their affiliated, predecessor, successor and related companies, shall be deemed to have released and does hereby release and forever discharge the Releasees of the Released Claims;

12. **THIS COURT ORDERS** that the deadline for Class Members to opt-out of the Settlement is sixty days following first publication of the notice of settlement approval (Schedule "H" of the Settlement Agreement), and that after that date, Class Members who have not timely and properly opted-out are bound by the Settlement Agreement;

13. **THIS COURT ORDERS** that any and all claims of the Provincial Health Insurers are also hereby released on the following terms:

In consideration of the payments made to the Provincial Health Insurers set out in this Settlement Agreement, Provincial Health Insurers will be deemed, in so far as their interest are concerned, to release and forever discharge the Defendants and Participating Insurers from any and all actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts, claims and demands whatsoever that were asserted or which could have been asserted by the Provincial Health Insurers on their own behalf by or on behalf of any Class Member relating to Fleet Phospho-Soda. Provincial Health Insurers may not make any claims, or take or continue any proceedings against any person, partnership, corporation, or other entity who might claim contribution or indemnity or any other relief of a monetary, declaratory or injunctive nature from the Defendants and Participating Insurers in connection with the claims released in this Settlement Agreement;

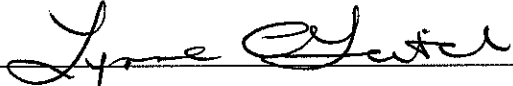
14. **THIS COURT ORDERS** that NPT<sup>+</sup>RICEPOINT Class Action Services is appointed as the Claims Administrator;

15. **THIS COURT ORDERS** that the Claims Administrator execute its obligations as laid out in the Settlement Agreement and Schedules attached thereto;

16. **THIS COURT ORDERS** that the Settlement Matrix attached to the Settlement Agreement as Schedule "B" be and is hereby approved and shall be implemented in accordance with its terms;

17. **THIS COURT ORDERS** that the notices of settlement approval attached to the Settlement Agreement as Schedule "H" and Schedule "I" be and are hereby approved;
18. **THIS COURT ORDERS** that the notice of settlement approval be disseminated in accordance with the plan attached to the Settlement Agreement as Schedule "K";
19. **THIS COURT ORDERS AND ADJUDGES** that this Proceeding be and is hereby dismissed against the Defendants, without costs and with prejudice.

Date: *April 25*, 2011

  
The Honourable Madam Justice L.C. Leitch



# **Appendix A**

**to the Order of Monday, April 25, 2011  
The Honourable Madam Justice Leitch**

**FLEET PHOSPHO-SODA CLASS ACTION  
CANADA – WIDE SETTLEMENT AGREEMENT**

Made as of December 23, 2010

<p>LYNDA QUINTON and FRED QUINTON</p> <p style="text-align: right;">Plaintiffs</p> <p style="text-align: center;">and</p> <p>C.B. FLEET HOLDING COMPANY, INC., C.B. FLEET COMPANY, INC., and JOHNSON &amp; JOHNSON – MERCK CONSUMER PHARMACEUTICALS OF CANADA</p> <p style="text-align: right;">Defendants</p>	<p style="text-align: center;">PROVINCE OF ONTARIO Ontario Superior Court of Justice London, Ontario Court File No.: 58675/08</p>
<p>DAVID GLYNN JONES</p> <p style="text-align: right;">Petitioner</p> <p style="text-align: center;">v.</p> <p>C.B. FLEET® HOLDING COMPANY, INC., C.B. FLEET® COMPANY, INC., and LA COMPAGNIE DE PRODUITS AUX CONSOMMATEURS JOHNSON &amp; JOHNSON – MERCK DU CANADA, CO.</p> <p style="text-align: right;">Respondents</p>	<p style="text-align: center;">PROVINCE OF QUÉBEC Superior Court of Québec, District of Québec (Class Actions) No.: 200-06-000116-098</p>
<p>DONNA HORPINUK, ROBERT HORPINUK, and MIKE BERTA</p> <p style="text-align: right;">Plaintiffs</p> <p style="text-align: center;">and</p> <p>C.B. FLEET HOLDING COMPANY INC., C.B. FLEET COMPANY, INC., and JOHNSON &amp; JOHNSON – MERCK CONSUMER PHARMACEUTICALS OF CANADA</p> <p style="text-align: right;">Defendants</p>	<p style="text-align: center;">PROVINCE OF SASKATCHEWAN Court of Queen's Bench for Saskatchewan Judicial Centre of regina Q.B. No. 506 of 2009</p>

**FLEET PHOSPHO-SODA CLASS ACTION  
SETTLEMENT AGREEMENT**

**TABLE OF CONTENTS**

FLEET PHOSPHO-SODA CLASS ACTION SETTLEMENT AGREEMENT.....	1
RECITALS .....	1
SECTION 1 - DEFINITIONS.....	3
SECTION 2 - CONDITION PRECEDENT: COURT APPROVAL .....	7
SECTION 3 - SETTLEMENT APPROVAL.....	7
3.1 Best Efforts.....	7
3.2 Motion for Approval.....	7
SECTION 4 - SETTLEMENT BENEFITS .....	7
4.1 Payment of Settlement Amount.....	7
4.2 Claims and Claimants .....	11
4.3 Taxes and Interest .....	12
SECTION 5 - RELEASES AND DISMISSALS .....	13
5.1 Release of Releasees .....	13
5.2 Dismissal of Proceeding.....	15
SECTION 6 - OPTING-OUT AND RIGHT TO TERMINATE AGREEMENT.....	15
6.1 Procedure.....	15
6.2 Opt-Out Report .....	15
6.3 Right to Terminate .....	16
SECTION 7 - TERMINATION OF SETTLEMENT AGREEMENT.....	16
7.1 Manner of Termination .....	16
7.2 Effect of Termination.....	16
7.3 Survival of Provisions After any Termination.....	17
7.4 Not Approved by the Court.....	17



SECTION 8 – DISTRIBUTION OF THE SETTLEMENT AMOUNT AND ACCRUED INTEREST .....	18
8.1 Settlement Matrix .....	18
8.2 Monies in the Account .....	18
SECTION 9 - LEGAL FEES AND DISBURSEMENTS .....	18
SECTION 10 - ADMINISTRATION AND IMPLEMENTATION .....	19
10.1 Mechanics of Administration .....	19
10.2 Notices Required .....	19
SECTION 11 – NO ADMISSION OF LIABILITY .....	19
SECTION 12 – MISCELLANEOUS .....	20
12.1 Governing Law .....	20
12.2 Ongoing Jurisdiction .....	20
12.3 Motions for Directions .....	20
12.4 Timing .....	20
12.5 Releasees Have No Liability for Administration .....	20
12.6 Headings, etc .....	21
12.7 Entire Agreement .....	21
12.8 Binding Effect .....	21
12.9 Survival .....	21
12.10 Counterparts .....	22
12.11 Negotiated Agreement .....	22
12.12 Language .....	22
12.13 Dates .....	22
12.14 French Translation .....	22
12.15 Confidentiality .....	22
12.16 Recitals .....	23

12.17 Schedules.....	23
12.18 Acknowledgements.....	23
12.19 Authorized Signatures.....	24
12.20 Notice .....	24

**FLEET PHOSPHO-SODA CLASS ACTION  
SETTLEMENT AGREEMENT**

**PREAMBLE**

Lynda Quinton and Fred Quinton, as representative plaintiffs in Ontario Court File No. 58675/08 (“the Ontario Proceeding”), and David Glynn Jones, as representative plaintiff in Québec Court File No. 200-06-000116-098 (“the Québec Proceeding”), and Donna Horpinuk, Robert Horpinuk and Mike Berta, as representative plaintiffs in Saskatchewan Court File No. Q.B. No. 506 of 2009 (“the Saskatchewan Proceeding”) (collectively, the “Plaintiffs”) (collectively the “Proceedings”), and the defendants, C.B. Fleet Holding Company Inc. and C.B. Fleet Company, Inc. (collectively, “Fleet”), and Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada (“the Defendants”) (collectively the “Parties”), hereby enter into this settlement agreement (the “Settlement Agreement”) providing for the settlement of claims arising out of or relating to, without limitation, the manufacture, marketing, sale, distribution, labelling, use, purchase or ingestion of Fleet Phospho-Soda in Canada, pursuant to the terms and conditions set forth herein, and subject to the approval of the Court;

**RECITALS**

A. WHEREAS, the Parties intend by this Settlement Agreement to resolve all past, present and future claims of Class Members in any way arising out of or relating to the use, purchase or ingestion of Fleet Phospho-Soda in Canada by or for residents of Canada during the Class Period;

B. WHEREAS, the Defendants deny the allegations made in the Proceedings, deny that any damages are payable, have not conceded or admitted any civil liability, and have defences to all of the claims in the Proceedings;

C. WHEREAS, Fleet and Plaintiffs’ Counsel have engaged in extensive, arms-length negotiations through counsel with substantial experience in complex class proceedings that have resulted in this Settlement Agreement;

D. WHEREAS, the Plaintiffs and Class Counsel have reviewed and fully understand the terms of this Settlement Agreement and, based on their analyses of the facts and law applicable to the Plaintiffs’ claims, and having regard to the burden and expense in prosecuting the Proceedings, including the risks and uncertainties associated with trials and appeals, the

Plaintiffs and Class Counsel have concluded that this Settlement Agreement is fair, reasonable, and in the best interests of the Plaintiffs and the classes they represent;

E. WHEREAS, despite their belief that they are not liable in respect of the allegations made in the Proceedings and have good defences thereto, the Defendants are entering into this Settlement Agreement in order to achieve a final resolution of all claims asserted or claims that could have been asserted against them by the Plaintiffs, and/or between them, and to avoid further expense, inconvenience, and the distraction of burdensome and protracted litigation, and it is acknowledged that the Defendants would not have entered into this Settlement Agreement were it not for the foregoing;

F. WHEREAS, the Parties therefore wish to, and hereby do, fully and finally resolve, without admission of liability, the Proceedings against the Defendants;

G. WHEREAS, for the purposes of settlement only and contingent on approval by the Ontario Superior Court of Justice ("Ontario Court"), and discontinuance of the Saskatchewan and Quebec Proceedings being granted by the Saskatchewan Court of Queen's Bench and the Quebec Superior Court, as provided for in this Settlement Agreement, the Parties have consented to the certification of a national class in the Ontario Proceeding;

H. WHEREAS, the Defendants expressly reserve their rights to contest certification of other related or unrelated proceedings and assert that the actions herein would not be appropriately certified in the absence of the Settlement Agreement and that this Settlement Agreement does not constitute in any way a precedent to support the certification of classes of this nature;

NOW, THEREFORE, in consideration of the covenants, agreements, and releases set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that all claims of Class Members and Provincial Health Insurers shall be settled and the Proceedings be discontinued and dismissed with prejudice and that the Parties shall consent to the Ontario Court's Order finally approving the settlement and dismissing the Ontario Proceeding with prejudice, without costs to the Plaintiffs, the classes they seek to represent, or the Defendants, subject to the approval of the Ontario Court, on the following terms and conditions:

## SECTION I - DEFINITIONS

For the purpose of this Settlement Agreement only, including the Recitals and Schedules hereto:

- (1) *Account* means an interest bearing trust account under the control of the Claims Administrator at a Schedule I chartered Canadian bank. All interest accrued will be added to the fund used to compensate Eligible Claimants. If the monies are not paid when due they will accrue interest until paid at a rate of 7% per annum.
- (2) *Administration Expenses* means all fees, disbursements, expenses, costs, taxes, and any other amounts incurred or payable by the Plaintiffs, Class Counsel, or otherwise for the approval, implementation, and operation of this Settlement Agreement, including the costs of notice and the fees and expenses of the Claims Administrator but excluding Class Counsel Fees.
- (3) *Claims Administrator* means the entity appointed by the Ontario Court to administer the Settlement Agreement pursuant to the terms outlined in Schedule "E".
- (4) *Claims Deadline* means one hundred and twenty (120) days from the date notice of settlement approval is first disseminated.
- (5) *Class Counsel* means Siskinds<sup>LLP</sup>; Siskinds, Desmeules; and Merchant Law Group<sup>LLP</sup>.
- (6) *Class Counsel Fees* means the legal fees, disbursements and applicable taxes of Class Counsel.
- (7) *Class or Class Members* shall be defined as:
  - (a) All persons resident in Canada, including their estates, who purchased, used or ingested Fleet Phospho-soda; and
  - (b) All persons who by virtue of a personal relationship to one or more of such persons described in (a) above have standing in this action pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended (or equivalent derivative or direct claim by statute or common law in other provinces or territories).

- (8) *Class Period* means any time on or before March 5, 2009 when Fleet Phospho-Soda was manufactured and/or placed into the stream of commerce in Canada by Defendants.
- (9) *Defendants* means C.B. Fleet Holding Company, Inc., C.B. Fleet Company, Inc., and Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada.
- (10) *Effective Date* means the later of (1) date on which the right to terminate the Settlement pursuant to section 6.3 has expired and (2) the approval order approving this Settlement Agreement has become a Final Order.
- (11) *Eligible Claimant(s)* are the Primary Claimants, Representative Claimants and Derivative Claimants who are able to establish the criteria for eligibility as defined in section 4.2 below and Schedules “B” and “E”.
- (12) *Eligible Derivative Claimant(s)* are those claimants who are able to establish the criteria for eligibility as defined in section 4.2 below and Schedule “E”.
- (13) *Fleet Phospho-Soda* means any and all Fleet products containing Fleet® Phospho-soda®.
- (14) *Final Order* means the final approval order entered by the Ontario Court in respect of the certification as a class proceeding and the approval of this Settlement Agreement, and the expiration of the time to appeal or to seek permission to appeal such final judgment or final approval order without any appeal being taken, or if an appeal from the final approval order is taken, the affirmation of such final approval order in its entirety, without modification, by the court of last resort to which an appeal of such final approval order may be taken.
- (15) *Opt-Out* means a person who would have been a member of the Class except for his or her timely and valid request for exclusion. Such exclusion will be by the timely submission of an Opt-out Form as attached hereto as Schedule “A”.
- (16) *Participating Insurer* means Federal Insurance Company; Medmarc Casualty Insurance Company; National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”); Starr Excess Liability Insurance Company Ltd. n/k/a CAT Excess Limited

("CAT Excess"); Arch Specialty Insurance Company; and Columbia Casualty Company. National Union and CAT Excess are Participating Insurers only with respect to insurance policies issued to Fleet with effective dates prior to August 1, 2006.

- (17) *Parties* means the Plaintiffs and the Defendants.
- (18) *Plaintiffs* means Lynda Quinton, Fred Quinton, David Glynn Jones, Donna Horpinuk, Robert Horpinuk, Mike Berta and all Class Members excluding Opt-Outs.
- (19) *Primary Class Members or Primary Claimants* are those persons defined in section 1(7)(a) above, excluding Representative Claimants.
- (20) *Proceedings* means *Lynda Quinton and Fred Quinton v. C.B. Fleet Holding Company, Inc., C.B. Fleet Company Inc., and Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada*, Court File No. 58675/09 in Ontario; *David Glynn Jones v. C.B. Fleet® Holding Company, Inc., C.B. Fleet® Company, Inc., and LA Compagnie De Produits Aux Consommateurs Johnson & Johnson – Merck Du Canada, Co.*, Court File No. 200-06-000116-098 in Québec; and *Donna Horpinuk, Robert Horpinuk, and Mike Berta v. C.B. Fleet Holding Company Inc., C.B. Fleet Company, Inc., and Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada*, Court File No. Q.B. No. 506 of 2009 in Saskatchewan.
- (21) *Provincial Health Insurers* means all provincial and territorial Ministries of Health or equivalents, Provincial and Territorial Governments, and/or provincial and territorial plans funding medical services throughout Canada, including those set out in Schedule "A" to the Ontario Statement of Claim and equivalents in Québec.
- (22) *Released Claims* means any and all manner of claims, demands, actions, suits, elections as to remedy, Québec civil law claims, statutory claims and causes of action of whatever kind, nature or description, including, without limitation, any and all claims for damages, pain and suffering, past, present or future cost of care and loss of income, disgorgement of profits or revenues, punitive damages, economic loss, and claims for loss of guidance, care and companionship, whenever incurred, or which could have been asserted in the Proceedings, whether direct or indirect, class, individual, or otherwise in nature, whether personal or subrogated, and claims of liabilities of any kind, nature or description

whatsoever, including, without limitation, interest, costs, expenses, disbursements, penalties, and attorneys' fees that Releasors, or any one of them, whether directly, indirectly, representatively, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have against the Releasees, whether known or unknown, relating in any way to any act or omissions by any or all of the Releasees prior to the execution of this Settlement Agreement concerning alleged damages from the purchase, use, or ingestion of, or otherwise related to, Fleet Phospho-Soda.

- (23) *Releasees* means, jointly and severally, the Defendants and their respective present and former parents, partners, subsidiaries, affiliates, predecessors, assigns, officers, shareholders, directors, employees, retailers or other entities in the chain of distribution, physicians and other health care professionals, health care providers, health care facilities, pharmacies and other distributors and suppliers of Fleet Phospho-Soda, indemnitees, insurers (including their agents), agents, attorneys, servants, representatives, and the successors, heirs, executors, administrators, trustees, and assigns of each of the foregoing.
- (24) *Releasors* means, jointly and severally, individually and collectively, the Plaintiffs, the Provincial Health Insurers and their respective successors, heirs, executors, administrators, trustees, and assigns, and their affiliated, predecessor, successor and related companies.
- (25) *Representative Claimants* means personal representatives, heirs, assigns and trustees of Primary Claimants/Primary Class Members.
- (26) *Settlement Agreement or Settlement* means this agreement, including the Recitals and Schedules.
- (27) *Settlement Amount* means the amount identified herein as outlined in section 4, plus any interest accrued.
- (28) *Settlement Matrix* means the plan for distributing the Settlement Amount as outlined in Schedule "B" hereto, and as approved by the Ontario Court.



## **SECTION 2 - CONDITION PRECEDENT: COURT APPROVAL**

Subject to section 7.3 below, this Settlement Agreement shall be null and void and of no force or effect unless the Ontario Court approves this Settlement Agreement for a national class, and the order so given has become a Final Order and the Effective Date has occurred; and the Saskatchewan Proceeding and Quebec Proceeding are discontinued.

## **SECTION 3 - SETTLEMENT APPROVAL**

### **3.1 Best Efforts**

The Parties shall use their best efforts to effectuate this Settlement. Fleet represents and warrants that it has obtained the agreement from the Participating Insurers to fund this Settlement Agreement on Fleet's behalf in accordance with the terms of their respective policies, without raising coverage defences, subject to the exhaustion of the Participating Insurers' respective applicable policy limits.

### **3.2 Motion for Approval**

- (1) The Plaintiffs shall file motions before the Saskatchewan and Quebec Courts for orders discontinuing or permitting the discontinuance of the Saskatchewan and Quebec Proceedings respectively;
- (2) The Plaintiffs shall file a motion before the Ontario Court for an order certifying a national class proceeding and approving this Settlement Agreement;
- (3) The order referred to in paragraph 3.2(2) shall be in a form substantially similar to the draft order attached hereto as Schedule "C", as agreed upon by Class Counsel and counsel for the Defendants and approved by the Ontario Court.

## **SECTION 4 - SETTLEMENT BENEFITS**

### **4.1 Payment of Settlement Amount**

(1) Fleet represents and warrants that it has obtained the agreement and authority from the Participating Insurers to pay on Fleet's behalf, subject to the remaining applicable limit of their policies, the Settlement Amount in accordance with this Settlement Agreement, in full satisfaction of all of the Released Claims against the Releasees. In the event the respective share of one or more Participating Insurers is greater than their respective policy limits, Fleet will fund the difference within thirty (30) days of when that determination is made. In addition, in the

event a claim implicates an insurance policy issued by a non-Participating Insurer and such insurer fails to agree to fund any such amount, Fleet will fund such amount. No Participating Insurer shall have any obligation to pay any amount in excess of its remaining applicable policy limit as of the date the payment is due. In no circumstances, including without limitation any failure or inability by the Participating Insurers or Fleet to fund the Settlement Amount as described herein, shall the Defendant Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada or any of its parent, partners, related or affiliated companies be required to pay or fund the Settlement Amount or any portion thereof.

(2) Contingent on discontinuance of the claims in the Quebec Proceeding and the Saskatchewan Proceeding, and dismissal of the claims of the national class in Ontario and approval of the Settlement, Fleet represents and warrants that the Participating Insurers have agreed to pay on Fleet's behalf the Settlement Amount (in Canadian dollars) in the total amount of \$11,995,000 in accordance with section 4.1(5).<sup>1</sup>

(3) The dollar values for all Eligible Claimants shall be allocated as calculated in section 4.2 into policy years based on dates of ingestion. For claims with dates of ingestion prior to August 1, 2006, the date of ingestion will determine the policy year for the corresponding Participating Insurer. For claims with dates of ingestion on or after August 1, 2006, the claims will be allocated to the Participating Insurer(s) covering the 07/08 policy year.

(4) The Settlement Amount shall be allocated in approximately the following proportions:

- (a) \$6,300,000 to Eligible Claimants;
- (b) \$1,800,000 to Provincial Health Insurers;
- (c) \$3,395,000 towards Class Counsel Fees, subject to the approval of the Ontario Court;
- (d) \$500,000 for Administration Expenses.

(5) Fleet has obtained the agreement of the Participating Insurers to pay on Fleet's behalf the amounts set forth in section 4.1(4)(a), (b), (c) and (d) above as follows:

- (a) Participating Insurers have paid \$500,000 to Class Counsel in trust for Administration Expenses (the amount set out in section 4.1(4)(d) above). Class Counsel shall only use these funds to pay costs associated with providing the notices identified in Section 10.2 below and the translation identified in Section 12.14 below. Any balance remaining at the time the Claims Administrator is appointed will be transferred from Class Counsel to the Claims Administrator within fifteen (15) days of the Claims Administrator being appointed by the Ontario Court. Any monies left over from this \$500,000 following payment of all Administration Expenses shall be added to the fund used to pay Eligible Claimants. Any further monies needed for Administration Expenses in excess of the \$500,000 shall come from the fund used to pay Eligible Claimants. The Parties recognize that the Participating Insurers shall reallocate among themselves this \$500,000 based on their respective proportional percentage shares as determined in Section 4.1(5)(b). The Parties further recognize that the amounts paid by each Participating Insurer for Administration Expenses pursuant to this paragraph shall reduce the Participating Insurer's applicable policy limits, unless and until that Participating Insurer is repaid by another Participating Insurer pursuant to the reallocation provisions set forth above;
- (b) Within thirty (30) days of a final determination of the number of Eligible Claimants and Eligible Derivative Claimants with corresponding breakdown of points awarded, the Participating Insurers (or Fleet as it may be obligated under section 4.1(1)) will pay their respective shares of \$11,495,000, which shall be calculated as follows:
- (i) The total number of points for all Eligible Claimants and Eligible Derivative Claimants shall be computed ("Total Points").
  - (ii) The amount of the Net Eligible Claimant Fund (as defined in section 4.2(3)(a)) shall then be divided by the Total Points to arrive at a per point value ("the Allocation Point Value").

(iii) For each Eligible Claimant and Eligible Derivative Claimant, that Claimant's number of points (as calculated under section 4.2) shall be multiplied by the Allocation Point Value to arrive at an allocation for each Eligible Claimant and Eligible Derivative Claimant (the "Per Claim Allocated Value").

(iv) For each policy year, the Per Claim Allocated Values and fixed sum awards for that year (as allocated pursuant to section 4.1(3)) shall be totalled to arrive at the "Policy Year Value".

(v) For each policy year, the Policy Year Value shall then be divided by the Net Eligible Claimant Fund plus the total of all fixed sum awards to arrive at the Policy Year Percentage for that policy year.

Each Participating Insurer, subject to its policy limits, shall issue one check to the Claims Administrator, for an amount equal to the product of

(1) \$11,495,000; and

(2) the sum of its applicable Policy Year Percentages,

along with simple interest on that amount at a rate of 2 percent per annum from the date of this Settlement Agreement to the date of payment under this section. No Participating Insurer shall have any obligation to pay any amount in excess of its remaining applicable policy limit as of the date the payment is due to be made.

(6) The Claims Administrator will invest the monies in a bankers acceptance issued by a Schedule 1 chartered Canadian bank. All interest accrued will be added to the fund used to compensate Eligible Claimants.

(7) The Defendants and Participating Insurers shall have no obligation to pay any amount in addition to the Settlement Amount, for any reason, pursuant to or in furtherance of this Settlement Agreement.

(8) The Claims Administrator shall maintain the Account as provided for in this Settlement Agreement and shall not pay out any monies from the Account, except in accordance with the

provisions of this Settlement Agreement, without an order of the Ontario Court made on notice to or on consent of the Parties.

#### **4.2 Claims and Claimants**

##### **Eligible Claimants**

(1) A Primary Class Member must establish the criteria outlined in Schedule "E" in order to become an Eligible Claimant.

(2) Fleet and Participating Insurers have the right to examine the supporting documentation for any claim submitted to the Claims Administrator. The Claims Administrator shall establish a central electronic repository of documents and information submitted by claimants, which shall be accessible for this purpose. Fleet and Participating Insurers shall be permitted to communicate with the Claims Administrator to assist with the analysis of claims.

(3) The Settlement Matrix at Schedule "B" will be used to allocate points to Eligible Claimants. Points are awarded based on the medical condition and other relevant factors. Any claims that do not meet the threshold requirements of the Settlement Matrix shall not participate in any distribution of the Settlement Amount. For purposes of calculating specific dollar amounts awarded to individual Eligible Claimants the following procedures shall be employed:

- (a) Starting with \$11,495,000 and any interest that has accrued on such amount either as provided for in section 4.1(5)(b) or interest accruing after payment is made by the Participating Insurers, there shall be a subtraction of \$1,800,000 under section 4.1(4)(b) (or the balance of such amount if any of the Provincial Health Insurers shall refuse payment as addressed in section 4.2(5)), a subtraction of \$3,395,000 (or such other amount as the Ontario Court may approve) under section 4.1(4)(c), a subtraction of funds, if any, used for administration in excess of the allocated \$500,000, the addition of unused funds, if any, from the \$500,000 administrative expense fund, the subtraction of any fixed dollar awards to Eligible Claimants under Schedule "B" and related percentage dollar awards to Eligible Derivative Claimants under Schedule "E", if any, and any other adjustments not specifically identified herein but that are necessary to effectuate this settlement including but not limited to any taxes or other fees due and owing as a consequence of administering this Settlement. This calculation shall yield the amount of funds

available to distribute to Eligible Claimants and Eligible Derivative Claimants who have been allocated points ("Net Eligible Claimant Fund").

- (b) The total number of points for all Eligible Claimants (as allocated in accordance with Schedule "B") and Eligible Derivative Claimants (as allocated in accordance with section 4.2(4) and Schedule "E") shall be divided into the Net Eligible Claimant Fund to arrive at a per point value.
- (c) The per point value shall then be multiplied by the number of points for each Eligible Claimant and Eligible Derivative Claimant, which dollar amount shall reflect the individual dollar awards.
- (d) Consistent with Schedule "B", claims that are assigned a base compensation point value, but which, after application of the quantifiable factors affecting that base compensation point value, have no positive base compensation points remaining, will be paid \$2,500, which sum is separate from the Net Eligible Claim Fund and subtracted under section 4.2(3)(a).

(4) Payments to Eligible Derivative Claimants will be determined in accordance with and made pursuant to section 10 of Schedule "E". The percentages identified in Schedule "E" are to be used to assign points to the Eligible Derivative Claimants based on the points allocated to the Eligible Claimant. For example, if the Eligible Claimant is allocated 100 points under section 4.2(3), and the Eligible Derivative Claimant is entitled to an 8 percent recovery based on Schedule "E", the Eligible Derivative Claimant will be allocated 8 points. Any fractional points shall be rounded up to the next whole point.

#### **Provincial Health Insurers**

(5) Payments to Provincial Health Insurers will be made pursuant to Schedule "D". If a Provincial Health Insurer refuses to take its share of the Settlement Amount, its share of the Settlement Amount shall be redistributed to the Participating Insurers based on the Participating Insurers' respective contributions to the funding of the Settlement Amount.

#### **4.3 Taxes and Interest**

(1) All interest earned on the Settlement Amount shall become and remain part of the Account.

(2) Class Counsel shall bear all risks related to the investment of the Settlement Amount in the Account.

(3) All funds held by the Claims Administrator shall be deemed and considered to be in *custodia legis* of the Ontario Court, and shall remain subject to the jurisdiction of the Ontario Court until such time as such funds shall be distributed pursuant to the Settlement Agreement and/or further order of the Ontario Court.

(4) Class Counsel, jointly and severally, hereby indemnifies, defends, and holds harmless the Defendants and Participating Insurers from and against any harm or injury suffered by reason of the use, misuse, erroneous disbursement, or other action taken or failure to act by Class Counsel or by the Claims Administrator with respect to the Settlement Amount, or funds in the Account not strictly in accordance with the provisions of this Settlement Agreement, the Settlement Matrix, or any orders of the Ontario Court.

(5) All taxes payable on any interest which accrues on the Settlement Amount in the Account or otherwise in relation to the Settlement Amount, shall be the responsibility of the Class. The Claims Administrator in consultation with Class Counsel shall be solely responsible to fulfill all tax reporting and payment requirements arising from the Settlement Amount in the Account, including any obligation to report taxable income and make tax payments. All taxes (including interest and penalties) due with respect to the income earned by the Settlement Amount shall be paid from the Account.

(6) The Defendants and Participating Insurers shall have no responsibility to make any tax filings relating to the Account and shall have no responsibility to pay tax on any income earned by the Settlement Amount or pay any taxes on the monies in the Account.

## **SECTION 5- RELEASES AND DISMISSALS**

### **5.1 Release of Releasees**

(1) Upon the Effective Date, the Releasers forever and absolutely release, acquit, and discharge the Releasees from the Released Claims. And for the consideration provided herein, the Releasers agree not to make any claim or take or continue any proceedings arising out of or relating to the subject matter of the Released Claims against any other person, corporation or entity including any public authority or statutory body (including, without limitation, any health

care professionals, health care providers, health care facilities, pharmacies, public authority including Her Majesty the Queen in right of Canada or any distributor or supplier of Fleet Phospho-Soda) which might claim damages and/or contribution and indemnity and/or other relief under the provisions of the *Negligence Act*, R.S.O. 1990, c. N-1 or other comparable provincial legislation and any amendments thereto, the common law, equity, Québec civil law, or any other statute, for any relief whatsoever, including relief of a monetary, declaratory or injunctive nature, from one or more of the Releasees.

(2) The Parties intend that the final Settlement Agreement will be approved by the Ontario Court and will result in the dismissal of all claims asserted or which could have been asserted by members of the putative classes herein.

(3) An Order will be sought at the settlement approval hearing which shall include a term releasing the claims of the Provincial Health Insurers generally in the following form:

In consideration of the payments made to the Provincial Health Insurers set out in this Settlement Agreement, Provincial Health Insurers will be deemed, in so far as their interest are concerned, to release and forever discharge the Defendants and Participating Insurers from any and all actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts, claims and demands whatsoever that were asserted or which could have been asserted by the Provincial Health Insurers on their own behalf by or on behalf of any Class Member relating to Fleet Phospho-Soda. Provincial Health Insurers may not make any claims, or take or continue any proceedings against any person, partnership, corporation, or other entity who might claim contribution or indemnity or any other relief of a monetary, declaratory or injunctive nature from the Defendants and Participating Insurers in connection with the claims released in this Settlement Agreement.

(4) Without limiting any other provisions herein, each Class Member who did not opt-out, whether or not he or she submits a claim or otherwise receives an award, will be deemed by the Settlement Agreement completely and unconditionally to have released and forever discharged the Releasees from any and all Released Claims, including all claims, actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts, and demands whatsoever, whether known or unknown, that were asserted or could have been asserted in the litigation that is the subject of this Settlement Agreement.

(5) The Parties agree that each Class Member who did not opt-out, whether or not he or she submits a claim or otherwise receives an award, will be forever barred and enjoined from



continuing, commencing, instituting or prosecuting any action, litigation, investigation or other proceeding in any court of law or equity, arbitration, tribunal, proceeding, governmental forum, administrative forum or any other forum, directly, representatively or derivatively, asserting against any of the Defendants, Releasees or third-party any claims that relate to or constitute any Released Claims covered by the final Settlement Agreement.

## 5.2 Dismissal of Proceeding

(1) The Parties shall, on consent, as part of the motions for approval of the Settlement, request the Ontario Court to dismiss the Ontario Proceeding with prejudice as against the Defendants, without costs.

## SECTION 6 - OPTING-OUT AND RIGHT TO TERMINATE AGREEMENT

### 6.1 Procedure

(1) The procedure for opting out, including timing and notice requirements and the information required from the person seeking to opt-out as set forth in Schedule "A", shall be agreed to by the Parties and approved by the Ontario Court.

(2) Class Counsel shall, as part of the motion for approval of the Settlement, submit a notice in a form that is mutually agreed by the Parties and substantially similar to Schedule "I", which shall include, *inter alia*, information regarding opting out of the action, for approval by the Ontario Court. This notice shall require that on a date (the "Opt-Out Deadline") sixty (60) days after the first publication of the notice of settlement approval, Primary Class Members or Representative Claimants who do not want to participate in the Settlement Agreement must submit a timely and valid request for exclusion from the Class in the Opt-Out Form attached as Schedule "A".

### 6.2 Opt-Out Report

Within fifteen (15) days after the expiration of the Opt-Out Deadline, the Defendants, the Participating Insurers and Class Counsel shall be provided with a report from the Claims Administrator advising as to the names of any Opt-Outs, the reasons for their opting out, if known, and a copy of all information provided by that Opt-Out ("Opt-Out Report").

### **6.3 Right to Terminate**

(1) If five (5) or more Primary Class Members or Representative Claimants Opt-Out of the Settlement and indicate intention to pursue a claim against the Defendants either individually or collectively, then the Defendants and/or Participating Insurers may terminate this Settlement Agreement. The right to terminate the Settlement Agreement may be exercised only by a Participating Insurer or Participating Insurers, individually or collectively, who are responsible for a majority of the Opt-Out claims. If the provincial health care insurer of British Columbia, Ontario or Quebec opts out of the Settlement Agreement, the Settlement Agreement may be terminated by the Defendants and/or the Participating Insurers, individually or collectively. Any termination rights must be exercised prior to any Participating Insurers' contribution to the Account established by the Claims Administrator.

(2) A Primary Class Member or Representative Claimant will not be counted for the purposes of section 6.3(1) if he or she has indicated, to the Defendants' and the Participating Insurers' satisfaction, that he or she does not intend to begin individual litigation against the Defendants with respect to Fleet Phospho-Soda. If the intention is not clear on the Opt-Out Form, Class Counsel will contact the Class Member so that Fleet and the Participating Insurers have sufficient information to make their determination about that Class Member's intentions.

## **SECTION 7 – TERMINATION OF SETTLEMENT AGREEMENT**

### **7.1 Manner of Termination**

If Fleet and/or Participating Insurers exercise their right to terminate this Settlement Agreement pursuant to paragraph 6.3(1), then they shall give written notice of the termination to Class Counsel no later than thirty (30) days after receipt of the Opt-Out Report.

### **7.2 Effect of Termination**

In the event of termination of this Settlement Agreement pursuant to paragraph 6.3(1), and notwithstanding any other provisions of this Agreement, all Parties shall be restored to their respective positions in and with respect to the Proceedings immediately prior to the date on which this Settlement Agreement is signed by all Parties. Any certification order made for the purposes of settlement shall be rescinded on consent. All statutes of limitation and/or repose for all claims asserted in the Proceedings shall be deemed to have been tolled from the date of signature of this Settlement Agreement by all Parties until the date of reinstatement and

reactivation, or for such longer period as the law may provide without reference to this Settlement Agreement.

The Parties further agree that any certification of a class for the purposes of settlement shall be without prejudice to any position that any of the Parties may later take on any issue in the Proceedings in the event of termination, and that the Defendants' consent to certification for the purposes of settlement shall not constitute and shall not be deemed or construed as any admission on the part of the Defendants that the Proceedings, or any other class proceeding, putative or otherwise, is appropriate for trial as a class proceeding.

### **7.3 Survival of Provisions After any Termination**

If this Settlement Agreement is terminated pursuant to paragraph 6.3(1), the provisions of this Settlement Agreement will have no force or effect and all obligations related thereto shall cease immediately, with the exception that the agreements and commitments contained in Section 11 shall survive termination.

### **7.4 Not Approved by the Court**

- (1) If this Settlement Agreement is not approved by the Ontario Court:
  - (a) subject to subsection 7.4(2) below, it shall be null and void and shall have no force or effect, and the Parties shall not be bound by its terms, with the sole exception of the agreements and commitments contained in section 11, which shall survive; and
  - (b) all negotiations, statements and proceedings relating to the Settlement and the Settlement Agreement shall be deemed to be without prejudice to the rights of the Parties, and the Parties shall be deemed to be restored to their respective positions existing immediately before it was executed.
- (2) In the event of a termination, notwithstanding any other provisions of this Settlement Agreement, all Parties shall be restored to their respective positions immediately prior to the date on which this Settlement Agreement is signed by all Parties.
- (3) The Parties expressly reserve all of their respective rights to the extent that the Ontario Court does not approve this Settlement Agreement.

## **SECTION 8 – DISTRIBUTION OF THE SETTLEMENT AMOUNT AND ACCRUED INTEREST**

### **8.1 Settlement Matrix**

The Settlement Amount shall be held by the Claims Administrator in trust for the benefit of Class Members and, after the Effective Date, shall be paid in accordance with the Settlement Matrix in a form substantially similar to Schedule "B", subject to approval by the Ontario Court.

The Claims Administrator shall administer claims according to the Settlement Matrix, this Settlement Agreement, and the procedures outlined in Schedule "E".

### **8.2 Monies in the Account**

In no event shall the Defendants or Participating Insurers have any responsibility, financial obligations, or liability whatsoever with respect to the investment, distribution, use, or administration of monies in the Account including, but not limited to, the costs and expenses of such investment, distribution, use, and administration, Administration Expenses and Class Counsel Fees except as otherwise provided for in section 4 of this Settlement Agreement.

## **SECTION 9- LEGAL FEES AND DISBURSEMENTS**

(1) Class Counsel will bring a motion to the Ontario Court for approval of Class Counsel Fees. Such Fees are awarded at the discretion of the Ontario Court after hearing from counsel for the Parties. The Defendants and Participating Insurers will not take any position with respect to the amount of Class Counsel Fees requested by Class Counsel.

(2) If the Ontario Court approves Class Counsel Fees of less than \$3,395,000, then the excess shall be added to the fund used to pay Eligible Claimants and if the Ontario Court approves Class Counsel Fees of more than \$3,395,000, the excess shall be taken from the fund used to pay Eligible Claimants.

(3) Class Counsel Fees may be paid out of the Account only after Class Counsel obtain the Ontario Court's approval.

(4) Class Members who have retained, or in the process of making a claim do retain, lawyers to assist them in making their individual claims to this settlement shall be responsible for the legal fees and expenses of such lawyers.

## **SECTION 10 - ADMINISTRATION AND IMPLEMENTATION**

### **10.1 Mechanics of Administration**

Except to the extent provided for in this Settlement Agreement, the mechanics of the implementation and administration of this Settlement Agreement shall be determined by the Ontario Court on motion brought by the Parties, or any of them.

### **10.2 Notices Required**

(1) The Class shall be given notice of (i) the hearing at which the Ontario Court will be asked to approve the Settlement Agreement; (ii) the outcome of that hearing; and (iii) any termination of this Settlement Agreement if the Settlement is terminated after notice of the hearing to approve the Settlement was provided.

(2) Class Counsel and Fleet will jointly prepare such notices to the Class as may be required, to provide for "Short Form" and "Long Form" notices ("Notices") substantially in the form attached in Schedules "F", "G" "H" and "I" respectively, as well as a plan for distribution of the Notices (Schedules "J" and "K"). Counsel acknowledge that all Notices and the plan for distribution of Notices must be approved by the Ontario Court. No Notices shall be disseminated anywhere until such time as they are approved by the Ontario Court.

## **SECTION 11- NO ADMISSION OF LIABILITY**

The Parties agree that, whether or not this Settlement Agreement is finally approved or is terminated, this Settlement Agreement and anything contained herein, and any and all negotiations, documents, discussions, and proceedings associated with this Settlement Agreement, and any action taken to carry out this 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 any of them, or of the truth of any of the claims or allegations made in the Proceedings or in any other pleading filed by the Plaintiffs.

The Parties further agree that, whether or not this Settlement Agreement is finally approved or is terminated, neither this Settlement nor any document relating to it shall be offered in evidence in any action or proceeding in any court, agency or tribunal, except to seek court approval of this Settlement Agreement or to give effect to and enforce the provisions of this Settlement Agreement.

## **SECTION 12- MISCELLANEOUS**

### **12.1 Governing Law**

This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario, without regard to Ontario's conflict of laws rules.

### **12.2 Ongoing Jurisdiction**

The Ontario Court shall retain exclusive jurisdiction over all matters relating to the implementation and enforcement of this Settlement Agreement. The Participating Insurers agree to submit to and to be bound by the jurisdiction of the Ontario Court with respect to any claim that a Party has breached this Settlement Agreement. The Participating Insurers agree to cooperate with Class Counsel and the Ontario Court to provide reasonable assurances that the claims will be paid in accordance with the Settlement Agreement. The Parties agree that any claim that a Party has breached the Settlement Agreement may be adjudicated before the Ontario Court, with appeal rights from any decisions preserved.

In the event a Participating Insurer fails to fulfill its obligations hereunder, Fleet agrees to commence litigation to pursue recovery from such insurer.

### **12.3 Motions for Directions**

(1) The Plaintiffs, Class Counsel, the Claims Administrator, Fleet or any Participating Insurer may apply to the Ontario Court for directions in respect of the implementation and administration of this Settlement Agreement.

(2) All motions contemplated by this Settlement Agreement, including applications to the Ontario Court for directions, shall be on notice to the Parties.

### **12.4 Timing**

The Parties will make their best efforts to bring the motion to approve the Settlement Agreement within ninety (90) days of the execution of the Settlement Agreement.

### **12.5 Releasees Have No Liability for Administration**

The Releasees have no responsibility for and no liability whatsoever with respect to the administration of the Settlement Agreement.

#### 12.6 **Headings, etc.**

In this Settlement Agreement:

- (a) the division of the Settlement Agreement into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement; and
- (b) the terms "this Settlement Agreement", "the Settlement Agreement", "hereof", "hereunder", "herein", "hereto", and similar expressions refer to this Settlement Agreement and not to any particular section or portion of this Settlement Agreement.

#### 12.7 **Entire Agreement**

This Settlement Agreement constitutes the entire agreement among the Parties, and supersedes any and all prior and contemporaneous understandings, undertakings, negotiations, representations, communications, promises, agreements, agreements in principle, and memoranda of understanding in connection herewith. The Parties agree that they have not received or relied on any agreements, representations, or promises other than as contained in this Settlement Agreement. None of the Parties shall be bound by any prior obligations, conditions, or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein. This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment must be approved by the Ontario Court.

#### 12.8 **Binding Effect**

Once the Settlement Agreement is approved by the Ontario Court and the approval orders become Final Orders, this Settlement Agreement shall be binding upon, and inure to the benefit of, the Plaintiffs, Class Members, the Releasers, the Defendants, the Participating Insurers, the Releasees, Class Counsel, and the Claims Administrator.

#### 12.9 **Survival**

The representations and warranties contained in this Settlement Agreement shall survive its execution and implementation.

#### **12.10 Counterparts**

This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile signature shall be deemed an original signature for purposes of executing this Settlement Agreement. This Settlement Agreement may be delivered and is fully enforceable in either original, faxed or other electronic form provided that it is duly executed.

#### **12.11 Negotiated Agreement**

This Settlement Agreement has been the subject of negotiations and discussions among the Parties, each of which has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties further agree that the language contained or not contained in previous drafts of this Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Settlement Agreement.

#### **12.12 Language**

The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English; les Parties reconnaissent avoir exigé que la présente convention et tous les documents connexes soient rédigés en anglais.

#### **12.13 Dates**

Dates referred to in this Settlement Agreement may be altered with the written consent of the Parties and with the approval of the Ontario Court.

#### **12.14 French Translation**

A French translation of this Settlement Agreement, all Schedules attached hereto, and all Notices pursuant to this Settlement Agreement shall be prepared by Class Counsel and made available to Class Members upon their request.

#### **12.15 Confidentiality**

When the notice of settlement approval is disseminated, Class Counsel will publish a press release, the form and content of which will be agreed to by the Parties.



The Parties agree that no public statements shall be made regarding these Proceedings or their settlement which are in any way inconsistent with the terms of the Settlement Agreement. In particular, the Parties agree that any public statements regarding these Proceedings will indicate clearly that the Settlement has been negotiated, agreed and approved by the Ontario Court without any admissions or findings of liability or wrongdoing, and without any admissions or conclusions as to the truth of any of the facts alleged in the Proceedings, all of which are specifically denied.

Each Party agrees not to disparage the opposite Parties or their counsel with respect to any of the matters in issue in the Proceedings or the manner in which the Proceedings were conducted or settled. The Parties agree that any public statements that are inconsistent with the terms of this Settlement Agreement could cause irreparable harm, including harm to the business and reputation of the Defendants.

**12.16 Recitals**

The recitals to this Settlement Agreement are true and form part of the Settlement Agreement.

**12.17 Schedules**

The Schedules annexed hereto form part of this Settlement Agreement.

**12.18 Acknowledgements**

Each of the Parties hereby affirms and acknowledges that:

- (a) he, she, or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has read and understood the Settlement Agreement;
- (b) the terms of this Settlement Agreement and the effects thereof have been fully explained to him, her, or the Party's representative by his, her, or its counsel;
- (c) he, she, or the Party's representative fully understands each term of the Settlement Agreement and its effect; and

- (d) no Party has relied upon any statement, representation, or inducement (whether material, false, negligently made, or otherwise) of any other Party with respect to the first Party's decision to execute this Settlement Agreement.

#### 12.19 Authorized Signatures

Each of the undersigned represents that he or she is fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement.

#### 12.20 Notice

Where this Settlement Agreement requires a Party to provide notice or any other communication or document to another, such notice, communication, or document shall be provided by email, facsimile, or letter by overnight delivery to the representatives for the Party to whom notice is being provided, as identified below:

#### For Plaintiffs and for Class Counsel:

Michael J. Peerless

**Siskinds** <sup>LLP</sup>

Barristers & Solicitors

680 Waterloo Street

London, ON N6A 3V8

Telephone: 519-660-7866

Facsimile: 519-660-7867

Email: mike.peerless@siskinds.com

Claude Desmeules

**Siskinds, Desmeules**

43 Rue Buade, Bureau 320

Québec City, Québec G1R 4A2

Telephone: 418-694-2009

Facsimile: 418-694-0281

Email:

claude.desmeules@siskindsdesmeules.com

Evatt F. A. Merchant

**Merchant Law Group** <sup>LLP</sup>

First Nations Bank Bldg.

501-224 4th Ave. S.

Saskatoon, SK, S7K 5M5

Telephone: 306- 653-7777

Facsimile: 306- 975-1983

Email: emerchant@merchantlaw.com

**For Defendants:**

Barry Glaspell

**Borden Ladner Gervais LLP**  
Scotia Plaza, 40 King Street West  
Toronto, ON M5H 3Y4

Tel: (416) 367-6104

Fax: (416) 361-7051

Email: bglaspell@blg.com

Gordon McKee

**Blake, Cassels & Graydon LLP**  
Barristers & Solicitors  
199 Bay Street  
Suite 2800, Commerce Court West  
Toronto, ON M5L 1A9

Tel: (416) 863-2400

Fax: (416) 863-2653

Email: gord.mckee@blakes.com


The Parties have executed this Settlement Agreement as of the date on the cover page.

**LYNDA QUINTON, FRED QUINTON, DAVID  
GLYNN JONES, DONNA HORPINUK,  
ROBERT HORPINUK and MIKE BERTA**

By:  \_\_\_\_\_

Name: Siskinds LLP

Title: Counsel for Lynda Quinton and Fred  
Quinton

By:  \_\_\_\_\_

Name: Siskinds, Desmeules

Title: Counsel for David Glynn Jones

By: \_\_\_\_\_

Name: Merchant Law Group LLP

Title: Counsel for Donna Horpinuk, Robert  
Horpinuk and Mike Berta

**For Defendants:**

Barry Glaspell

**Borden Ladner Gervais LLP**  
Scotia Plaza, 40 King Street West  
Toronto, ON M5H 3Y4

Tel: (416) 367-6104

Fax: (416) 361-7051

Email: bglaspell@blg.com

Gordon McKee

**Blake, Cassels & Graydon LLP**  
Barristers & Solicitors  
199 Bay Street  
Suite 2800, Commerce Court West  
Toronto, ON M5L 1A9

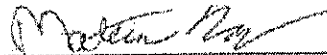
Tel: (416) 863-2400

Fax: (416) 863-2653

Email: gord.mckee@blakes.com

The Parties have executed this Settlement Agreement as of the date on the cover page.

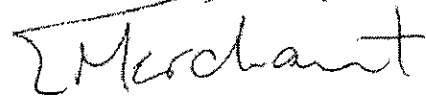
**LYNDA QUINTON, FRED QUINTON, DAVID  
GLYNN JONES, DONNA HORPINUK,  
ROBERT HORPINUK and MIKE BERTA**

By: 

Name: Siskinds <sup>LLP</sup>  
Title: Counsel for Lynda Quinton and Fred  
Quinton

By: \_\_\_\_\_

Name: Siskinds, Desmeules  
Title: Counsel for David Glynn Jones

By: 

Name: Merchant Law Group <sup>LLP</sup>  
Title: Counsel for Donna Horpinuk, Robert  
Horpinuk and Mike Berta

C.B. FLEET HOLDING COMPANY, INC. and  
C.B. FLEET COMPANY, INC.

By: Barry Allapell

Name: Borden Ladner Gervais LLP  
Title: Counsel for C.B. Fleet Holding  
Company, Inc. and C.B. Fleet Company,  
Inc.

JOHNSON & JOHNSON - MERCK  
CONSUMER PHARMACEUTICALS OF  
CANADA

By: \_\_\_\_\_

Name: Blake, Cassels & Graydon LLP  
Title: Counsel for Johnson & Johnson -  
Merck Consumer Pharmaceuticals of  
Canada

**C.B. FLEET HOLDING COMPANY, INC. and  
C.B. FLEET COMPANY, INC.**

By \_\_\_\_\_

Name: *William Eugene ...*  
Title: *President of C. B. Fleet Holding  
Company, Inc. and C. B. Fleet Company,  
Inc.*

**JOHNSON & JOHNSON - MERCK  
CONSUMER PHARMACEUTICALS OF  
CANADA**

By *[Signature]*

Name: *Walter ...*  
Title: *President of Johnson & Johnson  
Merck Consumer Pharmaceuticals  
Canada*

**SCHEDULE A  
OPT OUT FORM**

**FLEET PHOSPHO-SODA OPT OUT FORM**

**THIS IS NOT A REGISTRATION FORM OR A CLAIM FORM.  
IT EXCLUDES YOU FROM MAKING A CLAIM IN THE SETTLEMENT.  
DO NOT USE THIS FORM IF YOU WANT TO RECEIVE BENEFITS UNDER THE SETTLEMENT.**

Name: \_\_\_\_\_  
Mr. / Mrs. / Miss / Ms.

Current Address: \_\_\_\_\_  
Apt/No/Street                      City                      Province                      Postal Code

Telephone: Home: (        )                      Work or Cell: (        )

Date of Birth \_\_\_\_\_

Date of Death (if applicable) \_\_\_\_\_                       Death Certificate Attached

Health Card # \_\_\_\_\_

**Identification of person signing this Opt Out Form (check only one):**

- I purchased, used or ingested Fleet Phospho-soda and am the above identified Primary Class Member. I am signing this Form to EXCLUDE myself from potential entitlement to benefits under the Fleet Phospho-soda Settlement Agreement.
- I am the guardian, custodian, executor, administrator or court-appointed representative (a "Representative Claimant") of the above-identified Primary Class Member/Primary Claimant (or his/her estate). I am signing this Form to EXCLUDE myself and the Primary Class Member/ Primary Claimant identified above from potential entitlement to benefits under the Fleet Phospho-soda Settlement Agreement. NOTE: For this Opt Out to be valid the "Representative Claimant" must attach a copy of the court order or other official document appointing them as the representative.

**Purpose of Opting-Out (check only one):**

- My current intention is to begin individual litigation against C.B. Fleet Company, Inc. and/or Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada to seek to recover damages related to my use of Fleet Phospho-soda.
- I am opting-out of the class action for a reason other than to begin individual litigation against C.B. Fleet Company, Inc. and/or Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada to seek to recover damages related to my use of Fleet Phospho-soda. I do not intend to begin individual litigation against C.B. Fleet Company, Inc. and/or Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada with respect to my use of Fleet Phospho-soda.

**I UNDERSTAND THAT BY OPTING OUT I WILL NEVER BE ELIGIBLE TO RECEIVE ANY  
COMPENSATION PURSUANT TO THE FLEET PHOSPHO-SODA SETTLEMENT AGREEMENT**

DATE: \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
Year      Mo.      Day

\_\_\_\_\_  
Name of Primary Class Member or Representative Claimant

\_\_\_\_\_  
Signature of Primary Class Member or Representative Claimant

ALL OPT OUT FORMS MUST BE SUBMITTED BY ●, 201X TO:

[claims administrator contact info]



## SCHEDULE B

### POINT DISTRIBUTION MATRIX FOR PRIMARY CLAIMANTS

#### PART ONE: THRESHOLD EVIDENCE

<b>THRESHOLD EVIDENCE REQUIRED REGARDING USE OF MORE THAN 45 mL OF FPS<sup>1</sup> IN A 24 HOUR PERIOD</b>		<b>Sufficiency to enter process</b>
OR	Medical record indicating a procedure requiring a bowel preparation was performed and proof of contemporaneous purchase of FPS	Enter process
OR	Medical record of pre-procedure consultation, procedure records, or post procedure records, evidencing use of FPS	Enter process
OR	General bowel preparation instructions for use of FPS together with a medical record evidencing a procedure requiring a bowel preparation	Enter process
OR	Physician declaration of use of more than 45mL of FPS in a 24 hour-period as a bowel preparation	Enter process
OR	Medical record indicating a procedure requiring a bowel preparation was performed, an affidavit from claimant as to use of more than 45ml of FPS in 24-hours in connection with such procedure, and a declaration that due diligence was exercised in attempting to obtain the bowel preparation instruction utilized by claimant.	Enter process

<b>THRESHOLD EVIDENCE OF FPS-RELATED RENAL INJURY</b>		<b>Sufficiency to enter process</b>
OR	If claimant had a post-ingestion kidney biopsy, <sup>2</sup> biopsy must demonstrate the following: <ul style="list-style-type: none"> <li>• tubular necrosis and/or interstitial fibrosis;</li> <li>• calcium phosphate deposition; and</li> <li>• clinical assessment of Acute Phosphate Nephropathy ("APN") or nephrocalcinosis or Acute Kidney Injury ("AKI") in biopsy or other medical record<sup>3</sup></li> </ul>	Enter process
OR	In the absence of a biopsy, case specific expert report stating that use of more than 45mL FPS as a bowel preparation caused or contributed to claimant's renal impairment	Enter process

<sup>1</sup> FPS refers to any and all Fleet products containing Fleet® Phospho-soda®.

<sup>2</sup> Claimant who underwent post-ingestion renal biopsy shall only be considered for settlement if biopsy results are produced. Upon request, biopsy materials shall be provided for review.

<sup>3</sup> Can also be demonstrated by declaration or report upon review of biopsy report or biopsy materials.

This matrix does not reflect, and is not intended to reflect, the litigation positions of any of the Parties. It is intended solely for settlement purposes, to facilitate the distribution of settlement benefits for claimants who allege injuries based on ingestion of FPS, and shall not be introduced as evidence for any other purpose.

In the absence of a biopsy, medical records diagnosing patient with kidney injury, which injury was caused or contributed to by the use of FPS bowel preparation or the medical procedure for which FPS bowel preparation was used	Enter process
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EXCLUSIONARY SCENARIOS	Sufficiency to enter process
Claimant is unable to satisfy one or more of the threshold requirements for evidence of use of more than 45 mL of FPS in a 24-hour period <i>or</i> one or more of the threshold requirements for evidence of FPS-related renal injury	Not sufficient
Baseline eGFR <sup>4</sup> is 29 or lower	Not sufficient
Claimant first directed to use FPS as bowel cleanser after March 5, 2009	Not sufficient
In non-transplant cases, current eGFR is 60 or greater	Not sufficient
In non-transplant, non-death and non dialysis cases, no lab results measuring creatinine values or eGFR within 6 months of the date the claim is submitted.	Not sufficient
In non-transplant cases, where claimant's serum creatinine or eGFR returned to or improved upon claimant's baseline serum creatinine or eGFR within 12 months of ingestion.	Not sufficient <sup>5</sup>

<sup>4</sup> "Baseline eGFR" means the most recent eGFR prior to ingestion of FPS as indicated: (1) on lab report; or (2) otherwise calculated using MDRD scale.

<sup>5</sup> Claims that are not sufficient to enter the process are not compensable.

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**PART TWO: BASE POINTS FOR COMPENSABLE INJURIES BY CATEGORY**

I.	Chronic Kidney Disease (“CKD”) Stage III (a): GFR 55-59.....	35
II.	CKD Stage III (b): GFR 45-54.....	50
III.	CKD Stage III(c): GFR 36-44.....	80
IV.	CKD Stage III (d): GFR 30 to 35.....	110
V.	CKD Stage IV: GFR 20 to 29.....	180
VI.	CKD Stage IV: GFR of 19 or below.....	300
VII.	Renal transplant <sup>6</sup> .....	440
VIII.	Long term/permanent dialysis <sup>7</sup> .....	550
IX.	Wrongful death.....	500

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<sup>6</sup> This category includes claimants who: (1) actually have had a transplant; (2) have an eGFR of 19 or below, are on a renal transplant list, and are actively awaiting a transplant; or (3) have an eGFR of 19 or below, have a living donor, and are actively awaiting a transplant.

<sup>7</sup> This category includes claimants who have already had 3 years of dialysis and claimants who have had less than 3 year of dialysis, but whose medical records or treating physician affidavit establishes that a renal transplant is not feasible or that claimant is ineligible for a renal transplant.

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**PART THREE: QUANTIFIABLE FACTORS AFFECTING POINTS (Points from this section reduce or increase the base point level by taking the total number of points from this section, subtracting or adding the number from or to 100 to create a percentage, and then multiplying that percentage by the base point number)**

Enhanced Medical Factors		Negative Medical Factors	
Biopsy finding of APN as per threshold criteria and <ul style="list-style-type: none"> <li>• Biopsy report (or addendum thereto or subsequent review of biopsy) reflects that the biopsy is consistent with the diagnosis of APN; or</li> <li>• Expert report or medical record reporting that biopsy reflects APN</li> </ul>	+20%	Weak biopsy: Calcium phosphate deposition is < 30 tubular lumina in a sample size of eight or more glomeruli	-10%
		In addition to APN, renal biopsy includes findings of one or more of the following other causative diseases: <ul style="list-style-type: none"> <li>• active and/or chronic interstitial nephritis with interstitial inflammation associated with significant tubulitis</li> <li>• calcium-oxylate deposition is equal to or exceeds the number of calcium-phosphate deposition where the calcium phosphate deposition is &gt; 30 tubular lumina in a sample size of eight or more glomeruli</li> <li>• calcium-oxylate deposition is at least half the number of calcium-phosphate deposition where the calcium phosphate deposition is &lt; 30 tubular lumina in a sample size of eight or more glomeruli</li> </ul>	-6%
Where there is no biopsy, lab results demonstrate hyperphosphatemia or hypocalcemia within 48 hours of first ingestion (only applicable in cases in which the last pre-ingestion lab results do not demonstrate hyperphosphatemia or hypocalcemia)	+10%	Labs obtained within 48 hours of ingestion do not demonstrate hypocalcemia and/or hyperphosphatemia (only applicable in cases in which the last pre-ingestion lab results do not demonstrate hyperphosphatemia or hypocalcemia)	-10%
		At time of ingestion, patient has been diagnosed with one or more of the following: <ul style="list-style-type: none"> <li>• Megacolon</li> <li>• Congestive heart failure</li> <li>• Bowel obstruction (after March 19, 2002)</li> <li>• Ascites (after March 19, 2002)</li> <li>• Children under 12</li> </ul>	-75%

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		At the time of ingestion, patient suffered from <ul style="list-style-type: none"> <li>• Crohn's disease or colitis (after January 2003)<sup>8</sup></li> </ul>	-25%
		In the absence of a biopsy, at time of initial post-ingestion diagnosis of renal disease, lab results are not consistent with clinical picture of kidney injury associated with FPS ingestion: <ul style="list-style-type: none"> <li>• Proteinuria (defined as +3 or more with dipstick; or 1 gram/1000 milligrams or more protein with macroscopic analysis)</li> </ul>	-15%
		<ul style="list-style-type: none"> <li>• Hematuria (defined as +3 or more on a dipstick; or moderate or more of blood with macroscopic analysis; or more than 3 red blood cells (RBCs) with microscopic analysis)</li> </ul>	-15%
		<ul style="list-style-type: none"> <li>• Active urine sediment<sup>9</sup> (defined as abnormal finding of casts, crystals, eosinophils, pyuria or dysmorphic RBCs)</li> </ul>	-15%
		Significant other potential causes contributing to renal failure, forming part of the differential, or which either cannot be or have not been ruled out: <ul style="list-style-type: none"> <li>• In the absence of a biopsy, if claimant used a contrast agent between baseline creatinine and diagnosis of Acute Renal Failure ("ARF"); or</li> <li>• If claimant has a post-ingestion biopsy report that reflects a contrast agent inducing injury and claimant actually used a contrast agent between last known creatinine and diagnosis of ARF</li> </ul>	-25%
		<ul style="list-style-type: none"> <li>• In the absence of a biopsy, diagnosis of acute or chronic nephritis</li> </ul>	-33%
		<ul style="list-style-type: none"> <li>• In the absence of a biopsy, active light chain, myeloma or autoimmune kidney disease</li> </ul>	-75%

<sup>8</sup> The negative valuation applies if: (1) claimant was previously diagnosed with Crohn's disease or ulcerative colitis; (2) at the time of the ingestion of FPS has signs and symptoms documented in the medical records consistent with active disease or medical records document presumptive diagnosis of active Crohn's disease or ulcerative colitis; and (3) the diagnostic procedure confirms active disease. Signs and symptoms refer to rectal bleeding, diarrhea, tenesmus, abdominal pain and/or weight loss.

<sup>9</sup> As opposed to bland or inactive urine sediment: <10 red blood cells/hpf and no cellular casts in the sediment.

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		<b>Negative Product Use Factors</b>	
		If threshold evidence concerning use of more than 45mL of FPS in 24-hour period is based solely on a medical record indicating a procedure requiring a bowel preparation was performed and an affidavit from claimant as to use of more than one 45ml dose of FPS in connection with such procedure	-25%
		Bowel preparation was not in accordance with accepted practice:	
		• More than 45 mL in a single dose	-50%
		• Ingestion of more than a total of 90 mL of FPS in 24 hours	-50%
		• Ingestion of concomitant oral sodium phosphate product, sodium phosphate enema, , or other purgatives for bowel preparation (applies to ingestions after March 19, 2002)	-50%
		• Use of additional non-sodium phosphate laxatives as part of bowel preparation	-2%
		• Less than 5 hour separation between doses	-25%
		• Less than 4 hour separation between doses	-30%

<b>Enhanced Damages Factors</b>		<b>Negative Damages Factors</b>	
		Baseline eGFR is 50 to 59 <sup>10</sup> Last known eGFR is 50 to 59 Last known eGFR is 40 to 49 Last known eGFR is 30 to 39	-50% -10% -5%
		Baseline eGFR is 40 to 49 <sup>11</sup> Last known eGFR is 40 to 49 Last known eGFR is 30 to 39 Last known eGFR is 29 and below	-60% -30% -25%
		Baseline eGFR is 30 to 39 Last known eGFR is 30 to 39 Last known eGFR is 20 to 29 Last known eGFR is 19 and below	-70% -60% -50%

<sup>10</sup> The deductions in this category do not apply to transplant cases.

<sup>11</sup> The deductions in this category do not apply to either transplant or long-term dialysis cases.

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Surgery related to secondary hyperparathyroidism <sup>12</sup> diagnosed post-FPS ingestion Stage IV or worse Stage III	+1% +8%		
Medically-treated secondary hyperparathyroidism <sup>13</sup> diagnosed post-FPS ingestion Stage IV Stage III	+1% +3%		
Diagnosed with anemia secondary to FPS-induced renal impairment, requiring continuing treatment Stage IV Stage III	+2% +6%		
Short term dialysis (applies in cases in which claimant presently has Stage III or IV CKD but had previously undergone 25 or more sessions of dialysis)	+8%		
Short term dialysis or sodium thiosulfate infusion treatment (applies in cases in which claimant presently has Stage III or IV CKD but had previously undergone 1-24 sessions of dialysis or sodium thiosulfate infusion treatment)	+5%		
For Category VI (CKD IV; GFR 19 or less) claimants only presently on dialysis: Up to one year of dialysis completed: 1-2 years of dialysis completed: 2-3 years of dialysis completed:	+12% +18% +22%		

Enhanced Liability Factors		Negative Liability Factors	
Creatinine values in last lab work prior to ingestion is within "normal" range, but claimant's eGFR is at that time below 60	+10%		
		Ingestion occurred prior to April 15, 2003	-10%
Ingestion occurred on or after April 15, 2003 and before December 15, 2005.	+10%		
		Ingestion occurred on or after December 15,	-10%

<sup>12</sup> Requires medical record or expert report establishing relationship to post-colonoscopy CKD.

<sup>13</sup> Requires medical record or expert report establishing relationship to post-colonoscopy CKD.

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		2005 and before November 1, 2006	
		Ingestion on or after November 1, 2006 and before November 1, 2007	-15%
		Ingestion on or after November 1, 2007 and before January 15, 2008	-22%
		Ingestion on or after January 15, 2008 and before April 1, 2008	-26%
		Ingestion on or after April 1, 2008 and before December 24, 2008	-30%
		Ingestion on or after December 24, 2008	-35%

Enhanced Age Factors		Negative Age Factors	
Under 50 at time of ingestion	+8%	70 through 75 at time of claim submission	-2%
50 through 59 at time of ingestion	+5%	76 through 80 at time of claim submission	-10%
60 through 69 at time of ingestion	+1%	Over 80 at time of claim submission	-17%

		Negative Limitations Factors <sup>14</sup>	
		If there is a medical or other record indicating that Claimant was advised or aware of their diagnosis of kidney injury and that such injury was associated with the use of FPS bowel preparation; and the time between the date of that record and October 23, 2007 is more than the personal injury limitations period of the Claimants' home province. <sup>15</sup>	-50%

<sup>14</sup> The percentage deduction for negative limitation factors is applied after the total remaining base compensation points have been determined by application of all prior quantifiable factors affecting point value.

<sup>15</sup> For the sole purposes of assessing the application of this provision of this Settlement Construct, the following home province limitations periods shall apply:

- Alberta: 2 years
- British Columbia: 2 years
- Manitoba: 6 years
- New Brunswick: 6 years
- Newfoundland and Labrador: 2 years
- Northwest Territories: 6 years
- Nova Scotia: 6 years
- Nunavut: 6 years
- Ontario: 6 years (prior to January 1, 2004); 2 years (after January 1, 2004)

(continued...)

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**Claims with Negative Valuations**

Claims that are assigned a base compensation point value, but which, after application of the quantifiable factors affecting that base compensation point value, have no positive base compensation points remaining, will be assigned a \$2,500 dollar value that will not be subject to further adjustment.

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(continued...)

- Prince Edward Island: 6 years
- Quebec: 3 years
- Saskatchewan: 2 years
- Yukon: 6 years

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SCHEDULE C

SETTLEMENT APPROVAL ORDER

Court File No. 58675/08

ONTARIO  
SUPERIOR COURT OF JUSTICE

The Honourable Madam L.C. Leitch      ) \_\_\_\_\_, the \_\_\_\_\_ day  
  ) \_\_\_\_\_  
  ) of \_\_\_\_\_, 2010

BETWEEN :

LYNDA QUINTON and FRED QUINTON

Plaintiffs

- and -

C.B. FLEET HOLDING COMPANY, INC., C.B. FLEET COMPANY, INC., and  
JOHNSON & JOHNSON – MERCK CONSUMER PHARMACEUTICALS OF CANADA

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

**THIS MOTION**, made by the Plaintiffs for an Order that the within proceeding be certified as a class proceeding for settlement purposes, that the Settlement Agreement entered into between the Plaintiffs and Defendants be approved, and that [xxxxxxx] be appointed as the

Claims Administrator, was heard this day at the Court House, 80 Dundas Street, London, Ontario.

**ON READING** the materials filed, including the Settlement Agreement dated \_\_\_\_\_, 2010, and on hearing the submissions of counsel for the Plaintiffs and counsel for the Defendants:

1. **THIS COURT ORDERS AND DECLARES** that for the purposes of this Order the definitions set out in the Settlement Agreement apply to and are incorporated into this Order;
2. **THIS COURT ORDERS** that this action be certified as a class proceeding for settlement purposes pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6;
3. **THIS COURT ORDERS** that the Class be defined as:
  - (a) All persons resident in Canada, including their estates, who purchased, used or ingested Fleet Phospho-soda; and
  - (b) All persons who by virtue of a personal relationship to one or more of such persons described in (a) above have standing in this action pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended (or equivalent derivative or direct claim by statute or common law in other provinces or territories);
4. **THIS COURT ORDERS** that the within action be certified as a class proceeding for settlement purposes on the basis of the following common issue:

Were the Defendants negligent in the manufacture, marketing, or distribution of Fleet Phospho-soda in Canada?;

5. **THIS COURT ORDERS** that Lynda Quinton and Fred Quinton be appointed as representative plaintiffs for the Class;
6. **THIS COURT DECLARES** that the Settlement Agreement with its attached Schedules, attached hereto as Appendix "A", is fair, reasonable and in the best interests of Class Members;
7. **THIS COURT ORDERS** that the Settlement Agreement be and is hereby approved pursuant to s. 29 of the *Class Proceedings Act, 1992*, and shall be implemented in accordance with its terms;
8. **THIS COURT DECLARES** that the Settlement Agreement is incorporated by reference into and forms part of this Order and is binding upon the Representative Plaintiffs, upon all Class Members, upon Representative Claimants, and upon the Defendants and Participating Insurers;
9. **THIS COURT ORDERS AND DECLARES** that this Order, including the Settlement Agreement, is binding upon each Class Member, including those persons who are minors or mentally incapable and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure* R.S.O. Reg. 194 are dispensed with in respect of this action;
10. **THIS COURT ORDERS** that each Class Member, personally and on behalf of their respective heirs, successors, executors, administrators, trustees, and assigns, and their affiliated, predecessor, successor and related companies, shall be deemed to have released and does hereby release and forever discharge the Releasees of the Released Claims;
11. **THIS COURT ORDERS** that the deadline for Class Members to opt-out of the Settlement be sixty days following first publication of the notice of settlement approval

(Schedule "H" of the Settlement Agreement), or such other time period as may be approved by the Court, and that after that date, Class Members who have not timely and properly opted-out will be bound by the Settlement Agreement;

12. **THIS COURT ORDERS** that any and all claims of the Provincial Health Insurers are also hereby released on the following terms:

In consideration of the payments made to the Provincial Health Insurers set out in this Settlement Agreement, Provincial Health Insurers will be deemed, in so far as their interest are concerned, to release and forever discharge the Defendants and Participating Insurers from any and all actions, causes of action, suits, debts, duties, accounts, bonds, covenants, contracts, claims and demands whatsoever that were asserted or which could have been asserted by the Provincial Health Insurers on their own behalf by or on behalf of any Class Member relating to Fleet Phospho-Soda. Provincial Health Insurers may not make any claims, or take or continue any proceedings against any person, partnership, corporation, or other entity who might claim contribution or indemnity or any other relief of a monetary, declaratory or injunctive nature from the Defendants and Participating Insurers in connection with the claims released in this Settlement Agreement;

13. **THIS COURT ORDERS** that [xxxxxxx] is appointed as the Claims Administrator;
14. **THIS COURT ORDERS** that the Claims Administrator execute its obligations as laid out in the Settlement Agreement and Schedules attached thereto;
15. **THIS COURT ORDERS** that the Settlement Matrix attached to the Settlement Agreement as Schedule "B" be and is hereby approved and shall be implemented in accordance with its terms;
16. **THIS COURT ORDERS** that the notices of settlement approval attached to the Settlement Agreement as Schedule "H" and Schedule "I" be and are hereby approved;

17. **THIS COURT ORDERS** that the notice of settlement approval be disseminated in accordance with the plan attached to the Settlement Agreement as Schedule "K";
18. **THIS COURT ORDERS AND ADJUDGES** that this Proceeding be and is hereby dismissed against the Defendants, without costs and with prejudice.

Date: \_\_\_\_\_, 2010

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The Honourable Madam Justice L.C. Leitch

## SCHEDULE D

### PROVINCIAL HEALTH INSURERS – SETTLEMENT DISTRIBUTION

PROVINCE	SETTLEMENT AMOUNT
NFLD	\$27,180.00
PEI	\$7,560.00
NS	\$50,040.00
NB	\$39,960.00
QC	\$418,860.00
ON	\$699,120.00
MB	\$65,340.00
SK	\$55,260.00
AB	\$197,460.00
BC	\$239,220.00
Total:	\$1,800,000

## SCHEDULE E

### CLAIMS ADMINISTRATION PROCEDURES

The procedures set forth herein are for the administration of the Settlement Agreement and for the submission, processing, approval, compensation, and appeal of individual claims pursuant to the terms and conditions of the Fleet Phospho-Soda Class Action Canada-Wide Settlement Agreement. The procedures shall be implemented by the Claims Administrator, subject to the ongoing authority and supervision of the Ontario Court. The Claims Administrator may adopt additional policies and procedures for the administration of the Settlement Agreement that are consistent with the Settlement Agreement and the Order of the Ontario Court.

#### 1. ADMINISTRATION OF SETTLEMENT FUNDS

Following appointment by the Ontario Court, the Claims Administrator shall receive in Trust directly from the Defendants and/or Participating Insurers all settlement funds provided for in Section 4 of the Settlement Agreement at the times outlined in the Settlement Agreement. The Claims Administrator shall invest the funds in the classes of securities provided in Section 26 of the *Trustee Act*, R.S.O. 1990, c.23, with all interest or other income on such funds being added to the monies in trust for the benefit of the Eligible Claimants and all costs and fees of the custodian and/or manager of the funds to be paid out of the interest or sole income on such funds.

The Claims Administrator shall implement the Settlement Agreement so as to provide benefits to Eligible Claimants only, and in a timely manner designed to treat similarly situated Claimants as uniformly as reasonably possible and to minimize to the extent reasonably possible the administration and other transaction costs associated with the implementation of the Settlement Agreement.

The Claims Administrator shall provide to Class Counsel, Defendants' Counsel and counsel for the Participating Insurers a list of the persons who the Claims Administrator has identified as Eligible Claimants, a breakdown of the number of points awarded to the Eligible Claimant and the ingestion date of Fleet Phospho-soda for each Eligible Claimant ("List of Approved Claims").

#### 2. CLAIM FORMS AND CLAIM DEADLINE

Eligibility under the Settlement Agreement requires proper completion and execution of the claim form developed by the Claims Administrator in consultation with Class Counsel and Counsel for Fleet ("Claim Form"). The Claims Administrator shall develop such other forms as it deems necessary for the implementation of the Settlement Agreement.

Claimants must submit their Claim Form and Supporting Documentation (collectively, their "Submission") by the Claims Deadline. Any Claimant who fails to file their Submission in a timely manner will not be entitled to share in any distribution made in accordance with the Settlement Agreement, unless the Court orders, on application by a Claimant, that an extension of the Claims Deadline for that Claimant is in the interests of justice. If the Court so orders, the



Claims Administrator shall process and render a decision with respect to the disposition of the Claim in accordance with this Schedule.

### **3. OVERVIEW OF THE SETTLEMENT MATRIX**

The Settlement Matrix found at Schedule B of the Settlement Agreement contains the criteria to be applied in determining, and calculating points for, Eligible Claimants.

The Settlement Matrix has three parts with several components:

#### **3.1 Part One: Threshold Evidence**

1. Threshold evidence required regarding use of more than 45 mL of FPS (FPS refers to any and all Fleet products containing Fleet Phospho-soda) in a 24 hour period
2. Threshold evidence required regarding FPS-related renal injury (in this document, as in the Settlement Matrix, the terms "renal injury" and "kidney injury" are used interchangeably)
3. Exclusionary scenarios
4. In order to satisfy threshold evidence and move on to part two of the Settlement Matrix:
  - (a) The Primary Claimant must satisfy one or more of the threshold requirements for evidence of FPS ingestion and one or more of the threshold requirements for evidence of FPS-related renal injury; and
  - (b) The Primary Claimant must not be subject to an exclusion.

#### **3.1 Part Two: Compensable Injuries By Category**

1. All compensable injuries are based upon a determination of the degree of renal injury sustained. Criteria for determining the appropriate category of injury are specified within the Settlement Matrix and further defined within these Claims Administration Procedures, Schedule E.

#### **3.3 Part Three: Quantifiable Factors Affecting Value**

1. Enhanced Medical Factors and Negative Medical Factors
2. Negative Product Use Factors
3. Enhanced Damage Factors and Negative Damage Factors
4. Enhanced Liability Factors and Negative Liability Factors
5. Enhanced Age Factors and Negative Age Factors.

### 3.4 General Calculation Method

1. Satisfy part one threshold evidence.
2. Determine base value:

Each Primary Claimant shall fall within one (1) compensable injury category ranging from I to IX with a corresponding number of points. The last known available renal function status shall determine the applicable category as further defined herein.

3. Determine the total net percentage points.
4. Apply the total net percentage points to increase or decrease the base value.
  - (a) For example, the settlement value of a Primary Claimant with a current eGFR of 34 (i.e., Category IV) whose percentage point factors equal -10 is derived by multiplying 110 by 90% (total of 99 points);
  - (b) For example, the settlement value of a Primary Claimant with a current eGFR of 22 (i.e., Category V) whose percentage point factors equal +14 is derived by multiplying 180 by 114% (total of 205.2).

## 4. THE CLAIM PROCESS

### 4.1 Submission of Claim

To become an Eligible Primary Claimant, the following information shall be submitted:

1. All available lab results and medical records demonstrating:
  - (a) Current renal function;
  - (b) Renal function prior and subsequent to FPS ingestion; and
  - (c) The Primary Claimant's medical history prior and subsequent to FPS ingestion.
  - (d) In the event that a Primary Claimant is unable to obtain medical records or lab results demonstrating Primary Claimant's renal function in the two years prior to ingestion, the Primary Claimant shall submit an affidavit as to the efforts undertaken to obtain such information and the reasons it could not be obtained.
2. In all non-permanent dialysis, non-transplant or non-death cases, lab results supporting the compensable injury category assignment shall be dated within 6 months of the date the claim is filed. Determination of a Primary Claimant's compensable injury category and current medical status shall be based upon the information provided on the date the claim is submitted, unless the claim is determined to be deficient. Neither the Claimant nor Fleet shall be permitted to

supplement the initial claim submission with a lab report or medical status or other data obtained after the claim is submitted, except in the limited circumstances where: (1) there is proof that the most current lab report and/or medical status had been requested prior to filing the claim, and (2) the requested lab report and/or medical status were not timely supplied by the healthcare provider.

## 4.2 General Application

### 1. Determination of lab values

- (a) Lab results obtained from lab reports will be controlling:
  - (i) Where lab results documented in medical records do not correspond to a lab report, the lab report results will control.
  - (ii) Where no lab report is available and lab results are otherwise documented in medical records, the lab results reported in the medical record will control.
  - (iii) If the Primary Claimant contends that a lab report contains an error, it is the Primary Claimant's burden to establish same by submission of credible medical evidence for consideration (e.g., a doctor's statement, contemporaneous medical records showing that the physician(s) at the time considered the lab report to be in error, or other such evidence demonstrating that the record is in error).

### 2. Determination of renal function and renal injury

- (a) eGFR shall be determined as follows:
  - (i) Lab report providing eGFR calculation will control.
  - (ii) If lab report does not provide eGFR calculation, medical record documenting the eGFR will control.
  - (iii) If eGFR is not recorded in lab report or medical records, eGFR shall be determined using the MDRD GFR calculator provided at the National Kidney Foundation website using the original MDRD calculator. Link and highlighted instructions below:

[http://www.kidney.org/professionals/kdoqi/gfr\\_calculator.cfm](http://www.kidney.org/professionals/kdoqi/gfr_calculator.cfm)

MDRD GFR Calculator

Serum creatinine

mg/dL   $\mu\text{mol/L}$

Creatinine methods recalibrated to be traceable to IDMS. [Do not check box]

Age  years

Race  African American  All other races\*

Gender  Male  Female

GFR Value:  mL/min/1.73 m<sup>2</sup>

OR

### CKD EPI & MDRD GFR Calculator

Serum creatinine  
 mg/dL    $\mu$ mol/L

NOTE: CKD EPI GFR is only valid with creatinine methods are traceable to IDMS

Age  years

Race  African American  All other races\*

Gender  Male  Female

TRACEABLE TO IDMS  No  Yes

CKD EPI Value:  mL/min/1.73 m<sup>2</sup> in a  year old

MDRD GFR:  mL/min/1.73 m<sup>2</sup> in a  year old

(iv) eGFR values shall be rounded up or down to the nearest whole number.

(b) In order to establish a renal injury related to FPS ingestion, the Primary Claimant's initial post-ingestion lab results must show evidence of renal injury by way of an increased creatinine value. However, if the initial

post-ingestion lab result was taken within 48-hours of the last ingestion and did not show increased creatinine value, the Primary Claimant may still establish renal injury related to FPS ingestion if the first lab result taken more than 48-hours after the last ingestion shows increased creatinine value.

- (c) "Date of initial diagnosis" of a renal injury related to FPS ingestion, shall mean the date of the initial post-ingestion lab showing evidence of renal injury by way of an increased creatinine value as further defined herein.

3. Sufficiency of information and documents submitted

- (a) Only Primary Claimants with documentation sufficient to establish a claim will become Eligible Claimants.

- (i) If a Primary Claimant contends that any medical record contains an error, it is the Primary Claimant's burden to establish same by submission of credible medical evidence for consideration (e.g., a doctor's statement, contemporaneous medical records showing that the physician(s) at the time considered the medical record at issue to be in error, or other such evidence demonstrating that the medical record is in error).

- (b) Medical and Expert Evidence Threshold

- (i) If a renal biopsy report or expert report is being relied upon to support the threshold requirement of a finding and clinical assessment of a FPS-related injury from a biopsy, only a pathologist who is board certified in anatomic and/or clinical pathology who is regularly relied upon in a clinical diagnostic setting or otherwise a recognized nephropathologist will be considered.

- (ii) In the absence of a biopsy, if a case specific expert report or medical record associating the Primary Claimant's kidney injury with the use of FPS is being relied upon to support the threshold requirement of a FPS-related injury, only a board certified nephrologist's opinion will be considered.

4. Multiple Claim Ingestion Dates

- (a) In the event that the basis of a claim is comprised of a series of ingestions with successively worsening kidney function, the applicable base value (Part Two of Settlement Matrix), as well as all positive and negative value factors (Part Three of Settlement Matrix), shall be based upon the Primary Claimant's current kidney function. Baseline eGFR shall be measured by the last known eGFR prior to the first of the series of ingestions making up the basis of the claim. However, if any of the series of ingestions occurred after the Primary Claimant's eGFR had dropped to 29 or lower (the

"Below Threshold Ingestion"), the applicable base value, as well as all positive and negative value factors, shall be based upon the Primary Claimant's status prior to that Below Threshold Ingestion.

5. Determination of bowel preparation regimen employed
  - (a) When bowel preparation instructions are provided, it will be presumed that the Primary Claimant followed such instructions.
  - (b) Where medical records document a regimen different from the bowel prep instructions provided (e.g., additional purgatives used, different dosing interval or different amount of FPS ingested than indicated on the instructions), it will be presumed that the Primary Claimant followed the regimen described in the medical records.
  - (c) When bowel preparation instructions are not provided:
    - (i) If the medical records document the purgative products used, the doses or the dosing interval, it will be presumed that the Primary Claimant followed the regimen documented in the medical records
    - (ii) If the medical records indicate that FPS was taken as part of the bowel preparation regimen, but the number of doses, the amounts per dose, the timing of such doses and any other purgative products are not specified, the Primary Claimant shall provide an affidavit or physician's declaration setting forth the bowel prep regimen followed.
  - (d) The Primary Claimant's affidavit as threshold evidence of bowel prep regimen
    - (i) Where a Primary Claimant's FPS ingestion is established by the Primary Claimant's affidavit, such affidavit shall contain the number of doses, the amounts per dose, the timing of such doses and any other purgative products used.
  - (e) Physician declaration as threshold evidence of bowel prep regimen
    - (i) Where a Primary Claimant's FPS ingestion is established by a physician declaration, such declaration shall contain the number of doses, the amounts per dose, the timing of such doses and any other purgative products used.

#### 4.3 Specific Criteria Protocols

##### 1. Renal Biopsy

- (a) If medical or other records indicate that post-ingestion kidney pathology exists and there is no report or review so as to consider whether such pathology meets the causation threshold criteria for a renal biopsy case, the claim will not be considered to pass threshold in the absence of an affirmative showing by affidavit or other sworn declaration that the pathology cannot be made available for the Primary Claimant's review.
- (b) If a post-ingestion biopsy report is relied upon to meet threshold criteria, and if, upon request, the Primary Claimant fails to provide the renal pathology for review, the claim will not be considered to pass threshold in the absence of an affirmative showing by affidavit or other sworn declaration that the pathology cannot be made available for review.
- (c) If post-ingestion biopsy sample is unavailable upon request or insufficient for renal pathologist to render a diagnosis of Acute Phosphate Nephropathy as per the threshold criteria, the Primary Claimant will not be eligible to receive enhanced value points that otherwise may be associated with a renal biopsy.

2. Compensable Injury Category Definitions

- (a) Renal Transplant
  - (i) Medical records confirm actual transplant; or
  - (ii) Medical records confirm end stage kidney failure:
    - (A) eGFR of 19 and below together with proof of acceptance on a renal transplant waiting list; or
    - (B) eGFR of 19 and below together with proof of approved living donor.
- (b) Long term/permanent dialysis
  - (i) Medical records establishing that Primary Claimant has completed more than 3 years of dialysis; or
  - (ii) The Primary Claimant is on dialysis less than 3 years, and medical records or treating physician affidavit establishes that the Primary Claimant is ineligible for a transplant or that renal transplant is not feasible.

- (c) Wrongful death
  - (i) Death certificate or autopsy report establishing that the claimed renal injury was the primary cause of the Primary Claimant's death.
    - (A) If death certificate or autopsy report does not identify renal injury as the primary cause of the Primary Claimant's death, the compensable injury shall be governed by the Primary Claimant's last known eGFR related to post-FPS ingestion renal injury.
- 3. Diagnosis of "acute or chronic nephritis" includes glomerular nephropathy/nephritis in the presence of proteinuria, pyelo or tubular interstitial nephritis/nephropathy (other than acute phosphate nephropathy), and is intended to include all inflammatory and non-inflammatory kidney diseases.
- 4. Hyperparathyroidism secondary to FPS-induced renal impairment, requiring continuing treatment
  - (a) Does not apply to medical treatment related to pre-existing primary hyperparathyroidism first diagnosed post FPS ingestion.
  - (b) Treatment must be continuing at the time of the Primary Claimant's last known eGFR defining compensable injury category.
  - (c) The following medications shall be considered medical treatment secondary to hyperparathyroidism:
    - (i) Common phosphate binders: Aluminium hydroxide (Alucaps), Calcium carbonate (Calcichew, Titalac), Calcium acetate (Phosex, PhosLo), Lanthanum carbonate (Fosrenol), Sevelamer (Renagel, Renvela).
    - (ii) Common "Active forms of Vitamin D" (prescription medication *not* multi-vitamin/vitamin-D or calcium OTC supplements): Calcidiol (also sometimes called calcifediol or 25-hydroxy Vitamin D with the brand names of Calderol, Decostriol and Dedrogyl), dihydrotachysterol (DHT Intensol), and calcitriol (One Alpha, Rocaltrol and/or Calcijex when injected) Doxercalciferol (Hectorol) and Paricalcitol (Zemplar).
    - (iii) Common calcimimetics: Sensipar (cinacalcet) NPS R-467 or NPS R-568.
  - (d) The following medications will not be considered for "enhanced value" related to treatment for secondary hyperparathyroidism:



- (i) Multi-vitamins, calcium, vitamin-D supplements and any other type of claimed medical treatment other than specified above.
  - (ii) Treated or untreated pre-existing calcium, phosphorus or vitamin-D disorder or condition effecting calcium, phosphorus or vitamin-D regulation/metabolism.
5. Anemia secondary to FPS-induced renal impairment, requiring continuing treatment
- (a) Treatment must be continuing at the time of the Primary Claimant's last known eGFR used to establish compensable injury category.
  - (b) Continuing treatment includes EPO-therapy and/or iron supplements.
  - (c) B-12 supplements are not considered for enhanced value.
  - (d) Does not apply to Primary Claimants treating for anemia at the time of FPS ingestion.

## **5. GENERAL CLAIMS PROCESSING GUIDELINES**

The Claims Administrator shall process all Claims in a cost-effective and timely manner.

### **5.1 Technical Deficiencies**

1. If, during Claims processing, the Claims Administrator finds that technical deficiencies exist in a Claimant's Claim Form or Supporting Documentation that the Claims Administrator determines preclude the proper processing of such Claim, the Claims Administrator shall notify the Claimant via mail of the technical deficiencies, and shall allow the Claimant forty-five (45) days from the mailing of such notice to correct the deficiencies. If the deficiencies are not corrected within the forty-five (45) day period, the Claims Administrator shall reject the Claim (or the portion of the Claim as the case may be). The Claimant will have no further opportunity to correct the technical deficiency;
2. Technical deficiencies referred to in Section 5.1.1 shall not include missing deadlines for submitting Claim Forms, or failing to file sufficient Supporting Documentation to support the Claim which has been made.

## **6. AUDIT PROVISIONS FOR CLAIMS ADMINISTRATOR**

Primary Claimants shall provide the Claims Administrator with an executed Medical Direction by or on behalf of the Primary Claimant, as prepared by the Claims Administrator in consultation with Class Counsel. The Claims Administrator shall conduct audits of Claims in a manner deemed appropriate by the Claims Administrator to determine whether any such Claims reflect intentional fraud in any of the submissions relating to the Claims. Any Claim which is deemed by the Claims Administrator to be fraudulent shall cause the Claimant to be permanently disqualified from receiving any payment under this Settlement Agreement.

## **7. AUDIT AND COMMUNICATION PROVISIONS FOR DEFENDANTS**

### **7.1 General Right of Audit**

The Claims Administrator shall establish a central electronic repository of documents and information submitted by Claimants. The Defendants and Participating Insurers shall have access to the document repository and shall be permitted to communicate with the Claims Administrator to assist with the analysis of Claims.

### **7.2 List of Approved Claims**

Within 7 days of a final determination of the number of Eligible Claimants, the Claims Administrator will provide to Class Counsel, the Defendants and Participating Insurers the List of Approved Claims.

## **8. NOTIFICATION OF CLAIM REVIEW**

The Claims Administrator shall notify a Claimant of the final decision with respect to the disposition of their Claim and the points for which the Claimant is eligible via mail directed to their last mailing address provided by the Claimant to the Claims Administrator (or to counsel when represented).

## **9. APPEALS OF CLAIMS DECISIONS**

### **9.1 Procedure**

1. Claimants will be granted a forty-five (45) day period from the date of mailing of such notification to appeal the classification or rejection of their Claim.
2. All appeals will be on the basis of written submissions only, with reference only to material previously provided to the Claims Administrator in accordance with this Schedule.
3. All appeals will be determined by the Ontario Court.
4. The Ontario Court may appoint a referee to review and make recommendations on all appeals. If a referee is appointed, their reasonable costs shall be paid from the Settlement Amount.

### **9.2 Final Decision**

The judgment of the Ontario Court respecting any appeal from the Claims Administrator's decision is final and binding and shall not be the subject of any further appeal or revision.

## **10. DERIVATIVE CLAIMANT SETTLEMENTS**

### **10.1 Children of Eligible Primary Claimants**

Children of Eligible Primary Claimants who are under the age of 18 on the date the Eligible Primary Claimant ingested more than 45 mL of Fleet Phospho-Soda in a 24 hour

period, and spouses of Eligible Primary Claimants (including common-law and same-sex), shall receive 8% of the amount awarded to the related Eligible Primary Claimant, subject to section 10.4 below.

**10.2 All other Eligible Derivative Claimants**

All other Eligible Derivative Claimants (parents and children 18 or over) shall receive 2% of the amount awarded to the related Eligible Primary Claimant, subject to section 10.4 below.

**10.3 Supporting Documentation for Derivative Claimants**

In order to be eligible for compensation, Derivative Claimants must complete the Derivative Claim Form and proof of one's relationship to the Eligible Primary Claimant is required. For example:

1. Spouses must provide a copy of their marriage certificate or other document evidencing the relationship to the Eligible Primary Claimant;
2. Children of Eligible Primary Claimants must provide a birth certificate or other relevant documentation which establishes the date of birth of the Derivative Claimant, and, if the last name of the child is different from that of the Eligible Primary Claimant, documentation which establishes that the Derivative Claimant is the child of the Eligible Primary Claimant.

**10.4 Maximum Derivative Claimant Payments Per Family**

In the event that an Eligible Primary Claimant has Derivative Claimants eligible for benefits the total of which benefits would exceed 20% of the amount awarded to the related Eligible Primary Claimant, the total benefits paid to Eligible Derivative Claimants shall be divided on a pro-rata basis with the total derivative payments equal to 20% of the amount awarded to the related Eligible Primary Claimant.

**10.5 Derivative Claimant Settlement Payment Provisions**

1. Compensation which is payable to an Eligible Derivative Claimant who is a child of an Eligible Primary Claimant who, at the time of payment, is 18 years of age or older, shall be paid directly to the said Eligible Derivative Claimant.
2. For Eligible Derivative Claimants who are under age 18 at the time of payment, payments under \$5,000.00 shall be paid to the related Eligible Primary Claimant or Representative Claimant in trust, while payments of \$5,000.00 or more shall be paid into Court unless otherwise ordered by the Court.

**11. MISCELLANEOUS**

**11.1 Timeliness of Submissions**

All Submissions by Claimants to the Claims Administrator relating to a Claim shall be made in paper form transmitted via mail or delivery by courier. All Submissions by mail shall be conclusively deemed to have been submitted to the Claims Administrator on the postmark date of such mail. All Submissions delivered to the Claims Administrator by

overnight or other courier shall be conclusively deemed to have been submitted to the Claims Administrator on the date the Submissions were deposited with the overnight or other courier. These provisions shall determine the timeliness of any Submissions to the Claims Administrator. Submissions to the Claims Administrator by any other means, including without limitation facsimile or electronic mail, shall not be considered timely unless such materials are also submitted to the Claims Administrator via mail or delivery by the Claim Deadline.

#### **11.2 Call Centre**

The Claims Administrator shall establish a toll-free call centre for the assistance of Class Members and may devise such other means as the Claims Administrator deems appropriate to provide Claimants with information on the status of their Claims. The toll-free call centre and all other means of communication shall be available in both French and English.

#### **11.3 Correspondence with Class Members**

All written communications from the Claims Administrator to a Class Member shall be transmitted via regular mail to the last address provided by the Class Member to the Claims Administrator. Such written communications shall be directed to the Class Member's legal counsel, if the Class Member is represented by counsel. Payments by the Claims Administrator to a represented Eligible Claimant shall be made to the Eligible Claimant's counsel in trust for the Eligible Claimant. The Eligible Claimant (and legal counsel to a represented Claimant) shall be responsible for apprising the Claims Administrator of the Eligible Claimant's and counsel's correct and current mailing address. The Claims Administrator shall have no responsibility for locating Claimants for any mailing returned to the Claims Administrator as undeliverable. The Claims Administrator shall have the discretion, but is not required, to reissue payments to Eligible Claimants returned as undeliverable under such policies and procedures as the Claims Administrator deems appropriate.

#### **11.4 Surplus Settlement Monies**

If, within twelve (12) months of the payments being issued to Claimants from the Claims Administrator, a balance exists in the trust account as a result of returned or un-cashed cheques, interest earned on the Settlement Amount and not allocated to claimants, or any other surplus monies, the balance in the trust account shall be paid to the Kidney Foundation of Canada.

#### **11.5 Fonds d'Aide**

The Claims Administrator shall be responsible for calculating and sending the appropriate amount of money to the Fonds d'Aide from the claims of Eligible Claimants resident in Quebec under the applicable regulations had the Settlement been approved by the Quebec Superior Court.

#### **11.6 Legal Counsel to Claimants**

A Claimant shall be considered to be represented by legal counsel in connection with a Claim only if the Claims Administrator has received written notice signed by the

Claimant of the identity of the Claimant's counsel. A Claimant may discontinue such representation at any time by written notice to the Claims Administrator. No liens or claims for counsel fees or costs may be asserted against the Claims Administrator or the funds held by the Claims Administrator at any time.

**11.7 Preservation and Disposition of Claim Submissions**

The Claims Administrator shall preserve, in hard copy or electronic form, as the Claims Administrator deems appropriate, the submissions relating to a Claim, until the termination of one (1) year after the last Claim has been paid out and/or after any appeals have been dealt with and at such time shall dispose of the submissions by shredding or such other means as will render the materials permanently illegible.

**11.8 Assistance to the Claims Administrator**

The Claims Administrator shall have the discretion to enter into such contracts and obtain financial, accounting, and other expert assistance as are reasonably necessary in the implementation of the Settlement Agreement.

**11.9 Taxation of the Funds**

The Claims Administrator shall take all reasonable steps to minimize the imposition of taxes upon the monies in trust, and shall have the discretion to pay any taxes imposed on such monies out of the monies in trust.

**SCHEDULE F**  
**SHORT FORM NOTICE OF SETTLEMENT APPROVAL HEARING**

**HAVE YOU USED**  
**Fleet Phospho-Soda?**

IF YOU OR SOMEONE CLOSE TO YOU USED FLEET PHOSPHO-SODA, PLEASE READ  
THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR LEGAL RIGHTS AND YOU MAY  
BE ELIGIBLE FOR COMPENSATION.

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FLEET PHOSPHO-SODA is an over-the-counter pharmaceutical product which was often directed to be used as part of a bowel cleansing regimen, especially prior to undergoing a surgical procedure such as a colonoscopy.

Class action lawsuits were initiated in Ontario, Québec and Saskatchewan alleging that C.B. Fleet Holding Company Inc., C.B. Fleet Company, Inc., and Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada (the "Defendants") negligently manufactured, marketed and sold FLEET PHOSPHO-SODA in Canada without properly warning of alleged risks of kidney damage. The Defendants deny the plaintiffs' allegations and deny any wrongdoing or liability. The court has not taken any position as to the truth or merits of the claims or defences asserted by either side. The allegations made by the plaintiffs have not been proven in court.

If you or a family member ingested FLEET PHOSPHO SODA and developed kidney damage, you may be entitled to compensation.

A Settlement Agreement has been reached. If you or someone close to you used FLEET PHOSPHO SODA, you should immediately review the full legal notice in this matter to ensure you understand your legal rights. A copy of the full legal notice can be viewed at [www.classaction.ca](http://www.classaction.ca) (English and French) or can be obtained by contacting Class Counsel as listed below.

The settlement is for approximately \$11,995,000.00. It is not possible at this time to estimate what level of compensation any one particular Eligible Claimant may receive.

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A settlement approval hearing has been scheduled for \_\_\_\_\_, 2011, at 10:00 a.m. in the city of London, Ontario. At this hearing, the Court will determine whether the Settlement Agreement is fair, reasonable, and in the best interests of Class Members.

A hearing seeking permission to discontinue the Quebec Proceeding so that Quebec Class Members can participate in the Settlement Agreement for which approval is being sought in the Ontario Court has been scheduled for \_\_\_\_\_, 2011, at 10:00 a.m. in Quebec City.

All timely filed written submissions received by Class Counsel will be considered at the settlement approval hearing. If you support the settlement, you do not have to do anything at this time and further notice will be published following the settlement approval hearing. This will contain details of the procedure to be followed by Class Members making claims for compensation.

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Class Counsel can be reached as follows:

English enquiries:	Siskinds LLP 880 Waterloo Street London ON N6A 3V8	French enquiries:	Siskinds, Desmeules 43 Rue Buade, Bur 320 Québec City, Québec G1R 4A2
	Matthew D. Baer Tel: (800) 461-6166 x7822 Email: <a href="mailto:matt.baer@siskinds.com">matt.baer@siskinds.com</a>		Nathalie Boulay Tel.: (418) 694-2009 Email: <a href="mailto:nathalie.boulay@siskindsdesmeules.com">nathalie.boulay@siskindsdesmeules.com</a>

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PUBLICATION OF THIS NOTICE HAS BEEN AUTHORIZED BY THE  
ONTARIO SUPERIOR COURT OF JUSTICE

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**SCHEDULE G**  
**LONG FORM NOTICE OF SETTLEMENT APPROVAL HEARING**

**FLEET PHOSPHO-SODA CLASS ACTION**  
**NOTICE OF SETTLEMENT APPROVAL HEARING**

PLEASE READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR LEGAL RIGHTS

**TO ALL CLASS MEMBERS:**

To all persons resident in Canada who purchased, used or ingested FLEET PHOSPHO-SODA ("Primary Claimant") or their personal representatives, heirs, assigns and trustees ("Representative Claimant"), and any other residents of Canada asserting the right to sue the Defendants by reason of their familial relationship with a Primary or Representative Claimant, including spouses, common law spouses, same-sex partners, as well as parents and children by birth, marriage or adoption ("Derivative Claimant").

**Purpose of this Notice**

FLEET PHOSPHO-SODA is an over-the-counter pharmaceutical product which was often directed to be used as part of a bowel cleansing regimen, especially prior to undergoing a surgical procedure such as a colonoscopy.

Class action lawsuits were initiated in Ontario, Québec and Saskatchewan alleging that C.B. Fleet Holding Company Inc., C.B. Fleet Company, Inc., and Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada (the "Defendants"), negligently manufactured, marketed and sold FLEET PHOSPHO-SODA in Canada without properly warning of alleged risks of kidney damage. The court has not taken any position as to the truth or merits of the claims or defences asserted by either side. The allegations made by the plaintiffs have not been proven in court. The Defendants denied and continue to deny the allegations against them in these lawsuits.

Without any admission of liability or wrongdoing, a Settlement Agreement has been reached. If you would like a copy of the Settlement Agreement, it is available at [www.classaction.ca](http://www.classaction.ca) (English or French) or a copy can be obtained from contacting Class Counsel as listed below.

**Approval of the Settlement Agreement**

In order for the settlement to become effective, it must be approved by the Court. A motion to approve this Settlement Agreement will be heard by the Ontario Superior Court of Justice in the city of London, Ontario on \_\_\_\_\_, 2011 at 10:00 a.m. At this hearing the Court will determine whether the Settlement Agreement is fair, reasonable and in the best interests of Class Members. All timely filed written submissions from Class Members will be considered at this time.

If you wish to comment or make an objection to the Settlement Agreement, you may deliver a written submission to Class Counsel listed below in advance of the settlement approval hearing. Class Counsel will relay such submissions to the Court. Or, if you so choose, you may appear at the hearing and make your submissions orally. If you support the settlement, you do not have to do anything at this time and further notice will be published following the settlement approval hearing. This will contain details of the procedure to be followed by Class Members making claims for compensation.

Should the Settlement Agreement receive final approval, further Notice will be published.

**Discontinuing the Quebec Proceeding**

A hearing seeking permission to discontinue the Quebec Proceeding so that Quebec Class Members can participate in the Settlement Agreement for which approval is being sought in the Ontario Court has been scheduled for \_\_\_\_\_, 2011, at 10:00 a.m. in Quebec City.

**Distribution Protocol**

If the Settlement Agreement is approved by the Court, the settlement payments will be paid out in accordance with the Settlement Agreement which can be found on Class Counsel's website (listed below). Primary Claimants or Representative Claimants may be eligible to receive compensation based on criteria which are outlined in the Settlement Agreement, particularly Schedules B and E. Derivative Claimants may also be eligible for compensation.

Summary of Settlement Agreement

- The Defendants, while not admitting liability, will pay a sum of approximately \$11,995,000.00 to settle the claims of all Class Members.
- Claimants may be eligible to receive settlement payments if they ingested FLEET PHOSPHO SODA and subsequently developed certain types of kidney damage.
- The size of compensation payable to Eligible Claimants will be based on the total number of approved claims and the severity of injuries.
- The timing and the process for filing a claim will be available in a further notice to be published after the Settlement is approved by the Court.
- Provincial Health Insurers will share a fund of \$1,800,000.00 which shall be in full satisfaction of medical services provided or to be provided to Eligible Primary Claimants.

Further Details regarding the Settlement Agreement may be viewed at [www.classaction.ca](http://www.classaction.ca) (English and French) or a copy can be obtained from contacting Class Counsel as listed below.

Opting Out

At the settlement approval hearing, the Plaintiffs will ask the Court to approve terms whereby all persons who come within the class definition will automatically be included in the Class unless they exclude themselves from the Class ("Opt-Out").

The deadline and procedure for opting-out and the effect of doing so will be reviewed at the settlement approval hearing and those details will be available in a further notice to be published after the Settlement Agreement is approved by the Court.

Legal Fees

Class Counsel will seek court approval of legal fees not to exceed 25% of the total settlement benefits plus disbursements and applicable taxes.

Further Information

For Further Information Please Contact Class Counsel as follows:

English enquiries:

Siskinds LLP  
680 Waterloo Street  
London ON N6A 3V8

Matthew D. Baer  
Tel: (800) 461-6166 x7822  
Email: [matt.baer@siskinds.com](mailto:matt.baer@siskinds.com)

French enquiries:

Siskinds, Desmeules  
43 Rue Buade, Bur 320  
Québec City, Québec G1R 4A2

Nathalie Boulay  
Tel.: (418) 694-2009  
Email:  
[nathalie.boulay@siskindsdesmeules.com](mailto:nathalie.boulay@siskindsdesmeules.com)

This Notice has been authorized by the Ontario Superior Court of Justice



**SCHEDULE H**  
**SHORT FORM NOTICE OF SETTLEMENT APPROVAL**

**HAVE YOU USED  
FLEET PHOSPHO-SODA?**

IF YOU OR SOMEONE CLOSE TO YOU USED FLEET PHOSPHO-SODA, PLEASE READ  
THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR LEGAL RIGHTS AND YOU MAY  
BE ELIGIBLE FOR COMPENSATION

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FLEET PHOSPHO-SODA is an over-the-counter pharmaceutical product which was often directed to be used as part of a bowel cleansing regimen, especially prior to undergoing a surgical procedure such as a colonoscopy.

Class action lawsuits were initiated in Ontario, Québec and Saskatchewan alleging that C.B. Fleet Holding Company Inc., C.B. Fleet Company, Inc., and Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada (the "Defendants") negligently manufactured, marketed and sold FLEET PHOSPHO-SODA in Canada without properly warning of alleged risks of kidney damage. The Defendants deny the plaintiffs' allegations and deny any wrongdoing or liability. The court has not taken any position as to the truth or merits of the claims or defences asserted by either side. The allegations made by the plaintiffs have not been proven in court.

If you or a family member ingested FLEET PHOSPHO SODA and developed kidney damage, you may be entitled to compensation.

A Settlement Agreement has been reached and approved by the Court and the claim period has started to run. If you or someone close to you used FLEET PHOSPHO SODA, you should immediately review the full legal notice in this matter to ensure you understand your legal rights. A copy of the full legal notice can be viewed at [www.classaction.ca](http://www.classaction.ca) (English and French), or can be obtained from contacting Class Counsel as listed below or by contacting the Claims Administrator.

The settlement is for approximately \$11,995,000.00. It is not possible at this time to estimate what level of compensation any one particular Eligible Claimant may receive.

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Claim forms must be completed by [\[REDACTED\]](#).

The Claims Administrator can be reached at [\[REDACTED\]](#).

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Class Counsel can be reached as follows:

English enquiries:	Siskinds LLP 680 Waterloo Street London ON N6A 3V8	French enquiries:	Siskinds, Desmeules 43 Rue Buade, Bur 320 Québec City, Québec G1R 4A2
	Matthew D. Baer Tel: (800) 461-6166 x7822 Email: <a href="mailto:matt.baer@siskinds.com">matt.baer@siskinds.com</a>		Nathalie Boulay Tel.: (418) 694-2009 Email: <a href="mailto:nathalie.boulay@siskindsdesmeules.com">nathalie.boulay@siskindsdesmeules.com</a>

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PUBLICATION OF THIS NOTICE HAS BEEN AUTHORIZED BY THE  
ONTARIO SUPERIOR COURT OF JUSTICE

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**SCHEDULE I**  
**LONG FORM NOTICE OF SETTLEMENT APPROVAL**

**FLEET PHOSPHO-SODA CLASS ACTION**  
**NOTICE OF SETTLEMENT APPROVAL**

PLEASE READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR LEGAL RIGHTS

**TO ALL CLASS MEMBERS:**

To all residents in Canada who ingested FLEET PHOSPHO-SODA ("Primary Claimant") or their personal representatives, heirs, assigns and trustees ("Representative Claimant"), and any other residents of Canada asserting the right to sue the Defendants by reason of their familial relationship with a Primary Claimant or Representative Claimant, including spouses, common law spouses, same-sex partners, as well as parents and children by birth, marriage or adoption ("Derivative Claimant")

FLEET PHOSPHO-SODA is an over-the-counter pharmaceutical product which was often directed to be used as part of a bowel cleansing regimen, especially prior to undergoing a surgical procedure such as a colonoscopy.

Please be advised that the Ontario Superior Court of Justice has approved the FLEET PHOSPHO-SODA Settlement Agreement reached in class actions brought in Ontario, Québec and Saskatchewan which alleged that C.B. Fleet Holding Company Inc., C.B. Fleet Company, Inc., and Johnson & Johnson – Merck Consumer Pharmaceuticals of Canada (the "Defendants") negligently manufactured, marketed and sold FLEET PHOSPHO-SODA in Canada without properly warning of alleged risks of kidney damage. The claims period has now started to run.

The Defendants deny the plaintiffs' allegations and deny any wrongdoing or liability. The court has not taken any position as to the truth or merits of the claims or defences asserted by either side. The allegations made by the plaintiffs have not been proven in court.

If you would like a copy of the Settlement Agreement, it is available on Class Counsel's website at [www.classaction.ca](http://www.classaction.ca) (English and French) or a copy can be obtained by contacting Class Counsel or the Claims Administrator as the numbers listed below.

To be entitled to compensation, Class Members, including Primary Claimants, Representative Claimants and Derivative Claimants, must file a claim with the Claims Administrator by [DATE].

**Summary of Settlement Agreement**

- The Defendants, while not admitting liability, will pay a sum of approximately \$11,995,000.00 to settle the claims of all Class Members.
- Claimants may be eligible to receive settlement payments if they ingested FLEET PHOSPHO SODA and subsequently developed certain types of kidney damage. For detailed information on qualification, please see Schedules "B" and "E" of the Settlement Agreement.
- The size of compensation payable to Eligible Claimants will be based on the total number of approved claims and the severity of injuries.
- Class Members have until [DATE] to file a Claim.
- Derivative Claimants may also be eligible to receive settlement payments.
- Provincial Health Insurers will share a fund of \$1,800,000.00 which shall be in full satisfaction of medical services provided or to be provided to Eligible Primary Claimants.

**Opting Out** All persons who come within the class definition are automatically included in the Class unless they exclude themselves from the Class ("Opt-Out"). To Opt-Out, a Class Member has to complete, sign and return an "Opt-Out Form" postmarked or deposited by courier by [DATE]. If a Class Member does not timely and properly Opt-Out, he or she will be forever barred from instituting any action against the Defendants and/or Released Parties related to the use of FLEET PHOSPHO-SODA. If a Class Member does Opt-Out or does not timely and properly make a claim under the Settlement Agreement, he or she will be forever barred from receiving any compensation under the Settlement Agreement.

**Legal Fees** Once the Claims Deadline has passed, Class Counsel will seek court approval of legal fees not to exceed 25% of the total settlement benefits plus disbursements and applicable taxes. Class Counsel were retained on a contingent basis. Class Counsel were responsible for funding all disbursements incurred in pursuing this litigation.

Claimants are not responsible for any legal fees incurred to date. Claimants may, but are not obliged to retain their own lawyers to assist them in making individual claims under the Settlement Agreement but they may not find it necessary to do so. Submitting a claim under the Settlement Agreement is considerably less complex and less expensive than pursuing an individual lawsuit. In the event that Claimants feel they require the assistance of a lawyer in making their claim, they will be responsible to pay the legal fees of any lawyer they retain to prepare their claim.

**Important Deadlines** [DATE] Deadline to Opt-Out of the Settlement Agreement

[DATE] Deadline to File a claim

Because of the deadlines, you must act without delay.

**Further Information** A complete copy of the Settlement Agreement and the Claim Form are available at [www.classaction.ca](http://www.classaction.ca) (English and French). To have a hard copy of the claim form or opt-out form mailed directly to you, please call the Claims Administrator at [REDACTED].

For Further Information Please Contact Class Counsel as follows:

**English enquiries:** Siskinds LLP  
680 Waterloo Street  
London ON N6A 3V8

Matthew D. Baer  
Tel: (800) 461-6166 x7822  
Email: [matt.baer@siskinds.com](mailto:matt.baer@siskinds.com)

**French enquiries:** Siskinds, Desmeules  
43 Rue Buade, Bur 320  
Québec City, Québec G1R 4A2

Nathalie Boulay  
Tel.: (418) 694-2009  
Email:  
[nathalie.boulay@siskindsdesmeules.com](mailto:nathalie.boulay@siskindsdesmeules.com)

This Notice has been authorized by the Ontario Superior Court of Justice

## SCHEDULE J

### METHOD OF DISSEMINATING NOTICE OF SETTLEMENT APPROVAL HEARING

The Short Form Notice shall be:

- (a) published once in the following newspapers:
  - (i) The Globe & Mail (National Edition)
  - (ii) The Gazette (English Quebec)
  - (iii) Le Soleil (French Quebec)
  - (iv) La Presse (French Quebec)
  - (v) Le Journal de Quebec (French Quebec)
  - (vi) Le Journal de Montreal (French Quebec);
- (b) sent to the Kidney Foundation of Canada requesting that it be posted on their website and distributed to their membership through their newsletter or other means; and
- (c) sent to the Canadian Society of Nephrology requesting that it be distributed to their membership by e-mail or other means.

The Full Legal Notice shall be:

- (a) posted on the websites [www.classaction.ca](http://www.classaction.ca) (English and French) and [www.merchantlaw.com](http://www.merchantlaw.com); and
- (b) sent by direct mail to anyone requesting a copy.

## SCHEDULE K

### DISSEMINATION OF NOTICE OF SETTLEMENT APPROVAL

The Short Form Notice shall be:

- (a) published twice in the following newspapers (one Wednesday, one Saturday):
  - (i) The Globe & Mail (National Edition)
  - (ii) The Sun (Vancouver, British Columbia)
  - (iii) Vancouver Province (Vancouver, British Columbia)
  - (iv) Times Columnist (Victoria, British Columbia)
  - (v) Journal (Edmonton, Alberta)
  - (vi) Herald (Calgary, Alberta)
  - (vii) Leader Post (Regina, Saskatchewan)
  - (viii) Free Press (Winnipeg, Manitoba)
  - (ix) Star (Toronto, Ontario)
  - (x) Sun (Toronto, Ontario)
  - (xi) Citizen (Ottawa, Ontario)
  - (xii) Spectator (Hamilton, Ontario)
  - (xiii) Star (Windsor, Ontario)
  - (xiv) Le Journal de Quebec (French - Quebec)
  - (xv) Le Journal de Montreal (French - Quebec)
  - (xvi) The Gazette (English - Montreal, Quebec)
  - (xvii) Le Novelliste (French – Quebec)
  - (xviii) La Tribune (French – Quebec)
  - (xix) Le Quotidien (French – Quebec)
  - (xx) L'Actualite (French – Quebec)
  - (xxi) Times-Transcript (Moncton, New Brunswick)
  - (xxii) Chronicle (Halifax, Nova Scotia)
  - (xxiii) Guardian (Charlottetown, Prince Edward Island) and
  - (xxiv) Telegram (St. John's, Newfoundland);

- (b) published in the earliest possible edition of the Canadian Medical Association Journal;
- (c) sent to the Kidney Foundation of Canada requesting that it be posted on their website and distributed to their membership through their newsletter or other means; and
- (d) sent to the Canadian Society of Nephrology requesting that it be distributed to their membership by e-mail or other means.

The Full Legal Notice shall be:

- (a) posted on the websites [www.classaction.ca](http://www.classaction.ca) (English and French) and [www.merchantlaw.com](http://www.merchantlaw.com), and
- (b) sent by direct mail to anyone requesting a copy.

A press release with respect to settlement approval will be issued to Canada Newswire in both English and French.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Samia and transferred to London

Proceeding under the *Class Proceedings Act, 1992*

**ORDER**

**Certification and Settlement Approval**

**Siskinds<sup>LLP</sup>**

Barristers & Solicitors  
680 Waterloo Street  
London, ON N6A 3V8

Michael J. Peerless LSUC # 34127P  
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