CITATION : Przybylska v. Gatos Silver, Inc., 2024 ONSC 3740
COURT FILE NO.: CV-22-00676682-00CP
DATE: 20240628

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IZABELA PRZYBYLSKA, Plaintiff

– and –

GATOS SILVER, INC., STEPHEN ORR, ROGER JOHNSON, PHILIP PYLE, TETRA TECH, INC., GUILLERMO DANTE RAMÍREZ-RODRÍGUEZ, KIRA LYN JOHNSON, THE ELECTRUM GROUP LLC, ELECTRUM SILVER US LLC, ELECTRUM SILVER US II LLC, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Anthony O'Brien and Tyler Planeta*, for the Plaintiff

Paul Martin and Sarah Armstrong, for the Defendants, Gatos Silver, Inc., Stephen Orr, Roger Johnson, and Philip Pyle

Aoife Qujnn, for the Defendants, Electrum Group LLC, Electrum Silver US LLP, and Electrum Silver US II LL

Wendy Berman, for the former Defendants, BMO Nesbitt Burns Inc., Goldman Sachs Canada Inc., RBC Dominion Securities Inc., Canaccord Genuity Corp., and CIBC World Markets Inc.

HEARD: June 28, 2024

SETTLEMENT, PLAN, and FEE APPROVAL

[1] The Plaintiff in this securities class action seeks approval for a settlement and attendant Plan of Allocation with a second group of Defendants. The Plaintiff also seeks approval for payment of class counsel's fees and disbursements.

I. The settlement

[2] The claim against a first group of Defendants was granted leave to proceed under the Ontario *Securities Act* and was certified under the *Class Proceedings Act* in an earlier decision:

Przybylska v. Gatos Silver, Inc., 2024 ONSC 87 ("*Przybylska I*"). The underlying factual and legal bases for the claim were described in *Przybylska I*. I incorporate by reference that description such that it forms part of these reasons for decision.

[3] A settlement with that first group of Defendants (the "Tetra Tech Settlement" and "Tetra Tech Defendants") was approved on April 16, 2024, along with the granting of leave to proceed, certification, and various other pre-approval orders with respect to the second group of Defendants: *Przybylska v. Gatos Silver, Inc*., 2024 ONSC 2196 ("*Przybylska II*"). The underlying bases for the claim was further described, along with the terms of the Tetra Tech Settlement, in *Przybylska II*. I incorporate by reference those descriptions as well.

[4] At issue here is a Settlement Agreement dated April 2, 2024 (the "Gatos Settlement"), in which the Plaintiff has reached an agreement with the Defendants, Gatos Silver, Inc., Stephen Orr, Roger Johnson, Philip Pyle, and The Electrum Group LLC, Electrum Silver US LLC, and Electrum Silver US II LLC (collectively, the "Gatos Defendants"). The Defendants, BMO Nesbitt Burns Inc., Goldman Sachs Canada Inc., RBC Dominion Securities Inc., Canaccord Genuity Corp., and CIBC World Markets Inc., being Underwriters against whom the action has previously been discontinued, also included in the settlement documentation.

[5] The Gatos Defendants have agreed to pay US$3 million in full and final settlement of all existing and potential claims against them in the action. In exchange, the Gatos Defendants will obtain customary full and final releases of the claims of all class members and the action will be dismissed. The Underwriters will not be liable for payment of any of the settlement funds, but will be included in the release provided by the Plaintiff.

[6] The Gatos Settlement was reached with all parties represented by highly experienced and qualified counsel. The negotiations were arm's length and benefitted from the assistance of an experienced mediator. The Gatos Settlement is a final step in the resolution of these proceedings and will bring an end to the action.

[7] The Plaintiff, with the assistance of class counsel and the claims administrator appointed under my April 16, 2024 Order, have fulfilled the portion of the Notice Plan dealing with the dissemination of Notice of the proposed Gatos Settlement. Class counsel have received no objections or any other comments from class members with respect to the proposed settlement.

[8] Class counsel estimate that the range of potential damages attributable to primary market purchasers who held their prospectus shares through the alleged public correction on January 25, 2022, is in the range of US$3.7 million to US$7 million. Class counsel's estimate of the potential secondary market damages range is approximately US$7.5 million to US$11.85 million.

[9] The Plaintiff seeks approval of the Second Notice relating to the Gatos Settlement. The Second Notice provides, among other things, notice that the court approved the Gatos Settlement, the fees and disbursements of class counsel, and a reminder of the ongoing claims process and the procedure for making a claim. The Notice Plan provides that the Second Notice will be disseminated by being posted on class counsel's websites in English and French; and (b) a short-form Second Notice will be: (i) disseminated as a news release across Canada NewsWire in English and French; (ii) sent to Institutional Shareholder Services Inc. (ISS); and (iii) sent to those

persons and entities who had previously contacted class counsel to receive notice of developments in the action.

[10] In terms of allocation of the settlement funds and distribution among class members, the Plan tracks the formulae for calculating damages under section 138.5 of the Ontario *Securities Act* and is consistent with distribution protocols that courts have approved in other securities class action settlements. I note that the Plaintiff supports it, class counsel recommends it, and no objections about the Plan have been received.

[11] Under section 27.1(5) of the *Class Proceedings Act*, a settlement must be found to be fair, reasonable, and in the best interests of the class in order to be approved: *Dabbs v. Sun Life Assurance,* (1998), 40 OR (3d) 429 (Gen Div), aff'd (1998), 41 OR (3d) 97 (CA), leave to appeal to SCC refused Oct. 22, 1998. The burden of proof in terms of the reasonableness and fairness of the settlement is on the Plaintiff here: *Nunes v. Air Transat A.T. Inc*., [2005] OJ No. 2527 (SCJ).

[12] Although the burden never shifts, it is noteworthy that the Gatos Settlement, like the Tetra Tech Settlement before it, was reached through arm's length negotiations among parties with experienced counsel. This makes for a presumption of fairness and reasonableness of the settlement terms: *Loewenthal v Sirius XM Holdings, Inc.*, 2021 ONSC 4482, at para. 11.

[13] It is by now well understood that a settlement is inevitably a compromise resolution to a case. As Justice Winkler stated in *Parsons v. Canadian Red Cross Society* (1999), OJ No. 3572 (SCJ), at para. 79, the approval process must be approached with that in mind:

> It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscience and wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole.

[14] Class counsel advise that the Gatos Settlement recovers approximately 16% to 26% of the estimated damages of the class. The combined Tetra Tech and Gatos Settlements recover approximately 20% to 33% of the losses. This recovery range reflects the estimated consolidated primary and secondary market damages (US$11.2 million to US$18.85 million).

[15] It is noteworthy that class counsel considered this action stronger than the parallel U.S.-based class action, and this assessment was incorporated into the Plaintiff's strategy. While both the Ontario action and the US action arose out of the same facts and alleged misrepresentations, and both involved claims on behalf of primary market and secondary market purchasers, there were differences in the framing of the cases and the liability regimes under which the cases were brought.

[16] By way of comparison, the Gatos Settlement results in a recovery for class members that is roughly +138% of the US settlement, using class counsel's high-end damages estimate of US$18.85 million, to +300% using their low-end damages estimate of US$11.2 million. The combined settlements result in a recovery that class counsel estimate is between +196% and +400% of the US settlement.

[17] The Plaintiff's ability to obtain a successful result must always be viewed in the context of the generic uncertainties inherent in the litigation process, case-specific risks, and practical considerations. Here, there was a real risk that key, non-Defendant witnesses would not appear for trial, given that most of these witnesses appeared to reside outside Canada. Class Counsel attempted to contact witnesses likely to have relevant evidence, but these approaches were unsuccessful.

[18] Furthermore, several potentially viable defenses were either anticipated or put forward by the Defendants. These include the "expert reliance defense" the "reasonable investigation defense", and the "forward looking information" defense. In addition, there was a risk that the Plaintiffs would either be unable to prove sufficient damages or would be found to have overestimated damages. It was anticipated that the Defendants would assert that Gatos's share price decline was affected by confounding information that is unrelated to the alleged misrepresentations – e.g. Gatos's supposedly disappointing 2022 production figures. This line of argument would have added complexity and a degree of uncertainty to the remedial portion of any trial.

[19] Class counsel estimate that there was a potential 25% downside risk to the Second Offering damages estimate that would reduce the estimated range of total primary market damages from approximately US$3.7 million to US$7 million to approximately US$3.15 million to US$6 million. Furthermore, class counsel's damages estimates were premised on 100% participation by class members in any damages award, which is unlikely to be achievable and becomes even less likely the longer litigation goes on.

[20] Also factored into the equation by class counsel was the rapidly diminishing insurance coverage for Gatos' losses. They assessed that they could be faced with the elimination of insurance altogether as a potential source of future recovery, which would mean that Gatos would have to self-fund any ongoing defense and future settlement. That development could jeopardize any recovery of future settlement or judgment awards.

[21] The proposed Plan of Allocation is contained in the record before me and the Administrator for the settlement has already been appointed. The expenses associated with the Administrator's implementation the Plan are also in evidence. Class counsel submit that the Plan is consistent with those approved by courts in other securities class proceedings.

[22] The distributions to class members in accordance with the Plan appear to be principled and equitable. They are based on a statutory damages formula, without any risk adjustments, and are to be made proportionately to calculated losses.

II. Class counsel fees

[23] Under s. s 32(4) of the *Class Proceedings Act*, the court has broad discretion to set or determine the fees payable to class counsel. Those fees can be determined either on a base fee/multiplier approach or "in any other manner": *Smith Estate v National Money Mart Co.*, 2011 ONCA 233, at paras. 53-55, leave to appeal to SCC dismissed [2008] SCCA No 535.

[24] Class counsel seeks payment of its fees on a contingency basis pursuant to its retainer agreement with the Plaintiff. Using an exchange rate for U.S. currency as of earlier this month

when materials were being filed with the court, counsel's approval request came to $CDN 1.28 million in fees on $CDN 5.1 million in total settlement value. That comes to 25% on a contingency basis.

[25] This has been a complicated, multi-stage settlement which has doubtless consumed substantial lawyer time. The action was resolved against 15 separate Defendants through three separate agreements, which class counsel summarize as follows:

> (a) Standstill and Tolling Agreement with the Underwriters: On June 7, 2023, the Plaintiff entered into a Standstill and Tolling Agreement with the Underwriters.6 The action was subsequently discontinued against the Underwriters on terms approved by the Court. Pursuant to the terms of the agreement, the Underwriters provided information regarding the jurisdictional composition of investors who purchased shares in Gatos's Class Period public offerings, with warranties as to accuracy and completeness.
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> (b) Settlement Agreement with the Tetra Tech Defendants [i.e. the first group of Defendants]: The Plaintiff settled her litigation against Tetra Tech and two of its employees, Guillermo Dante RamirezRodriguez, and Kira Lyn Johnson, for C$1 million. That settlement was approved by the Court on April 10, 2024.
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> (c) Settlement Agreement with the Gatos Defendants: After the Tetra Tech settlement, the Plaintiff entered into a final settlement with the remaining Defendants, for US $3 million.

[26] Class counsel advise that the requested fee is significantly less than the hours invested in the case would produce if they had charged on an hourly basis. The multiplier comes to 0.83, which is an acceptable range by any measure. Class counsel also point out that a 25% fee on the amount recovered is less than ¾ of the 33% fees that courts have deemed presumptively valid: *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

[27] Considering the amount of time and effort invested in this matter by class counsel, the complexity of the subject matter of the litigation, the magnitude of risk that class counsel assumed in taking on the case and carrying it through to final settlement, and the proportionality between the fees and the recovery for the class, the fees requested here are fair and reasonable.

[28] The disbursements incurred by class counsel are also fair and reasonable. These include expert fees, which are a crucial and inevitable part of building a credible case. Together, the fees and disbursements incurred by class counsel come to 31%, which is within the range that the court has approved in other class actions.

III. Disposition

[29] In my view, the Gatos Settlement overall, together with the Plan of Allocation and other ancillary relief sought, is fair, reasonable, and in the best interests of the class. It is hereby approved.

[30] Likewise, the fees and disbursements sought by class counsel are fair and reasonable and are hereby approved.

[31] There will be an Order to go as submitted by class counsel.

Date: June 28, 2024 **Morgan J.**