CITATION: Westwood v. TD Asset Management Inc., 2024 ONSC 6872
COURT FILE NO.: CV-18-595380-00CP
DATE: 20241210

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Peter Westwood

AND:

TD Asset Management Inc.

BEFORE: J.T. Akbarali J.

COUNSEL: *Michael G. Robb, Anthony O'Brien, Garett M. Hunter, and Gigi Pao*, for the plaintiff

Shane D'Souza and Agatha Wong, for the defendant

Paul Bates, for the respondent Bates Barristers

HEARD: December 9, 2024

ENDORSEMENT

Overview

[1] On this motion, the plaintiff seeks orders (i) approving the settlement of this action and dismissing the action against the defendant; (ii) approving the second notice and plan of notice, the distribution protocol, the form and content of the claim for and claims process, and the appointment of RicePoint Administration Inc., doing business as Verita Global ("Verita") as the administrator; and (iii) approving counsel fees and disbursements, an interim payment of the funding commission to the litigation funder, the release to the funder of security previously paid into court, and an honorarium for the plaintiff.

Brief Background

[2] This action relates to the payment of trailing commissions to discount brokers from mutual funds for which the defendant, TD Asset Management Inc., acted as trustee and manager. The proposed class consists of TD Mutual Fund unitholders who held their units through discount brokers. The claim alleges that the defendant improperly paid trailing commissions to discount brokers for services and advice that were never provided, and thereby improperly dissipated TD Mutual Fund assets, which diminished the value of the TD Mutual Fund units held by the class members. The plaintiff also makes claims under s. 130 of the *Securities Act*, R.S.O. 1990, c. S.5, alleging misrepresentations in the defendant's fund facts documents. The defendant denies all allegations.

[3] This proceeding was certified on February 27, 2020, after a contested motion before Belobaba J. Justice Belobaba also approved the third-party litigation funding agreement with Claims Funding International (the "funder") by way of order dated June 20, 2019, under which the funder posted security by depositing $400,000 with the Accountant of the Superior Court of Justice.

[4] There is a parallel class action which has also been settled, subject to court approval, in which the class members are those who held their units through a full-service broker: *Aggarwal v. TD Asset Management Inc.*, CV-22-00691344-00CP.

[5] I note that there are also related actions proceeding against other defendants that, in many ways, have been case managed together with this action. The first set of actions was commenced in 2018, including this one, on behalf of those investors who purchased mutual fund units through discount brokers. I sometimes refer to these actions as the 2018 actions. The second set of actions, including the *Aggarwal* action, was commenced in 2022 on behalf of investors who purchased mutual fund units through full-service brokers. I sometimes refer to these actions as the 2020 actions. The actions against this defendant are, at least as of now, the only actions to have been settled.

[6] In addition, there is another related action: *Frayce v. BMO InvestorLine Inc. et al.*, bearing court file no. CV-20-638868-CP, which overlaps with this action in certain ways, and in which certification was denied. One of the defendants in the *Frayce* action is TD Asset Management Inc. The settlement negotiations were conducted between the parties to this action, the parties to the *Aggarwal* action, and the plaintiff in the *Frayce* action.

[7] Under the terms of the negotiated settlement, the *Westwood* class will receive $70.25 million. The *Aggrawal* class will receive $8.5 million. The *Frayce* class will not receive anything.

[8] In these reasons, I am evaluating the settlement of the *Westwood* proceeding only.

Issues

[9] The issues raised on this motion are:

a. Should the court approve proposed settlement and dismiss the action against the defendant without costs and with prejudice?

b. Should the court approve the proposed notice and notice plan?

c. Should the court approve the proposed distribution protocol, claim form and claims process, and appointment of the proposed administrator?

d. Should the court approve the requested counsel fees and disbursements?

e. Should the court approve the requested interim payment of the funding commission to the third-party litigation funder and the release of the security the funder previously paid into court?

f. Should the court approve an honorarium for the representative plaintiff?

Approval of the Settlement

Proposed Settlement Terms and Conditions

[10] In this case, the settlement provides for the payment of $70.25 million inclusive of all legal fees, disbursements, taxes, and administration expenses. The settlement is without admission of liability. In exchange, the defendant will obtain a full and final release of the claims of all class members and a dismissal of the action without costs and with prejudice.

[11] Other key terms include that the settlement amount is non-reversionary. Moreover, the funds were required to be paid into a trust under the control of class counsel by November 8, 2024, and the amount has been invested in a guaranteed investment product. Investment proceeds accrue to the benefit of class members.

[12] Of note, the settlement agreement requires class counsel, who are counsel in the other 2018 actions, to reasonably and in good faith, seek to negotiate terms in any subsequent settlement that are at least as favourable to class members in those actions as the terms are to class members in this action. In this way, the settlement memorializes class counsel's obligation to class members in the other 2018 actions. The agreement provides that class counsel shall advise the defendant in writing of any settlement in one of the other actions, its amount, and other factors relating to the value of the settlement. It also requires class counsel seeking approval of a settlement of another 2018 action to include in its motion materials their opinion on whether the settlement is at least as favourable to the class members in that action as this settlement is to the class members in this action. The settlement agreement does not grant the defendant in this action any standing with respect to the other 2018 actions.

Legal Principles Applicable to Motions to Approve a Settlement in a Class Proceeding

[13] Under s. 27.1(1) of the *Class Proceedings Act*, 1992, S.O. 192, c. 6, ("*CPA*"), a proceeding brought under the *CPA* may only be settled with court approval. The court shall not approve a settlement unless it determines that the settlement is fair, reasonable, and in the best interests of the class: s. 27.1(5) *CPA*, at para. 7. The burden lies on the party seeking approval: *Robinson v. Medtronic, Inc.*, 2020 ONSC 1688, at para. 63; *Nunes v. Air Transat A.T. Inc.*, 2005 CarswellOnt 2503 (S.C.J.), at para. 7.

[14] Public policy favours the resolution of complex litigation: *Nunes*, at para. 7.

[15] Settlements need not be perfect; they are compromises: *Lozanski v. The Home Depot, Inc.*, 2016 ONSC 5447, at para. 71. To find that a settlement is not fair and reasonable, it must fall outside a range of reasonable outcomes: *Nunes*, at para. 7. An objective and rational assessment of

the pros and cons of a settlement is required: *Mancinelli v. Royal Bank of Canada*, 2017 ONSC 2324, at para. 38. There is a strong presumption of fairness when a proposed class settlement, which was negotiated at arms-length by counsel for the class, is presented for court approval: *Nunes*, at para. 7.

[16] A court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of its litigation rights against the defendants: *Nunes*, at para. 7. However, it is not the court's function to substitute its judgment for that of the parties or attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action, or, on the other hand, to rubber-stamp a settlement: *Nunes*, at para. 7.

[17] When considering whether to approve a negotiated settlement, the court may consider, among other things: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of litigation and risk; (f) the recommendation of neutral parties, if any; (g) the number of objectors and nature of objections, if any; (h) the presence of good faith, arm's length bargaining and the absence of collusion; (i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and (j) information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Lozanski*, at para. 73; *Nunes*, at para. 7; *Robinson*, at para. 65.

[18] Other relevant considerations include whether there are any structural indicators that suggest collusion or conflict of interest: *Leslie v. Agnico-Eagles Mines*, 2016 ONSC 532, at para. 8; *Green v. CIBC*, 2022 ONSC 373, at para. 17.

[19] Agreements that place a high value on non-monetary or conditional compensation, contemplate a possible reversion of settlement funds to defendants without a concomitant reduction in class counsel's compensation, make settlement approval contingent on fee approval and have optics that suggest the settlement is more favourable to class counsel than class members are the kinds of features which suggest collusion or conflict of interest: *Smith Estate v. National Money Mart Co*., 2010 ONSC 1334, at paras. 33 and 95, varied in part, 2011 ONCA 233; *Leslie*, at footnote 10, *Brown v. Canada (Attorney General)*, 2018 ONSC 3429, at paras. 85-86.

[20] Where counsel is in possession of significant facts and knowledge of risks, the court is justified in assuming that counsel had a complete or almost complete understanding of the risks and rewards of further litigation, and the court will be more comfortable relying on class counsel's recommendation that the settlement is in the best interests of the class: *Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670, at paras. 5-10.

Should the settlement agreement be approved?

[21] I approve the settlement agreement in this case for the following reasons:

a. Complex, multi-party settlement negotiations were undertaken over a lengthy period of time with the assistance of Joel Wiesenfeld, a mediator experienced in

class actions mediation and securities regulation. The parties had four formal mediation sessions, and informal discussions, which eventually led to the proposed settlement agreement.

b. Significant production was made, and as part of the negotiation process, the defendant produced data related to the quantum of trailing commissions it had paid to discount brokers. The parties exchanged expert reports on damages. The parties had access to industry documents and reports from industry organizations to securities regulators on the payment of trailing commissions and the purported services offered by discount brokers. The parties also had the benefit of Belobaba J.'s reasons on the certification motion, and the evidence each filed on the certification motion, including from an expert on the history and rationale for the payment of trailing commissions to discount brokers. Cross-examinations were conducted in the certification motion. The defendant's disclosure documents and constating documents for TD's mutual funds were available to the parties. In short, although discovery was at an early stage, significant information was available to the plaintiff to assess both liability and damages and to allow class counsel to make recommendations grounded in the evidence and legal theory. Class counsel's understanding of the legal and factual issues in this litigation is mature.

c. Apart from the risks present in all class action litigation, there were case-specific risks the plaintiff had to account for, including that one of the defences advanced by the defendant would be accepted. Below, I set out four examples of arguments that created a real risk to the plaintiff's ability to establish liability and damages, although the record establishes many more:

    i. There was a risk that the defendant's argument that it had adequately disclosed the payment of trailing commissions to discount brokers could have been accepted by the court.

    ii. There was a risk that the payment of commissions to discount brokers occurred in a heavily-regulated industry which permitted those payments at the relevant time, and the court could conclude that as a result, there was no misconduct on the part of the defendant nor any breach of duty. This risk was particularly pointed given the failure of the *Frayce* action, which concentrated on whether discount brokers complied with Canadian securities laws in receiving trailing commissions from mutual fund managers.

    iii. There was a risk that the defendant could establish that its broad discretion to manage the day-to-day affairs of the mutual funds under the trust instruments gave it discretion to determine whether to pay trailing commissions to discount brokers, and the amount of any such payment.

iv. There was a risk that the defendant's argument that the services that were provided by discount brokers justified the trailing commissions paid, and furthermore, that those services were worth more than the value of trailing commissions paid. This argument was supported by expert evidence adduced by the defendant at mediation.

d. A best-case scenario for the class was that $622 million in trailing commissions could be recoverable over the class period from November 1, 2002 to May 31, 2022, when the industry ban on paying trailing commissions to discount brokers came into effect. Of that amount, approximately $522 million in trailing commissions was paid to the defendant's affiliated discount broker. However, there were risks that recoverable trailing commissions would be significantly lower than this figure. Those risks included the application of the limitation period, and the value of the services provided by discount brokers. The defendant's expert opined that recoverable trailing commissions could be as low as $13 million. There was also a risk that the *Aggarwal* action would lower the recovery that the class members in this action could obtain, since it targeted the same trailing commissions.

e. The proposed settlement requires the defendant to provide customer data to streamline the claim filing process easing the burden on class members who seek to make a claim and likely increasing the take-up rate of the settlement significantly.

f. No objections to, or comments on, the settlement agreement were received following the first notice.

g. My order approving the first notice included a supplemental opt-out process. No supplemental opt-out requests were made through that process. There have been no opt-outs at all.

h. Class counsel is experienced, and they recommend the settlement.

i. There are no structural aspects to the proposed settlement that suggest collusion or conflict of interest.

[22] In view of these factors, I find that the settlement is within the zone of reasonableness, and I approve it.

Approval of the Notice and the Notice Plan

[23] The first notice regarding the settlement approval hearing was disseminated in accordance with my order. The parties have agreed to the form of the second notice, which addresses the settlement approval, counsel fees and disbursements, the appointment of the administrator, the start of the claims process, the deadline to file a claim, and the procedure for making a claim.

[24] The proposed notice plan requires dissemination of the short-form notice as follows: (i) on class counsel's webpage; (ii) provided to class members, by email if possible, who have contacted class counsel for purposes of receiving notice of developments in the action; (iii) in the form of a news release across Canada News Wire, in English and in French; (iv) published once in the business section of the national weekend edition of *The Globe and Mail* in English; (v) published once in the business section of *La Presse*, in French; (vi) sent electronically and/or in paper form to discount brokers in Canada under cover of a letter requesting that they distribute the notice through their electronic message systems to clients who may be class members, and post the notice on their news boards directed to the attention of their clients who may be class members; and (vii) filed by the defendant as a news release on SEDAR.

[25] The plan requires dissemination of the long-form notice by posting it on class counsel's webpage, in English and in French, and providing it, by email if possible, by class counsel to any potential class member who has previously contacted class counsel for the purposes of receiving notice of developments in the action.

[26] The plan also calls for publication of a Google banner ad for approximately 700,000 impressions across Canada to an investor-focused audience, in English and French, for at least 30 but not more than 35 days, and publication as a 12-day sponsored news link on Stockhouse.

[27] In addition, although not technically part of the notice plan, it is worth noting that the streamlined claims process will bring the fact of the settlement agreement and the claims process to the attention of many class members.

[28] I am satisfied that the notice program is robust. Its costs are proportionate in view of the size of the settlement. It will bring the settlement to the attention of class members in both English and French, which is appropriate in this case.

[29] Class counsel has made some minor changes to the forms of notice on my direction. I am satisfied that the current notices set out the necessary information in an appropriate manner.

Approval of the Distribution Protocol, Claim Form and Process, and Appointment of the Proposed Administrator

[30] The stated objective of the distribution protocol is to equitably distribute the net settlement amount among class members who submit a valid claim while avoiding double compensation.

[31] The agreement requires the defendant to provide the administrator with client information in respect of the TD mutual fund units held by class member through its affiliated discount broker ("TDDI") to determine the trailing commissions paid by class members who were clients of the TDDI.

[32] Claimants will have 180 days after the second notice is disseminated to make a claim. If the claim is denied, a claimant can request reconsideration of their claim. In some circumstances, the decision of the administrator on a reconsideration can be appealed to an arbitrator, whose decision will not be subject to appeal.

[33] The net settlement amount will be distributed on a *pro rata* basis to authorized claimants. The distribution protocol provides that a claimant who has paid trailing commissions greater than zero will be eligible to receive a *pro rata* share of the net settlement amount based on their trailing commissions paid relative to the trailing commissions paid by all authorized claimants. However, compensation will only be paid if the authorized claimant's minimum *pro rata* entitlement calculated under the distribution protocol is greater than $25. There is a detailed formula set out in the motion materials for determining the trailing commissions paid that requires the administrator to use actual trailers paid when available, and estimated trailers paid based on asset value when the actual figure is not available.

[34] If there are funds remaining six months after the initial distribution, the administrator will make a second distribution to authorized claimants to the extent it is economical to do so, or if it is not economical to do so, the money will be distributed *cy-prés*. The proposed *cy-prés* receipient is the Osgoode Hall Law School Investor Protection Clinic, a *pro bono* clinic that provides free legal advice to retail investors who cannot afford a lawyer. The clinic also undertakes research to help regulators, policymakers and courts understand issues facing retail investors and undertakes investor education initiatives.

[35] I note that no objections to, or comments on, the distribution protocol were received.

[36] In my view, the distribution protocol and claims process are appropriately designed to achieve the objective of an equitable distribution of the net settlement fund to authorized claimants, because it divides compensation between authorized claimants based on their relative alleged losses while avoiding distinctions between class members that would be unduly expensive, time-consuming, or confusing.

[37] Moreover, the claims process proposed is accessible and navigable for claimants. The fact that data in the possession of the defendant will streamline the claims process for many claimants, and will be used to assist in bringing the settlement to the attention of many class members, is an additional benefit to the class, and will result in an increased take-up rate.

[38] The proposed *cy-prés* recipient is appropriate in view of the nature of the proceeding and the claims levied in it. Moreover, a *cy-prés* recipient is appropriate in this case because it is consistent with the access to justice and behaviour modification goals of the *CPA* to benefit a *cy-prés* recipient that provides free legal advice to investors if it is not economical to distribute any residual net settlement funds to the class members.

[39] Moreover, the proposed administrator, Verita, is also appropriate. Counsel solicited bids from three experienced class action administrators and has concluded that Verita is an appropriate choice. Verita has been appointed as claims administrator by courts in Ontario and elsewhere in Canada many times. It is an experienced administrator.

[40] Verita estimates its costs (based on the number of claims made) to range between $165,966 to $1,159,045 plus notice costs and taxes. Verita estimates an additional $25,000 in fees for processing and managing client information, although the actual costs could vary depending on the information it receives.

[41] The costs of the administrator are proportionate having regard to the size of the settlement. The evidence indicates the other bids projected similar costs.

[42] I approve the distribution protocol, the claim form and process, and the appointment of Verita as claims administrator.

Should the court approve the requested counsel fees and disbursements?

[43] In this case, class counsel is made up of two firms, Siskinds LLP and Bates Barristers. They seek approval of fees and disbursements plus applicable taxes in accordance with an executed retainer agreement. Specifically, they seek:

a. Class counsel fees of $17,920,000;

b. Applicable taxes on fees of $2,329,600;

c. Class counsel disbursements of $299,627.99; and

d. Applicable taxes on disbursements of $38,840.09.

[44] The retainer agreement entered into between class counsel and the representative plaintiff provides for a contingency fee of 28% of the amount recovered, plus taxes. A reduction of 5% from the maximum contingency fee percentage (33%) was built in, to account for the fact that third-party funding was obtained.

[45] Under the terms of the retainer agreement, class counsel would be entitled to a fee of $19,670,000, which is $1.75 million greater than the fee being sought. The amount sought equates to approximately 25.51% of the settlement amount. The reduction of the fee sought was agreed to by class counsel to facilitate the settlement of the action. In effect, class counsel agreed to allocate what would have been $1.75 million of its fee under the retainer agreement to the *Aggarwal* action to enable the global settlement of all matters, failing which the negotiations were in danger of falling apart.

[46] Under the retainer agreement, class counsel was also entitled to charge interest on disbursements incurred, but it is not seeking such interest on this motion. In addition, costs awarded to the plaintiff for the certification motion and motion for leave to appeal the certification order are also excluded from the fee request on this motion, such that the entirety of those costs awards benefit class members.

[47] The retainer agreement complies with the requirements set out in s. 33 of the *CPA*.

Legal Principles Applicable to the Approval of Counsel Fees and Disbursements

[48] As Morgan J. recetly noted in *Austin v. Bell Canada*, 2021 ONSC 5068, at para. 10, citing *Commonwealth Investors Syndicate Ltd. v. Laxton,* [1994] O.J. No. 2922, at para. 63 (S.C.J.),

generally speaking, when considering whether to approve class counsel fees, "the amount payable under the contract is the starting point for the application of the court's judgment."

[49] In *MacDonald et al. v. BMO Trust Company et al.*, 2021 ONSC 3726, at para. 21, Belobaba J. held that the approach that presumes valid the percentage of recovery agreed to in the contingency fee retainer (up to one-third) is appropriate in most class action settlements, but not in "mega fund" settlements that are in the range of $100 million or higher. Class counsel submits that this case is one where the contingency fee agreed upon is presumptively valid.

[50] There is ample law explaining why contingency fees in class proceedings advance the goal of access to justice: see, for example, *Baker (Estate) v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105, at para. 64; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, at para. 21.

[51] Contingency fees also incentivize class counsel to maximize recovery for the class, and promote judicial economy by encouraging efficiency in the litigation and discouraging unnecessary work: *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*, 1998 CanLII 14842; *Osmun*, at para. 21

[52] The general principles to apply to the assessment of class counsel's fees were set out by Juriansz J.A., in *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233, at para. 80:

a. the factual and legal complexities of the matters dealt with;

b. the risk undertaken;

c. the degree of responsibility assumed by class counsel;

d. the monetary value of the matters in issue;

e. the importance of the matter to the class;

f. the degree of skill and competence demonstrated by class counsel;

g. the results achieved;

h. the ability of the class to pay;

i. the expectations of the class as to the amount of the fees;

j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

[53] The court also considers the integrity of the profession as a relevant factor: *Fresco v. Canadian Imperial Bank of Commerce*, 2023 ONSC 3335, at paras. 127-133, aff'd 2024 ONCA 628, at paras. 101-102. It is important to note, as the Court of Appeal did in *Fresco*, at para. 84, that the phrase "integrity of the profession" is not meant to connote dishonesty in this context, but rather, a fee that is not champertous.

[54] In *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 45046, at para. 76, the Court of Appeal for Ontario found that a "fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose -- i.e., taking advantage of the client."

[55] The risk class counsel took on must be measured from the outset of the litigation, not with the benefit of hindsight: *Gagne v. Silcorp Ltd.*, 1998 CanLII 1584.

Analysis of Class Counsel's Fee and Disbursement Request

[56] Having regard to the factors above, I make the following observations.

[57] Class counsel assumed risks in this proceeding, as class counsel always does. This action was complex, and the risk that class counsel would devote significant resources to an action that might not succeed was not insignificant. Complex securities litigation like this proceeding, here complicated by the related 2022 and 2018 actions, and the *Frayce* action, would require many contested motions, interlocutory steps and appeals. The time needed to go from commencement of the action to a common issues trial can be considerable. Counsel's investment in this action was considerable.

[58] I accept that counsel risked investing enormous time in this action, and foregoing other opportunities, with the prospect of no or little recovery, or significant delay in obtaining any recovery.

[59] This action involved numerous steps. Class counsel investigated the alleged misconduct, conducted research and analysis, and drafted the statement of claim. Thereafter, there was a hotly-contested certification motion requiring the drafting of motion materials, conducting cross-examinations, drafting and making legal argument, and dealing with the appeal therefrom. There was also a funding approval motion. Other steps included the plaintiff's motion to stay the *Aggarwal* action (which was part of a motion to stay all the 2022 actions), a motion to substitute the representative plaintiff, Mr. Westwood, for the previous representative plaintiff, and the negotiation of a discovery plan, pursuant to which the defendant produced close to 3,000 documents. In addition, counsel obtained expert evidence and reviewed the defendant's expert evidence. And there were the settlement negotiations and multiple attendances at mediation.

[60] Counsel has maintained records of the time spent by separately tracking their work that was relevant to all 2018 actions, and the work relevant to this action only. Siskinds' docketed fees related to this action only total $2,345,501, representing over 4,800 hours. Its docketed fees related to all the 2018 actions total $1,014,081, representing nearly 1,900 hours. If that time is shared equally between the 2018 actions, the portion related to this action is $144,868.71. Taxes are not included in these amounts.

[61] Siskinds has also incurred disbursements related to this action only in the amount of $296,665.24 pre-tax. The most significant portion of these disbursements relates to expert fees in the amount of $202,646.25. These fees relate to two experts. Ermanno Pascutto is a senior securities regulator who prepared an expert affidavit for the certification motion on the history and

rationale for the payment of trailing commissions to discount brokers. Mr. Pascutto's report was also used at mediation. Errol Soriano's report was over triple the cost of Mr. Pascutto's report. Mr. Soriano is a chartered professional accountant, chartered business valuator and certified fraud examiner. He prepared an expert damages report for the mediation, and played an ongoing consulting role throughout the mediation process.

[62] Mediation fees are just over $14,000, while notice fees are just over $23,000. Research and resource material total over $17,000, while copying is over $14,000 and mileage/travel/meals account for over $11,500.

[63] Siskinds incurred a further $5,256.75 pre-tax with respect to all the 2018 actions, of which $750.98 plus taxes is attributable to this action.

[64] In addition, Siskinds estimates it will incur an addition 350 to 500 hours to complete the administration of the settlement, including the approval hearing, responding to enquiries from class members, and liaising with the administrator as necessary.

[65] Bates Barristers has docketed fees of $1,041,360 on work related to this action. Of that amount, $610,020 relates only to this action, while $431,340 relates to all the 2018 actions. If that amount is divided equally between the 2018 actions, $61,620 is the portion related to this action.

[66] Bates Barristers incurred disbursements of $2,211.79, plus taxes, mostly for travel expenses.

[67] In addition to carrying fees and disbursements, between the commencement of the litigation and June 20, 2019, when the third-party funding agreement was approved, class counsel took on additional risk in the form of an indemnification of the plaintiff against adverse costs awards.

[68] No objections to, or comments on, the counsel fee or disbursement request were received.

[69] The result achieved for the class is excellent. For such complex litigation, it has come relatively early in the process, as discoveries are not yet complete. The settlement is a cash settlement.

[70] Counsel have provided me with examples of settlements in a similar range where similar fees have been approved by the court: see, among other examples, *Eidoo v. Infineon Technologies AG*, 2016 ONSC 3628; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2017 ONSC 5000, at paras. 24, 34; and *Ironworkers Ontario Pension Fund v. Manulife Financial*, 2017 ONSC 2669, at paras. 26-27, 29.

[71] Cross-checking the percentage fee against a multiplier of counsel's docketed time can be a useful exercise in evaluating the reasonableness of the fee request. In this case, the fee request as compared to the docketed hours (before the work that remains to be done) is 5.67. Class counsel argues that the multiplier confirms the reasonableness of the fee requested because it is consistent with past fee awards. The past fee awards offered up by counsel in comparison reflect multipliers

ranging between 3.7 to 5.5. The fees sought in this case would thus exceed the multipliers applicable to past fee approvals.

[72] However, the multiplier is inflated, in that it does not account for (i) the time that remains to be spent on the action; or (ii) the time spent that applies to all 2018 actions of which only 1/7 has been allocated to this action (notionally) although arguably most of the work done to advance all the actions would have been undertaken in this action if it were the only one. I thus conclude that the multiplier is reasonable.

[73] I am of the view that the result in this settlement justifies a significant award of costs.

[74] I approve the fees sought of $17,920,000. I also approve payment of applicable taxes from the settlement fund.

[75] The plaintiff also seeks approval of the agreement between Siskinds and Bates Barristers. These firms worked together as co-counsel, and agreed, in January 2018, to share the risk of the litigation and the fees awarded if it were successful.

[76] Bates Barristers resigned as counsel for the class in April 2020, at which time Siskinds served a Notice of Change of Lawyer. At the same time, the two firms agreed on the allocation of any counsel fees that may be awarded in the action.

[77] The evidence indicates that Bates Barristers played an important role in advancing this action, including in developing the theory of the case, preparing the pleading and certification motion materials, conducting cross-examinations, and arguing the certification motion. This is not a case where Bates Barristers has already been compensated, or that its compensation is for an improper purpose.

[78] The agreement between the two firms was amended in March 2024. At that time, Bates Barristers agreed to reduce its percentage entitlement to fees compared to the earlier agreement. This change facilitated the settlement.

[79] Class counsel argues that, by the time they restated their agreement in March 2024, six years into the litigation, they were well-placed to assess what a fair and reasonable allocation of fees between them was to reflect their respective efforts and risk.

[80] I see no reason not to approve the arrangement that Bates Barristers and Siskinds entered into in March 2024.

[81] With respect to disbursements, the amount sought, much of which is for expert fees, is not shocking in view of the amount of the settlement. I am advised that all costs ordered on the certification motion are being held for the benefit of the class in the settlement fund, and no amount has been recovered by Siskinds for disbursements on the certification motion. As I have already noted, Siskinds has waived its claim to interest on disbursements incurred.

[82] I approve the amount of disbursements sought, plus applicable taxes.

Should the court approve the requested interim payment of the funding commission to the third-party litigation funder and the release of the security the funder previously paid into court?

[83] The third-party funding agreement, approved by Belobaba J., sets out the commission payable to the funder. That amount is 7% of the net resolution sum, which is defined as the resolution sum less lawyers' fees and disbursements, including HST, and administration expenses.

[84] The administration expenses cannot be quantified with certainty until the conclusion of the administration of the settlement agreement, so it is impossible to determine with precision the amount of commission to which the third-party will be entitled.

[85] The plaintiff requests that the funder be paid $3.25 million, representing approximately 93.13% of what the plaintiff calculated would be the funder's full entitlement. The plaintiff proposes that the remainder of the commission be paid at the conclusion of the administration when the final administration expenses are known.

[86] Distribution may take more than a year; the plaintiff argues that an interim payment to the funder is fair, because the funder has carried the risk of adverse costs throughout most of the litigation, which financial support has contributed to the successful resolution of the litigation. He argues that an interim payment will encourage the participation of the third-party funders in future cases which will, in turn, facilitate access to justice in class proceedings.

[87] Similar orders have been made by other courts: *Ironworkers Ontario Pension Fund v. Manulife Financial*, 2017 ONSC 2669, at paras. 26-28, *Dyck v. 0799714 B.C. Ltd. et a.l*, Order dated October 3, 2023 at para. 4.

[88] I accept these arguments, and order that the funder be paid $3.25 million from the settlement funds as soon as practicable, with the remainder of its entitlement to be paid at the conclusion of the administration of the settlement.

[89] The plaintiff also seeks an order releasing the $400,000 in security the funder paid to the Accountant of the Superior Court of Justice forthwith after the effective date of the settlement agreement. I agree with the plaintiff that at that time, the action will be at an end, and there will no longer be any rationale for the funder posting security for costs. I thus grant the plaintiff's request.

Should the court approve an honorarium for the representative plaintiff?

[90] The plaintiff requests an honorarium for the representative plaintiff in the amount of $10,000.

[91] In *Doucet v. Royal Winnipeg Ballet Company*, 2023 ONSC 2323, the Divisional Court considered the circumstances under which a representative plaintiff may be entitled to an honorarium. The Divisional Court found that a modest payment to the representative plaintiff can be made in exceptional circumstances. In considering whether to approve or disapprove a request for an honorarium, the court should consider the following factors (*Doucet*, at para. 92):

a. The nature of the case, including whether the representative plaintiff brings forward a claim (such as for sexual abuse) in which they expose themselves to re-traumatization for the benefit of the class.

b. The nature of the remedies available for the cause of action asserted, particularly cases where even complete success would lead to only a tiny monetary remedy for each class member or none at all.

c. The steps taken by the representative plaintiff, who must do more than taking an active role and fulfilling the normal steps required in class proceedings, [in] achieving a settlement. Exceptional circumstances include enduring significant additional personal or financial hardship in connection with the prosecution of the class proceeding.

d. The rationale for the requested payment, which must not be added compensation for losses or damages that fall within the potential remedies available for the causes of action asserted in the claim itself or for the necessary steps to fulfill the responsibilities of a representative plaintiff.

e. The exposure to a real risk of an adverse costs award.

f. The quantum of the requested payment, which must be modest both in general terms and in relation to the remedies available to the class members in the settlement.

[92] The Divisional Court's conclusion was cited with approval by the Court of Appeal for Ontario in *Fresco,* at paras. 107-112.

[93] Mr. Westwood argues that his contribution warrants an honorarium. He is described by experienced class counsel as a model representative plaintiff, who stepped up to continue the case when the first representative plaintiff chose to step aside. Mr. Westwood played an active role in the litigation and was an engaged participant during settlement negotiations. He independently prepared a financial evaluation of the monetary range for settlement negotiations to test and challenge the analyses prepared by class counsel, and as such, brought an objective eye to the assessment of the settlement value. The results of the settlement are excellent.

[94] Mr. Westwood's individual entitlement under the settlement agreement is likely to be modest; counsel argues it is appropriate to recognize Mr. Westwood's contribution.

[95] In *Fresco,* at para. 112, the Court of Appeal referred with approval to the Divisional Court's conclusion in *Doucet* that a representative plaintiff should be committed to fulfilling their responsibilities, including active involvement in every step of the litigation including settlement, without seeking added compensation.

[96] In this case, the evidence discloses that Mr. Westwood was an admirable representative plaintiff. He was engaged, diligent, and committed to advancing the interests of the class. Without

Mr. Westwood agreeing to take on the role of representative plaintiff on the decision of the prior representative plaintiff to step aside, the action could not have continued. Mr. Westwood's commitment lead to a significant settlement for the class. The amount of the honorarium sought is minimal in the context of the overall settlement award, and raises no concerns about conflict of interest.

[97] In my view, Mr. Westwood's extraordinary efforts for the class are part of the reason that an excellent settlement has been reached in this case. On the facts of this case, a $10,000 honorarium is consistent with the guidelines set out in *Doucet* and *Fresco*.

[98] I approve the honorarium sought.

Summary of Orders

[99] In summary, I:

a. Approve the settlement agreement and dismiss the action against the defendant without costs and with prejudice;

b. Approve the second notice and the notice plan;

c. Approve the distribution protocol, the claim form and the claim process, and the appointment of Verita as administrator;

d. Approve counsel fees in the amount of $17,920,000 million plus tax of $2,329,600, approve disbursements in the amount of $299,627.99 plus applicable taxes of $38,840.09, and approve the agreement between Siskinds and Bates Barristers;

e. Approve an interim payment to the funder in the amount of $3.25 million as soon as practicable, with the remainder of its entitlement to be paid at the conclusion of the administration of the settlement, and approve the release of the $400,000 in security the funder paid to the Accountant of the Superior Court of Justice forthwith after the effective date of the settlement;

f. Approve the plaintiff's request for an honorarium of $10,000.

[100] The orders shall go in the form of the drafts I have signed.

J.T. Akbarali J.

Date: December 10, 2024