

CITATION: MM Fund v. Excelsior Mining Corp., 2024 ONSC 5979
COURT FILE NO.: CV-24-00719487-00CP
DATE: 20241028

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MM FUND (Trustee of), Plaintiff

– and –

EXCELSIOR MINING CORP., STEPHEN TWYEROULD, and MARK MORABITO, Defendants

BEFORE: Justice E.M. Morgan

COUNSEL: *Eli Karp and Sage Nematollahi*, for the Plaintiff

James Sullivan, K.C., Robin Reinerston, and Josha Hutchinson, for the Defendants

HEARD: Motion in writing

ENDORSEMENT

[1] In its Notice of Motion, the Plaintiff seeks an Order:

- (a) granting leave to dismiss the within action with prejudice, without costs, on consent of all parties;
- (b) approving the dismissal of this action pursuant to section 29(1) of the *Class Proceedings Act* (“CPA”), on a with prejudice and without cost basis;
- (c) approving the form, content, and method of dissemination of the proposed notice of dismissal attached hereto as Schedule “A”, pursuant to sections 19 and 29(2) of the CPA.

[2] This is a proposed securities class action against Excelsior Mining Corp. (“Excelsior”); its President, CEO, and director Stephen Twyerould, and its former Chairman and director Mark Morabito. Excelsior is incorporated under the laws of British Columbia, with its registered office in Vancouver, and its head office in Phoenix, Arizona.

[3] The action was brought on behalf of a proposed class of all persons who acquired the securities of Excelsior and who purchased the securities of Excelsior offered by the Prospectus Supplement dated February 12, 2021, during the period of distribution (other than certain Excluded Persons). The action claims misrepresentation in Excelsior’s prospectus, contrary to section 130

of the Ontario *Securities Act*. It alleges that Excelsior's Prospectus Supplement dated February 12, 2021 failed to disclose certain material facts respecting the operations of Excelsior at its then flagship asset and sole mineral project, the Gunnison Project, which is located in Arizona.

[4] Prior to commencing the within action, the Plaintiff had brought an identical action in British Columbia. On November 30, 2021, the Plaintiff served a Notice of Application to certify the B.C. proceeding as a class proceeding pursuant to the British Columbia *Class Proceedings Act*. In June 2022, the Defendants brought an application to strike the Plaintiff's Notice of Application for Certification in the BC action on the basis that the Plaintiff, which is a mutual fund based in Ontario, is not "a resident of British Columbia" for the purposes and within the meaning of section 2 of the BC *Class Proceedings Act*.

[5] On September 1, 2022, the Supreme Court of British Columbia granted the Defendants' application and struck the Plaintiff's Notice of Application for Certification. That ruling was upheld by the BC Court of Appeal on April 30, 2024. Thereafter, on May 1, 2024, in order to preserve the limitation period, the Plaintiff commenced the within action. At the same time, the Plaintiff brought an application before the Supreme Court of British Columbia to transfer the BC Action to Ontario pursuant to Part 3 of British Columbia's *Court Jurisdiction and Proceedings Transfer Act*, but on July 2, 2024 the BC court dismissed that application.

[6] In view of the prolonged procedural dispute, significant and increased costs, enhanced risks, the multiplicity of the proceedings across Ontario and British Columbia, the Plaintiff's desire to no longer pursue the class action, and the fact that a substitute plaintiff has not come forward in Ontario, Plaintiff's counsel has assessed that the action no longer is justified in terms of access to justice and judicial economy. The Plaintiff has instructed its counsel to seek a dismissal of the within action on a with prejudice and without costs basis.

[7] The Plaintiff proposes to distribute a notice of dismissal substantially in the following form:

NOTICE OF DISMISSAL
MM FUND V EXCELSIOR MINING CORP ET. AL.
ONTARIO SUPERIOR COURT OF JUSTICE
COURT FILE NO. CV-24-00719487-00CP

The above-captioned shareholder lawsuit relating to Excelsior Mining Corp. ("Excelsior") was dismissed on the consent of all parties by Order of the Ontario Superior Court of Justice, dated [DATE]. A copy of the Order is available [here].

The proposed Class was defined as all persons and entities, wherever they may reside or may be domiciled, who purchased the securities of Excelsior offered by the Prospectus Supplement dated and filed on February 12, 2021, during the period of distribution, other than certain Excluded Persons.

The plaintiff claimed damages on behalf of itself and the proposed Class under the pertinent liability provisions of the Ontario Securities Act, RSO 1990, c S.5, and the securities legislation of the other Canadian jurisdictions.

A dismissal of this action means that it is not going forward, and it will no longer be pursued.

Dismissal of the action means that any applicable limitation periods in respect of these claims, which may have been suspended, began running again on the date of the Order, and will ultimately expire (if they have not already done so).

If you are/were a member of the proposed Class, you should seek legal advice regarding the impact of the Order on your rights immediately.

Should you have any questions, please do not hesitate to contact KND Complex Litigation at contact@knd.law or 416-537-3529

[8] The above Notice will be posted on Plaintiff's counsel's website. The Plaintiff will also email it to anyone who has contacted Plaintiff's counsel's firm about this proceeding for whom an email address is available. The proposed form of notice contains an account of the conduct of the proceeding, a statement of the result of the proceeding, a warning about the limitation period, and contact information for the Plaintiff's counsel. It is therefore an appropriate notice.

[9] I see no reason for compelling the action to continue. It appears no longer economically justified and, in any case, if the current Plaintiff wishes to end its participation and no other plaintiff has been found who is willing to take its place, there is little choice but to bring the action to an end.

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



Date: October 28, 2024

Morgan J.